

THE BULLETIN

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

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

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

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

The decisions are presented in the following way:

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

T. Markert

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

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

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There was no relevant constitutional case-law during the reference period 1 January 2014 – 30 April 2014 for the following countries:

Bosnia and Herzegovina, Norway.

Précis of important decisions of the reference period 1 January 2014 – 30 April 2014 will be published in the next edition, *Bulletin 2014/2*, for the following country:

Turkey.

Albania

Constitutional Court

Important decisions

Identification: ALB-2014-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 05.02.2014 / **e)** 5/14 / **f)** Laws and other acts having statutory force / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, French).

Keywords of the systematic thesaurus:

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

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

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

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

4.5.6.3 Institutions – Legislative bodies – Law-making procedure – **Majority required.**

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

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

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

Keywords of the alphabetical index:

Normative act / Civil servant / Public administration / “Qualified majority”, approval / Legislative procedure.

Headnotes:

The Normative Act no. 5, which was approved by the Assembly on 30 September 2013 and enacted by presidential decree, amended the new Law no. 152/2013 on “*the civil servant*” (hereinafter, the “new Law on Civil Servant”). The Normative Act postponed the application of the new Law on Civil Servant for six months, starting from the moment of its entry into force. The new Law would repeal the Law on the “Status of the civil servant” and every other provision in conflict with it.

The preamble of the Normative Act listed reasons justifying its approval. They included the impossibility of the new Law on Civil Servant to be implemented

because of the absence of subordinate legal acts and the general nature of the law, insufficient time to make legal regulations according to the legislative process, the need for institutional organisation, the financial effects on the state budget, and the economic and financial condition.

An amendment to or normative act of the Law on Civil Servant with the force of law must be carried out only through parliamentary procedure or otherwise be rendered unconstitutional as well as inapplicable.

Summary:

I. The Constitutional Court accepted the applicants’ request to review the constitutionality of the Normative Act, which amended the new Law on Civil Servant. The applicants raised issues about the approval and enactment of the Normative Act. They highlighted that a law pertaining to the “status of civil servants” must be approved by three-fifths of the votes of Assembly members, as expressed in Article 81.2 of the Constitution. The applicants added that, from a systematic reading of Article 83 of the Constitution, the drafters had excluded the laws provided by Article 81.2 of the Constitution from the government sphere through normative acts.

In light of the applicants’ contention, the Court also considered the legislative process to ratify laws, in light of the principle of the separation of powers expressed in Article 7 of the Constitution and the sources of law defined in Article 116 of the Constitution.

II. After reviewing the case, the Court provided the following response. It underscored that constitutional norms defining the legislative process cannot be interpreted in isolation but should be read in context with norms sanctioned by the principle of the sovereignty of the people and the rule of law.

The Court examined the entirety of the laws as to which the constitutional norms expressly require Assembly approval by a qualified majority. It noted that such approval is an exception to the general rule of decision-making by a simple majority of the Assembly. Concretely, the drafters of the Constitution have provided an exhaustive list in Article 81.2 of the Constitution.

In its case-law, the Court has constantly emphasised that ordinary laws cannot deal with issues that are dealt with by codes or organic laws. If the drafters of the Constitution had intended for them to be treated the same, Article 81.2 of the Constitution would not exist.

To the contrary, the drafters of the Constitution – notwithstanding that Article 81.2.a of the Constitution is a norm of a procedural nature – included the procedure in question to protect institutions provided by the Constitution because of the importance of the fields regulated by qualified laws. The purposes of such protection are manifold: ensure political stability, promote broad consensus from political forces represented in the Assembly and avoid the possibility for the ruling majority to undermine the fundamental principles of a functioning democratic society.

Furthermore, respect for the constitutional criterion of a “qualified majority” allows for legal certainty. This is an essential principle, as laws in their entirety should guarantee clarity, foreseeability and comprehensibility for the individual.

The Court pointed out that respect for the formal and substantive criteria imposed by the Constitution is essential during the law-making procedure in a state governed by the rule of law. The direct reference in the Constitution to the manner of approval of organic laws gives them a special legal force in comparison with the ordinary acts of the legislator. For this reason, they are ranked after the Constitution in the hierarchy of acts and before the ordinary laws of the Assembly.

The Court noted that the new Civil Servant Law, considering its object and purpose, indeed regulates the status of civil servants. Because it concerns civil servants mentioned in Article 81.2.g of the Constitution, the approval requirement of three-fifths of all Assembly members applies, as stipulated in Article 81.2 of the Constitution. Similarly, referring to the regulation of Article 83.3 of the Constitution, the Assembly is prohibited from approving such a law by an expedited procedure.

In this sense, the Court stipulated that the only meaning assumed by the procedural and subject matter requirements provided expressly in the above constitutional norms is that the regulation of the status of civil servants constitutes a field regulated exclusively by the Assembly. The Assembly realises this competence by approving a law with three-fifths of all its members, through a normal legislative procedure. Consequently, the examination and approval of any issue included in the sphere of regulation of this Law is reserved only to the Assembly.

The Court noted that the Normative Act to amend the new Civil Servant Law was issued by the Council of Ministers, which had invoked the exception under Article 101 of the Constitution. Regulation of civil servants, according to the Court, constitutes a competence belonging only to the Assembly.

In this sense, the law approved by the Assembly – evaluating the normative act with the force of law formally and substantively – is an instrument converting the former as a material law into a formal law, and the latter may not be only a simple law.

In light of requirements to ratify a normative act, the Court ruled that any amendment that might be made to the new Law on Civil Servant as a whole or in part cannot be done through a simple law, as in the instant case. Changes must be carried out through a qualified law, approved through a normal procedure by the Assembly, with at least three-fifths of all its members.

Under those conditions, the Assembly’s approval of the Normative Act by Law no. 161/2013 conflicts with the constitutional provisions of Article 81.2 of the Constitution. It did not respect the constitutional requirements to approve qualified laws and consequently to amend Law no. 152/2013, which regulates a field reserved only to the Assembly.

The Court underscored that the Assembly cannot delegate its law-making power. It has the constitutional obligation to meet the procedural and subject matter requirements for the approval of qualified laws according to Articles 81.2 and 83 of the Constitution, in relation to Articles 1, 2, 4, 7 and 116 of the Constitution. The Council of Ministers, even less, may not intervene with normative acts with the force of law in those fields, as the regulation of which, *expressis verbis*, constitutes the exclusive competence of the Assembly.

For these reasons, the Court found unconstitutional the Council of Ministers’ issuance of the Normative Act with the force of law, which regulates issues reserved only to the Assembly. It also concluded that the latter had failed to respect the procedure provided in Articles 81.2.e and 83.3 of the Constitution. Such shortcomings, the Court ruled, conflict with the principle of the separation and balancing of the powers in the meaning of Article 7 of the Constitution. This is one of the basic principles of the rule of law, where the law constitutes the basis and boundaries of the activity of the state.

The Court also decided whether the issuance of the Normative Act violated Article 101 of the Constitution in light of the exceptional nature of the competence of the Council of Ministers to issue a normative act with the force of law. The Court considered the hierarchy of the sources of law, the requirements that derive from the principle of the separation of and balancing among the powers and the values on which the rule of law is based. The Court ruled that the limits of government discretion in assessing an extraordinary

situation and the urgent need are defined and subjected to the constitutional requirements and the respective limitations.

In the concrete case, the Council of Minister's failure to respect the constitutional, procedural and subject matter criteria and limitations hindered the government's constitutional legitimacy to issue the Normative Act. It is also rendered the ratifying law that the Assembly approved inapplicable.

Languages:

Albanian.



Armenia Constitutional Court

Statistical data

1 January 2014 – 30 April 2014

- 60 applications have been filed, including:
 - 6 applications, filed by the President
 - 52 applications, filed by individuals
 - 2 applications by the Human Rights Defender
- 18 cases have been admitted for review, including:
 - 10 applications, based on individual complaints concerning the constitutionality of certain provisions of laws
 - 6 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 2 cases on the basis of applications by the Human Rights Defender
- 14 cases heard and 14 decisions delivered (including decisions on applications filed before the relevant period) including:
 - 4 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 4 decisions on cases initiated on individual complaints concerning the constitutionality of certain provisions of laws
 - 1 case on the basis of the application of the deputies of National Assembly
 - 1 case on the basis of the application of the Administrative Court

Important decisions

Identification: ARM-2014-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 18.04.2014 / **e)** / **f)** On the conformity with the Constitution of the provisions of Law on Advocacy / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Expectation, legitimate, law, clarity.

Headnotes:

Within the rule of law, regulations set forth in the law shall specify a person's legitimate expectations. The right to legitimate expectations is one of the integral elements of the guarantee of the rule of law. This fundamental idea is the basis of legal regulations and law-enforcement practice.

Summary:

I. The applicant challenged a provision in the Law on Advocacy. The disputed provision stipulates that in order to attend the Advocate School, an individual must possess a Bachelor's Degree in Law or a qualification degree of certified specialist. To the applicant, the provision allows for discrimination, as it does not clarify whether a person who earned a Master's Degree in Law would satisfy the meaning of a certified specialist, such that he would qualify to become an advocate. The said provision, however, limits the performance of such right. The applicant also stated that the provision violated his legitimate expectations, as he obtained his Master's Degree in Law before the adoption of the disputed provisions.

II. After reviewing the case, the Constitutional Court noted that the legislature defined common educational criterion for candidates, including judge, attorney, investigator, advocate and notary. That criterion is the obtention of a Bachelor's Degree in Law or the obtention of degree of the qualification of higher legal education of certified specialist. The

Court stated that this requirement is not an aim *per se*, as the analysis of the respective legislation shows that within any university specialisation, a master's degree is considered to be a system of deepening of that specialisation.

Simultaneously, the Court noted that the educational system in Armenia allows an individual holding a bachelor's degree in other specialisation or certified specialist of other specialisation to enter a master's degree programme related to another specialisation. In this regard, the Court stated that the credit system introduced as a result of the process requires certain credits to obtain the corresponding professional qualification within the educational system. Consequently, the qualification of a master's degree shall be considered to be a higher educational degree within that certain specialisation only when the credits required for that specialisation are cumulated. The Court underscored that only in this case, the person could be considered to be a holder of a second degree, i.e. master's degree of that specialisation within the corresponding educational programme.

The Court noted that the mentioned issue is not definitely stipulated by Armenian legislation, which includes a high risk of human rights violations. The respective legislations do not specify the approach towards the legal content of different degrees of education, continuation of education, credits cumulative system and towards the common criteria in the respective field. As a result, the person does not possess a right to work in certain professions, as well as a right to obtain further professional education even after receiving an education at the state educational institutions.

The Court considered the consequences due to the lack of clarity. On the one hand, the person passes the exams, enrolls in a master's degree programme, and obtains a state diploma, but later finds out that he cannot work in that profession due to the limitations defined in various legal acts. On the other hand, he can get a master's degree in another specialisation in one or two years and earn a state diploma without cumulating the necessary credits.

After considering the case, the Constitutional Court stated that the applicant's right to legitimate expectation was breached and that the challenged provision blocks an individual's right to qualify to enrol in the Advocate School due to concerns about the appropriate qualification of certain higher degrees. The Court declared it unconstitutional and void.

Languages:

Armenian.



Identification: ARM-2014-1-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 02.04.2014 / **e)** / **f)** On the conformity with the Constitution of the provisions of Law on Cumulative Pensions / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Right to property, social protection, social security, limitations.

Headnotes:

A sovereign, democratic, and social state governed by the rule of law shall ensure prerequisites for the common well-being and civil solidarity of the present workforce, as well as for the different generations. Social security is a citizen's right as well as a purposeful function conditioned by the positive obligation of the state, as it is aimed to guarantee the life of those strata of society who cannot do so.

Summary:

I. The applicants challenged several provisions of the Law on Cumulative Pensions, contending that they contradict the right to property, as the compulsory cumulative payment is not a public interest. Any limitation to the right to property performed beyond the grounds stipulated by the Constitution, they argue, cannot be legal. The applicants also noted that the regulation stipulating the scope of the persons paying compulsory cumulative payment is unconstitutional and contradicts the idea of a social state.

II. After reviewing the applicants' arguments and the respective regulations in this case, the Constitutional Court reaffirmed the legal approaches presented in its

prior decisions concerning the right to property. The Court emphasised that the Constitution recognises and protects the right to property, from which the appropriate public-legal obligation of state emanates. The Court stated the prerequisite of that obligation is that everyone has a right to possess, use, dispose and bequeath his or her property at his or her discretion. That right cannot be limited by law.

In light of the disputed regulations, the Court established that some of them stipulate limitations inconsistent with Article 31 of the Constitution and inconsistent with the legal approaches of the Constitutional Court. The Court also held that the Constitution endowed the government with the authority to exclusively govern state property. Governance of the property of individuals and self-government bodies, however, cannot be included in that authority by law.

The Court also underscored that the Constitution declares the right to social security. One of the features of the right is that the size and forms of social security are stipulated by law and fall within the ambit of legislative discretion. According to the fundamental principles of balance and proportionality, the Court underscored that the limits of that discretion are conditioned by the social-economic possibilities of the state balanced with the requirements of the constitutional nature of social state. The Court stated that in Armenia, private pension payments are contributions from additional compulsory payments from salary and taxes. The social security system, however, is based on stable social payments, which is more reliable.

The Court also highlighted several issues concerned with the forms of legal regulation of the relations set forth in some of the debated provisions. In this regard, the Court noted that the Constitution stipulates the scope of the relations that could be regulated solely by law, while the regulation of some of the relations of that kind is included in the authority of various bodies other than legislature. In this light, the Court declared those norms to be inconsistent with the Constitution.

The Court also held that it is necessary to stipulate definite and different approaches to legal responsibility in accordance with the nature of the regulations of the discussed law, as such regulations could become important guarantee for the reliance on the debated system.

Governed by the aforementioned, the Constitutional Court declared that some of the provisions are inconsistent with the Constitution and void, in so far as they do not ensure everyone's right to possess,

use, dispose and bequeath his or her salary at his or her discretion and lead to limitation to the right to property beyond the person's wish. Some of the provisions have been declared unconstitutional as they do not stipulate guarantees for the protection of human rights and do not define the limits of the discretion of the executive power, as well as some of the provisions stipulate authority to regulate the relations subject to regulation by legislature for other bodies.

The Court also held that the provisions declared consistent with the Constitution could not be interpreted and implemented in the context which presumes limitation to right to property beyond the person's will. The Constitutional Court also held that the provisions declared inconsistent with the Constitution will become void on 30 September 2014.

Languages:

Armenian.



Austria Constitutional Court

Important decisions

Identification: AUT-2014-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 06.03.2014 / **e)** B 1035/2013 / **f)** / **g)** / **h)** www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Broadcasting, restriction.

Headnotes:

The Austrian Broadcasting Corporation must be allowed to act within existing social networks. Activities of the Austrian Broadcasting Corporation on the social platform 'Facebook' do not fall under the legal provision banning it from providing 'forums'. Any other interpretation of the provision would result in a violation of the freedom of expression.

Summary:

I. The Austrian Broadcasting Corporation (*Österreichischer Rundfunk*, hereinafter, "ORF") acted on the social platform 'Facebook' by providing several services within the network. Specifically, the ORF supplied 39 sites on Facebook. After the Federal Communications Board ruled that these activities constituted a violation of Section 4f.2.25 Act on the Austrian Broadcasting Corporation (hereinafter, "ORF Act"), prohibiting the ORF from providing links to or cooperate with social networks unless this was related to the ORF's own daily online news overviews, the ORF filed a complaint against this decision with the Constitutional Court and the Supreme Administrative Court. The Supreme Administrative Court dismissed the complaint, ruling that the activities of the ORF on Facebook were

prohibited under Section 4f.2.25 ORF Act (*VwGH* 22 October 2012, 2012/01/007). The Constitutional Court, however, quashed parts of Section 4f.2.25 of the ORF Act on the basis that they violated the freedom of expression of the ORF (Judgment of 27 June 2013, G 34/2013). As a consequence, the remaining part of the provision prohibited the ORF from providing a social network of its own, whereas the prohibition of cooperation with social networks was held unconstitutional by the Court.

As a reaction to the ORF's continuing activities on Facebook, the Federal Communications Board altered its decision and declared the ORF to have violated Section 4f.2.23 ORF Act, prohibiting the ORF from running forums, chats and other services for the publication of content by users. The Federal Communications Board defined a 'forum' as a virtual place for the exchange and storage of thoughts, opinions and experiences. As the sites provided by the ORF on Facebook contained a 'wall' allowing registered users to state their opinions *vis-à-vis* the ORF and other users, the activities of the ORF on Facebook, according to the Federal Communications Board, fell within the prohibition of running 'forums'. Hence, as the sites were attributable to the ORF, the ORF's activity constituted a breach of Section 4f.2.23 ORF Act. This view was, according to the Federal Communications Board, compatible with the Constitutional Court's previous ruling on the interaction of the ORF on Facebook as the prohibition of providing forums did not ban the ORF from acting on Facebook altogether but only concerned a specific part of its activities on Facebook.

II. Following a public hearing, the Constitutional Court quashed the decision of the Federal Communications Board, stating that the Federal Communications Board's decision constituted interference with the freedom of expression of the ORF under Article 10 ECHR.

The Court reiterated that the definition of a 'forum' used by the Federal Communications Board corresponds to the respective definition of the term established by the Supreme Administrative Court in proceedings concerning a webpage run by the ORF (*debatte.orf.at*; see *VwGH* 24 July 2012, 2011/03/0232). According to the Constitutional Court, however, the Supreme Administrative Court based its decision on an interpretation of Section 4f.2.23 ORF Act that would render the provision unconstitutional. The Federal Communications Board was, in the Constitutional Court's view, right to assume that most of the Facebook-sites run by the ORF including their 'walls' and the possibility to publish postings, comments on postings and comments on already existing comments have to be considered as a virtual

space for the exchange of thoughts, opinions and experiences. Hence, from an isolated perspective, these activities of the ORF on Facebook fall within the meaning of 'forums, chats and other services for the publication of content by users' as prohibited by the provision mentioned above.

However, the Constitutional Court observed that a complete lack of differentiation between forums provided for on online platforms which are run by the ORF itself and the ORF's activities on other platforms is not compatible with Article 10 ECHR. The prohibition of providing forums according to Section 4f.2.23 has to be read in the systematic context of Section 4f.2.25, i.e. the prohibition of providing for social networks. Once the Constitutional Court had overturned those parts of the latter provision which had banned the ORF from interacting with existing social networks (Judgment of 27 June 2013, G 34/2013), the remaining part of the provision only prohibits the ORF from providing a social network of its own. This, however, does not affect links to or cooperation with existing social networks. In this context, Section 4f.2.25 constitutes a *lex specialis* with regard to Section 4f.2.23 (i.e. the prohibition of providing forums). Hence, the ORF is, according to the provisions of the ORF Act, allowed to appear on social networks, e.g. in the shape of business pages on Facebook, posts on individual Facebook profiles or automatically generated Facebook pages.

The Constitutional Court also pointed out that the removal of one provision from the legal order by the Constitutional Court must not result in the same activities of the ORF on Facebook falling within another ban provided by the ORF Act. It could not be assumed that it was the intention of the legislator to regulate the same activities of communication with two different legal provisions.

The permissibility of the pursuance by ORF of the activities outlined above on Facebook does not depend on the feasibility of the relevant Facebook pages being designed so as to exclude the feature of leaving posts, comments on posts or comments on comments. If the ORF Act only allowed ORF to appear on Facebook on condition that these features were disabled, this would constitute a disproportional infringement of the freedom of expression. Such a condition would keep the formal possibility of ORF to appear on Facebook, but would deprive the use of Facebook of its purpose, namely reciprocal communication between broadcaster and audience.

The Constitutional Court found that the Federal Communications Board had incorrectly interpreted the provision at hand as having an unconstitutional content. It therefore overturned the decision.

Languages:

German.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2014-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 30.06.2014 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.

5.2 Fundamental Rights – **Equality**.

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

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

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

Keywords of the alphabetical index:

Education, higher, status, equal.

Headnotes:

The constitutional principle of legal equality requires that “higher legal education” shall not be distinguished by any criteria of specialisation. Such principle guarantees the elimination of unequal treatment of rights and freedoms in higher education, including higher legal education. Otherwise, unequal application of state requirements to the education of persons, with identical legal status, can undermine social justice and equality.

Summary:

I. The Supreme Court requested the Constitutional Court to interpret the provision “those who have higher legal education”, as expressed in Article 126 of the Constitution and in other normative legal acts and provisions. It was noted that students specialising in “International Law” were admitted to Baku State University. The inscription “Legal Science” was assigned to graduates with this specialty until 2000.

By the Resolution of the Cabinet of Ministers, the field and specialty “International law” were added in May 1999. Afterwards, the inscription of “Legal Science” in education documents of graduates who specialised in “International law” was suspended. In “The list of specialties (programmes) on a grade of a bachelor degree of the higher education” approved by the Resolution of the Cabinet of Ministers of 12 January 2009, the specialty and the field of education “International law” were included but the graduates in “International law” were not admitted to the required positions.

II. The Plenum of the Constitutional Court, which considers provisions of the Constitution and domestic laws, noted that the right to education is directly connected to a number of constitutional rights and freedoms, including the right to work and the right to take part in administrating the state. The right to education also acts as an important condition to implementing such constitutional rights and freedoms. According to Article 35 of the Constitution, citizens possess the right to freely choose an activity, profession, occupation and place of work based on his or her abilities. Article 55 of the Constitution grants citizens the right to participate in governing the state. One of the important conditions to an occupation is access to higher legal education. Thus, by not recognising the education of graduates in “International law” as those who have earned a “higher legal education,” the rights to choose a profession and place of work are restricted. At the same time, the possibility to implement their rights enshrined in Articles 35 and 55 of the Constitution are also limited.

As such, the Constitutional Court determined that the provision “those who have higher legal education” implies, on an equal basis with, the specialty “Legal Science” and the higher education for the specialty “International Law”. The Court’s ruling applied to Article 126 of the Constitution, Article 93 of the Law “On Courts and Judges”, Article 29 of the Law “On Public Prosecution Office”, Article 3 of the Law “On Notary Office”, Article 8 of the Law “On Advocates and Advocacy”, item 20 of the Provision “On Service in Internal Affairs Bodies of the Republic of Azerbaijan” and other normative legal acts.

Languages:

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



Belarus Constitutional Court

Important decisions

Identification: BLR-2014-1-001

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 16.04.2014 / **e)** D-917/2014 / **f)** On the conformity of the Law on “Making Alterations and Addenda to Certain Laws of the Republic of Belarus on the Minimum Wage” to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2014; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.
5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Minimum wage, essential / Social right, minimum standard.

Headnotes:

The legal provision determining the minimum wage as the minimum level of state social security guarantees ensured to everyone complies with the constitutional rule defining the Republic of Belarus as a social state. In disputes relating to minimum wage issues, the constitutional right to a hearing, enshrined in Article 60.1 of the Constitution, is secured to everyone.

Summary:

The Constitutional Court in the exercise of obligatory preliminary review considered the constitutionality of the Law on “Making Alterations and Addenda to

Certain Laws of the Republic of Belarus on the Minimum Wage". Obligatory preliminary review (i.e., abstract review) is required for any law adopted by the Parliament before it is signed by the President.

First, the Court observed that according to the Constitution the Republic of Belarus is a social state based on the rule of law (Article 1.1); the individual, his or her rights, freedoms and guarantees to secure them are the supreme value and goal of the society and the State; the State shall assume responsibility before the citizen to create the conditions for free and dignified development of his or her personality (Article 2); safeguarding the rights and freedoms of citizens of the Republic of Belarus shall be the supreme goal of the State; and everyone has the right to a decent standard of living, including appropriate food, clothing, housing and a continuous improvement of conditions necessary to attain this (Article 21.1 and 21.2).

In the Court's view, the provisions of the Constitution as well as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Minimum Wage-Fixing Machinery Convention require that a state shall be concerned about the wellbeing of all individuals subject to its jurisdiction, and their social security, including by means of fixing the minimum amount of money that shall be secured to workers as a remuneration for fulfilling labour commitments.

The Constitutional Court considered that the definition of the minimum wage provided by Article 59 of the Labour Code, as amended by Article 1 of the Law on "Fixing and the Procedure of Increasing of the Minimum Wage", corresponds to its understanding as the state minimum social standard, notably as the minimum level of state social security guarantees aiming at the satisfaction of primary human needs.

The Constitutional Court held that this legislative regulation complies with the constitutional provision defining the Republic of Belarus as a social state, conforms to the reasonableness of setting state minimum social standards on the basis of the state's economic capacities and is directed at safeguarding of human social rights and interests provided for by the Constitution and international legal acts to which the Republic of Belarus is party.

Second, the Constitutional Court noted that the legislator, pursuant to the constitutional provision that individuals shall have the right to protection of their economic and social interests, including the right to conclude collective contracts (agreements) (Article 41 of the Constitution), prescribes in the Law on "Fixing and the Procedure of Increasing of the Minimum

Wage" that another amount of the monthly minimum wage may be fixed by a collective contract (agreement), but not less than the amount of the monthly minimum wage fixed in accordance with this Law.

The Court considered that the establishment of this rule confirms the establishment at the legislative level of additional social guarantees to workers with regard to the economic and financial capacities of an employer and complies with the constitutional provision prescribing that a just share of remuneration for the economic results of the labour in accordance with the quantity, quality and social significance of such work shall be guaranteed to employees, but it shall not be less than the level which shall ensure an independent and dignified living for them and their families (Article 42.1 of the Constitution).

Third, the Court stated that in a state governed by the rule of law the observance of the constitutional right of everyone to a hearing is of the highest importance.

It follows from the analysis of the content of the Law on "Fixing and the Procedure of Increasing of the Minimum Wage" that the provisions of this Law aim at the implementation of the indicated right. Under these rules violation of legal requirements contained in the legislation on fixing the minimum wage and on the procedure for increasing the minimum wage is assessed in accordance with legislative acts; disputes concerning the application of the legislation on setting the minimum wage and the procedure for increasing the minimum wage shall be settled by the Commission of Labour Disputes and/or a court.

The Court considered that the specified legal regulation is based on constitutional principles and rules and complies with Article 60.1 of the Constitution, which ensures that everyone shall be guaranteed protection of his rights and freedoms by a competent, independent and impartial court within the time limits specified by law.

On the basis of its interpretation of the constitutional legal sense of the provisions of the Law on "Making Alterations and Addenda to Certain Laws of the Republic of Belarus on the Minimum Wage", the Court held that it establishes the legal basis for fixing and the procedure of increasing of the minimum wage and aims at the implementation of principles and rules of the Constitution as well as rules of international legal acts on the minimum wage. The Constitutional Court recognised the Law on "Making Alterations and Addenda to Certain Laws of the Republic of Belarus on the Minimum Wage" as conforming to the Constitution.

Languages:

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

*Identification:* BLR-2014-1-002

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 21.04.2014 / **e)** D-920/2014 / **f)** On the conformity of the Water Code to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2014; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.
 5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Environment, protection / Resource, natural, right to use or exploit / Water, use.

Headnotes:

The publication of information on water objects (e.g., rivers, lakes, reservoirs) on the official website of the Ministry of Natural Resources and Environmental Protection contributes to the implementation of a right to receive information on the state of the environment. Limitations to the right to water use are allowed on condition that they are proportionate to the constitutional aims pursued. The constitutional duty to protect the environment encourages individuals to exercise duly their environmental rights directed at the protection of nature and, thus, ensures the right to a conducive environment.

Summary:

The Constitutional Court in the exercise of obligatory preliminary review considered the constitutionality of the Water Code. Obligatory preliminary review (i.e., abstract review) is required for any law adopted by the Parliament before it is signed by the President.

First, the Court observed that constitutional provisions stipulating that the mineral wealth, waters and forests are the exclusive property of the State (Article 13.6 of the Constitution), constitutional requirements for state supervision over rational utilisation of natural resources to preserve and restore the environment (Article 46 of the Constitution) have been developed in articles of the Water Code aimed at further strengthening of guarantees of the constitutional right of everyone to a conducive environment, ensuring environmental safety, public health and compliance with legislation on the protection and use of waters.

Article 3 of the Water Code establishes the principle of basin management of river water resources as one of the basic principles for the protection and use of waters. These principles also include the priority for the use of ground waters for drinking needs before using them otherwise provided by Article 3 of the Water Code.

In the view of the Constitutional Court these provisions of the Water Code are directed at the implementation of the constitutional requirement for the rational use of natural resources.

Second, the Court observed that provisions of the Water Code set out ecological state (status) classes of surface water objects (or parts thereof) subject to the inclusion to the state water cadastre and publication on the official website of Ministry of Natural Resources and Environmental Protection (Article 6).

The ecological state (status) of surface water objects (or parts thereof) is classified as excellent, good, fair, poor or very poor.

The Court considered that use of the official website of the Ministry of Natural Resources and Environmental Protection by individuals and associations gives them an opportunity to exercise the right to access to environmental information in the field of protection and use of waters (Article 17 of the Water Code) and serves as a guarantee for fulfilling the constitutional right to receive information on the state of the environment (Article 34.1 of the Constitution).

Third, the Court noted that the Constitution enjoins the State to grant equal rights to all to conduct economic and other activities, except for those prohibited by law, and to guarantee equal protection and equal conditions for development of all forms of ownership (Article 13.2); to guarantee to all equal opportunities for free utilisation of abilities and property for entrepreneurial and other types of economic activities which are not prohibited by law (Article 13.4); to regulate economic activities in the interests of the individual and society, and to ensure the direction and co-ordination of state and private economic activity for social purposes (Article 13.5).

These constitutional provisions have been developed in a number of articles of the Water Code determining the procedure of water use (terms of special water use, approval procedure for special water use, etc.).

At the same time the right to water use can be limited or terminated in the interests of public benefit and security, protection of the environment, historical and cultural values, safeguarding of the rights and legitimate interests of legal entities and individuals by the President, Ministry of Natural Resources and Environmental Protection or its territorial bodies, and other state bodies in cases and under the procedures prescribed by legislative acts (Article 34.1 of the Water Code).

In particular, the right to water use shall be limited in case of violation of conditions of water use; failure to comply with requirements established by legislative acts concerning the protection and use of waters, including technical normative legal acts; failure to comply with conditions established by lease agreements on surface water objects for fish farming, etc.

The Constitutional Court noted the appropriateness of this approach in relation to the implementation of the right to water use. The approach is consistent with Article 23.1 of the Constitution allowing the restriction of rights and liberties in instances specified by law in the interests of national security, public order, protection of the morals and health of the population as well as rights and freedoms of other persons, as well as it conforms to the principle of proportionality as the restrictive measures set out in the Water Code are proportionate to the constitutional aims pursued.

Fourth, the Court noted that under the Constitution it shall be the duty of everyone to protect the environment (Article 55). The duty is, first of all, of a moral (ethical) nature. Being given in the constitutional legal form it obtains the quality of legal 'ought', acquiring the legal meaning of a compulsory imperative of objective and subjective nature ensured

by the State in order to create appropriate conditions for the realisation of the constitutional right to a conducive environment.

According to the Constitutional Court's interpretation of Article 55 of the Constitution implementation of the duty of every person to protect the environment may be put into effect directly or indirectly, in various forms and various methods, including using of legal methods. With respect to ecological relations the duty, taking the dominant position as an ethical requirement (imperative), motivates a person to fulfil environmental rights aimed at the protection of nature and, in the meantime, ensuring and guaranteeing the implementation of the right of everyone to a conducive environment.

The Court considered that the establishment of environmental rights by law presumes the corresponding actions of individuals directed at their realisation, which imparts to the ethical requirement the quality of a compulsory legal imperative.

The Court considered that this provision has been developed and specified in Article 17 of the Water Code, which enshrines the rights of individuals and associations in the field of protection and use of waters, in particular, the right to initiate the conduct of public environmental review under the established procedure, the right to take part in activities for the protection and rational (sustainable) use of water resources, the right to participate in the work of basin councils.

Based on the ascertained constitutional legal meaning of provisions of the Water Code the Constitutional Court held that its legislative regulation is aimed at safeguarding the balance of interests between business entities or those engaged in activity relating to the exercise of the right to water use and the interests of an individual and society as a whole as well as at ensuring to everyone the opportunity to exercise the constitutional right to a conducive environment. The Constitutional Court accordingly recognised the Water Code as conforming to the Constitution.

Languages:

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



Belgium

Constitutional Court

Important decisions

Identification: BEL-2014-1-001

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 29.01.2014 / **e)** 20/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette), 18.04.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

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

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

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

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

Keywords of the alphabetical index:

Detainee, rights / Prison, damage, liability, non-contractual / Search, body, systematic.

Headnotes:

The stipulation in the impugned law of a systematic body search without specific justification pertaining to the detainee's conduct is a discriminatory breach of the prohibition of degrading treatment.

Summary:

A private individual asked the Court to set aside two provisions of the law of 1 July 2013 “amending the law of 12 January 2005 establishing principles for prison administration and the legal status of detainees”.

The Court acknowledged the appellant's interest in the action, since he had received a prison sentence and could at any time be required to serve the remainder of the sentence.

The first provision challenged enables the prison governor to recover the value of damage caused by the detainee through negligence or malice to property placed at his disposal by the prison administration, from any sums owed by the prison administration to the detainee. The appellant pleaded in particular the violation of the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) in conjunction with Article 144 of the Constitution and Article 6.1 ECHR. The Court held that the last two provisions did not prevent the authorities, in this case a prison governor, from taking a decision in relation to a civil right, in this case non-contractual liability for damage done to prison property, provided that an appeal could be brought against this decision before a tribunal of the judiciary.

The prison governor's decision concerning the non-contractual liability of the detainee, taken in pursuance of the impugned provision, could be challenged before the competent court of the judiciary. In this case the detainee was admittedly acting as applicant and not respondent, as would be the case if the authorities brought an action for non-contractual liability, but the disadvantages which the appellant considered to be inherent in this situation could not in themselves suffice to conclude that there was any inequality between the parties to the proceedings. They did not prejudice the rights of the defence and the right to equal access to justice.

The second provision challenged introduces body search as a routine practice whereby a detainee can be compelled to undress for inspection of his or her body surface, orifices and cavities in the circumstances prescribed by law: committal to prison, before being placed in a secure cell or confined in a punishment cell and after a visit with certain persons where it does not take place in a room fitted with a transparent partition separating visitors from detainees.

The appellant argued that this constitutes a violation of the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) and of the right to privacy (Article 22 of the Constitution) in conjunction with Articles 3 and 8 ECHR.

The Constitutional Court recalled the case-law of the European Court of Human Rights concerning body searches of detainees (*Ciupercescu v. Romania*, 15 June 2010; *Frérot v. France*, 12 June 2007 and *Jetzen (no. 2) v. Luxembourg*, 31 October 2013). It transpires from this case-law that a body search may

prove necessary in certain circumstances to maintain order and security in prison and guard against infringements, that is, when the detainees conduct requires it.

The Constitutional Court nevertheless held that the impugned provision went beyond what was strictly necessary to achieve the aim pursued, in providing for a systematic body search in the instances prescribed by law.

Indeed, it could not be accepted that each of these situations, in respect of each detainee, occasioned an aggravated risk to security or order in the prison.

Finally, the Court held that the discriminatory breach of the prohibition of degrading treatment was substantiated all the more in that another provision of the law on principles enabled the prison governor to have the body search conducted on the basis of individualised evidence that search of clothing would not suffice to ascertain whether the detainee was in possession of prohibited or dangerous substances or items.

The Court therefore decided to set aside the impugned provision.

Supplementary information:

In its Judgment no. 143/2013 of 30 October 2013, the Court had already suspended the provision set aside by Judgment no. 20/2014.

Languages:

French, Dutch, German.



Identification: BEL-2014-1-002

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 03.04.2014 / **e)** 61/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette), 02.06.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Administrative offence / Offence, classification / Tax evasion.

Headnotes:

The possibility of consultation between the tax authority and the prosecution in order to establish whether administrative or criminal proceedings should be brought in a case of tax evasion is not contrary to the Constitution.

In accordance with the general principle of law “*non bis in idem*”, any person penalised for evasion by final ruling of the tax authority cannot undergo criminal punishment or prosecution for a second time where essentially identical acts are concerned and where the first penalty is of a criminal character.

Summary:

I. The registered association “*Ligue des contribuables*” brought an application before the Court to set aside the law of 20 September 2012 establishing a “single process” principle in connection with the prosecution of offences against tax legislation and increasing the criminal fines for tax offences.

This law notably purports to arrange for consultation between the tax authority and the prosecution to establish whether or not the tax authority should deal with a case of tax evasion or whether criminal proceedings should be brought.

II. The Constitutional Court did not consider this legislation unconstitutional as such, even though it did not predetermine who would face criminal proceedings and who would receive an administrative penalty. Indeed, the prosecution still retained the right to institute or to refrain from proceedings against everyone suspected of tax evasion. The Court recalled that tax offences prejudiced the entire community by denying authority the resources necessary for it to function properly.

The Court nevertheless set aside Articles 3, 4 and 14 providing that the recoverability of the tax fine or of the tax increment ordered against a taxpayer shall be suspended from the time when the prosecution brings criminal proceedings against the same taxpayer. If the investigating courts to which the prosecution refers the case order a discharge, this suspension is terminated. Conversely, where the taxpayer’s case is referred to the criminal court, the tax fines and tax increments become non-recoverable with final effect.

The Court recalled that according to the general legal principle *non bis in idem*, also secured by Article 14.7 of the International Covenant on Civil and Political Rights, by Article 4 of the Seventh Additional Protocol ECHR and, as to its scope, by Article 50 of the Charter of Fundamental Rights of the European Union, nobody could be prosecuted or punished a second time for an offence of which he had already been acquitted or convicted by a final judgment. The Court made reference in that respect to the case-law of the European Court of Human Rights (*Zolotukhin v. Russia* (GC), 10 February 2009).

The Court noted that the ordering, even with final effect, of a tax fine or a tax increment – of a predominantly punitive character and therefore constituting criminal sanctions – against the taxpayer did not have the effect of preventing subsequent criminal proceedings against him, or possibly his referral to a trial court, even though the acts charged were in substance identical to those for which an administrative penalty had been imposed. The Court held that the legislator had thus disregarded the *non bis in idem* principle by permitting the prosecution to institute criminal proceedings against a person already having received an administrative sanction of a criminal nature, which had become final, for substantially identical acts, and by authorising the referral of this person's case to a criminal court for substantially identical acts or, if the case was already before this court, by permitting it to proceed with the case.

However, the Court stressed that should new facts emerge after the administrative sanction became final, indicating that the evasion was of a greater extent than originally discovered, the *non bis in idem* principle would not preclude criminal proceedings against the taxpayer concerned, in so far as this was not for acts substantially identical to those for which the administrative sanction had been imposed.

Cross-references:

European Court of Human Rights:

- *Zolotukhin v. Russia* [GC], no. 14939/03, 10.02.2009; *Reports of Judgments and Decisions* 2009.

Languages:

French, Dutch, German.



Brazil Supreme Court

Important decisions

Identification: BRA-2014-1-001

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 03.04.1991 / **e)** 4.662 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 10.05.1991 / **h)**.

Keywords of the systematic thesaurus:

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

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**

Keywords of the alphabetical index:

Amendment, legislative, judicial review / Constitution, amendment, validity / Constitution, clause, immutable / Death penalty, possibility.

Headnotes:

Brazilian constitutional law does not allow preventive abstract control of constitutionality.

Summary:

I. This case refers to a direct claim of unconstitutionality filed against a constitutional amendment bill by which lawmakers sought to establish, after a referendum, the death penalty in cases of robbery, kidnapping and rape, if these offences cause death. The plaintiff argued that the House of Representatives, as it proceeded with this bill, would have breached Article 60.4.IV of the Federal Constitution, which bans deliberation on bills that aim at abolishing individual rights and safeguards.

II. The Supreme Court, by majority, denied hearing the case. The Court stated that, throughout Brazilian history, the preventive abstract control of constitutionality was never allowed, and the current Constitution of 1988 does not permit it. Thus, except for the Court's power to address legislative omission, which allows constitutional control grounded on omission, in all other cases, the normative act must be in force to be subject to constitutional challenge.

The Court added that, despite not being allowed to abstractly review amendment bills, it can abstractly review constitutional amendments. Accordingly, the Court emphasised that the National Congress, whenever it passes laws or amends the Constitution, must follow the core provisions that are unamendable and that cannot be modified by the legislature, as it was established by the framers of the Constitution in Article 60.4. If such provisions, within express material limitations, are breached, it gives rise to constitutional control, either abstract or concrete.

Supplementary information:

- Article 60.4.IV and 60.4 of the Federal Constitution of 1988.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-002

a) Brazil / b) Supreme Court / c) Full Court / d) 16.09.1999 / e) 23.452 / f) Petition for a writ of *mandamus* / g) *Diário da Justiça Eletrônico* (Official Gazette), 12.05.2000 / h).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
 4.5.2.2 Institutions – Legislative bodies – Powers – **Powers of enquiry**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Parliament, enquiry, guarantee / Parliament, investigative committee, power, scope / Personal privacy, right.

Headnotes:

Parliamentary Committees of Investigation may order the disclosure of information on tax returns, bank and phone data, if they provide reasons for the adoption

of these measures. Such committees cannot determine other actions ordinarily assigned to judges, such as ordering an individual's detention or the seizure of assets.

Summary:

I. This case refers to a petition for a writ of *mandamus* filed against an act of the Federal Senate Parliamentary Committee of Investigation (hereinafter, "CPI", the Portuguese acronym) which ordered the disclosure of information concerning the petitioner's tax returns, bank and phone data, without the issuance of a search warrant. The petitioner argued that these acts were in violation of his rights and were illegal.

II. The Supreme Court, unanimously, granted the request. Initially, the Court stated that the acts of the CPI can be controlled by the judiciary if they violate the Constitution, since pursuant to the principle of limited powers, there are no hegemonic institutions in the State. Moreover, the principle of separation of powers does not relieve parliament of the obligation to respect the Constitution.

The Court decided that the investigative powers of CPIs, pursuant to Article 58.3 of the Constitution, are limited to the investigation of evidence. These investigative powers do not include the powers ordinarily assigned to judges, such as punishment for crimes, arrest or asset seizure orders. In addition, CPIs are required to justify the investigative measures that can restrict an individual's basic rights.

On the other hand, the Court held that CPIs may order the disclosure of data concerning tax returns, bank and phone records if facts may be proven by doing so and if they are indispensable to the investigation. The Court noted that confidentiality in this context derives from the right to privacy, but that there are no absolute rights in the Brazilian constitutional system. Public interest reasons or the need to ensure the coexistence of freedoms make it possible to adopt measures by state agencies which restrict rights.

Furthermore, the Court highlighted that CPIs may only have access to certain data relating to phone records; namely, the numbers and the duration of the calls made. They cannot order the interception of calls, which entails the recording of conversations conducted through telephone. Only judges can order such measures, since they are only allowed as part of an investigation in the context of criminal proceedings, as stated in Article 5.XII of the Constitution.

Finally, the Court warned that after having access to the confidential information, the CPIs are liable to ensure their confidentiality. Disclosure to other members of society can only occur if there is good cause to publish them: either in the final report on grounds of measures that need to be taken; or in the information to the Prosecutor Office or other public organs; or to meet the social interest in exceptional cases.

Supplementary information:

Decision related to the one in MS 24.831.

- Articles 5.XII and 58.3 of the Federal Constitution.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-003

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 10.12.2003 / **e)** 81.611 / **f)** *Habeas Corpus* / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 13.05.2005 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Decision, administrative / Admission, prerequisite / Administrative proceedings / Criminal proceedings / Tax, evasion, profits, confiscation.

Headnotes:

Suppressing or reducing taxes by providing incomplete or fraudulent information to the treasury is a crime that requires an actual harm. There is no probable cause to initiate criminal proceedings until there is a final decision assessing the taxpayer's tax liability in the administrative proceedings.

Summary:

I. This case refers to a *habeas corpus* aimed at suspending criminal proceedings against the defendant for having allegedly committed crimes against the tax legal order under Articles 1.I and 1.II of Law 8.137/1990.

II. A majority of the Court, in plenary session, granted the order to suspend the criminal proceedings. The Court held that such crime – suppressing or reducing taxes by providing incomplete or fraudulent information to the treasury – is considered material, which requires the result of effective tax suppression or reduction in order to exist. In this case, as there was no final decision in the administrative proceedings that assessed the tax liability, the Court decided that there was no probable cause, in other words, not enough evidence of the crime and its commission in order to proceed with the prosecution.

Moreover, the Court emphasised that Article 34 of Law 9.249/1995 prohibited the imposition of criminal sanctions, if the due tax is paid off before the criminal proceedings are initiated. The Court stressed that it is not reasonable to require the taxpayer to pay the supposedly due taxes before the tax liability is fully determined in the administrative proceedings. Otherwise the principles of due process and full defence would be violated. Finally, the Court determined that the statute of limitation starts to run only from the date of the final decision in the administrative proceedings.

III. In a separate opinion, a dissenting Justice considered that the crime in question is not material and that the tax liability would be accomplished when the facts provided by the law occurred. Thus, the non-payment of tax on the due date would already enable the criminal proceedings to be initiated.

In another separate opinion, a dissenting Justice found that, although the crime was material, there was no obstacle to accepting the criminal proceedings. Such proceedings should remain suspended along with the statute of limitations, until the assessment of the final administrative decision.

Supplementary information:

The understanding in this case, combined with other precedents, led the Court to enact Binding Precedent 24, which reads as follows: "There is no crime against the tax legal order, as provided under Articles 1.I, 1.II, 1.III and 1.IV of Law 8.137/90, before the tax liability is completely defined on the administrative proceeding."

- Articles 1.I, 1.II, 1.III and 1.IV of Law 8.137/90;
- Article 34 of Law 9.249/1995;
- Binding Precedent 24.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-004

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 06.04.2005 / **e)** 3.035 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 14.10.2005 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Rules, conflict with different legal power / Genetic data / Health, protection / Local law / Federal law, primacy.

Headnotes:

The Federal Government has the competence to enact legislation concerning the trade, import and export of genetically modified organisms. The plantation, manipulation and industrialisation of these organisms are under the concurrent legislative competence of the Federal Government and the States, because they are related to production and consumption, as well as protection of health and the environment. In such cases of concurring competence, the Federal Government must establish general rules and the States must legislate to fill the gaps in the federal law.

Summary:

I. This case refers to a direct claim of unconstitutionality filed against Law 14162/2003 of the State of Paraná. This Law prohibits the plantation, manipulation, import, industrialisation and trade of genetically modified organisms (hereinafter, “GMOs”) that would be used in farming and the feeding of humans and animals in the State of Paraná, except for the purposes of scientific research that aim at protecting the environment and the life and health of humans, animals and plants.

II. The Supreme Court, unanimously, granted the claim to declare the unconstitutionality of the Law 14162/2005. The Court asserted that the State cannot enact legislation concerning the trade (Article 22.I of the Constitution), import and export (Article 22.VIII of the Constitution) of GMOs, because these subjects are under the competence of the Federal Government.

Furthermore, the Court stated that state law establishes restrictive norms about the plantation, manipulation, and industrialisation of GMOs in regard to, among other aspects, concerns on sanitary and environmental issues. Such subjects are under the concurrent competence of the Federal Government and the States, once they are related to production and consumption (Article 24.V of the Constitution), protection of the environment (Article 24.VI of the Constitution) and the protection and defence of health (Article 24.XII of the Constitution). In these cases of concurring competence, when the Federal Government sets general rules, States must only fill the gaps of the federal law. The Law at issue exceeded the subsidiary competence of the State of Paraná, since it fully prohibited the plantation, the manipulation and industrialisation of GMOs, whereas the federal laws concerning this subject allow it under certain conditions.

Supplementary information:

- Articles 22.I, 22.VIII, 24.V, 24.VI, 24.XII of the Federal Constitution;
- Law 14162/2003 of the State of Paraná.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-005

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 16.08.2007 / **e)** 229.096 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 65, 11.04.2008 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Taxation, exempting measures / Taxation, federated entity / Treaty, effect in domestic law.

Headnotes:

The Federal Government, when acting as a legal entity governed by public international law, may grant exemption from state or local taxes, because when acting in this capacity it represents the federation in its integrality and not just the central government.

Summary:

I. This case refers to an extraordinary appeal filed against a judicial decision which held that a legal exemption from the Tax on the Circulation of Interstate and Intermunicipal Transportation and Communication Goods and Services (hereinafter, “ICMS”) for imported goods, when the national similar good is exempt, was not received by the Constitution. Such exemption was instituted by the Federal Government by signing the General Agreement on Tariffs and Trade (hereinafter, “GATT”). However, Article 151.III of the Constitution prohibits the Federal Government from granting exemptions from state tax, such as the ICMS, or local tax.

II. The Supreme Court, unanimously, granted the extraordinary appeal on the grounds that the Federal Government, when acting as an entity governed by public international law, is not subject to the limitation contained in Article 151.III of the Federal Constitution.

The Court explained that the Brazilian Federation is composed of different types of legal orders. There is a federal legal order (or entire legal order) and partial legal orders. These are divided into central legal order (Federal Government) and regional legal orders (States and Federal District) and local (municipalities).

Internationally, only the federal legal order, referred to in the Constitution as the Federative Republic of Brazil, has legal personality under public international law and may sign treaties. As a result, when the Federal Government operates internationally, it does not act as the partial central legal order, but as the entire legal order, which includes other federal entities. Therefore, it may grant exemptions from state or local taxes. The prohibition under Article 151.III of the Federal Constitution only applies when it acts as a legal entity of internal law.

Supplementary information:

- Article 151.III of the Federal Constitution.

Languages:

English (translation by the Court).

**Identification:** BRA-2014-1-006

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 19.12.2007 / **e)** 876 / **f)** Request for a writ of injunction / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 142, 01.08.2008 / **h)**.

Keywords of the systematic thesaurus:

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

5.5.2 Fundamental Rights – Collective rights – **Right to development.**

Keywords of the alphabetical index:

Environment, protection / Environmental impact assessment / Sustainable development.

Headnotes:

The judiciary cannot review a political decision to divert water from the São Francisco River. It can only verify compliance with the conditions of the prior project license. In addition, the National Congress does not need to authorise the project, since it does not involve water from an indigenous community.

Summary:

I. This case refers to an internal interlocutory appeal filed by the Federal Prosecution Office against a decision that denied the preliminary injunction on a civil action in order to stop the Integration Project of São Francisco River with the watersheds of the north region of the northeast of Brazil. This project aims at diverting part of the natural course of the river, to meet the demand for water resources in the so called drought polygon region of Brazil. The appellant argued the possibility of irreversible environmental damages, given the irregularities on the project license, and the lack of authorisation by the National Congress, as part of the collected water would be extracted from sources close to some indigenous communities.

II. The Supreme Court, by majority, denied the internal interlocutory appeal. The Court found that it was proved that, from the 31 conditions established on the prior project license, 25 had been strictly observed by the Federal Government and the Brazilian Institute of Environment (IBAMA, in the Portuguese acronym), only 5 items were partially fulfilled, what authorises the granting of the installation license to the beginning of the project. The Court found also that several plans and programmes were elaborated to enable the work and to ensure the protection of the environment. Furthermore, the Court noted that although the success of the project requires effective monitoring by the State, the judiciary should not interfere in the management of the project, nor stand in favour or against the decision to divert part of São Francisco river, since such measures are within the scope of the typical activity of the executive. Such interference is only justified in the event of legal or constitutional violations, which had not been demonstrated.

Finally, the Court decided that the National Congress authorisation (Articles 49.XVI and 231.3 of the Constitution) would only be required if the project had taken advantage of water resources located within indigenous lands. In the case, it had not been proved that this would happen, but only that the water would be captured from a source located 100 meters from the nearest indigenous community.

III. In a separate opinion, the Justice argued that due to the size of some projects, a previous authorisation of the National Congress would always be needed (Articles 48.IV; 58.2; 165.4 of the Federal Constitution). Moreover, as the environmental impacts of the project would still be uncertain and may be irreversible, the precautionary principle would require that when in doubt, the project should be stopped.

Supplementary information:

- Articles 48.IV, 49.XVI, 58.2.VI, 165.4 and 231.3 of the Federal Constitution.

Languages:

English (translation by the Court).

*Identification: BRA-2014-1-007*

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 08.03.2012 / **e)** 4.029 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 125, 27.06.2012 / **h)**.

Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.
4.5.6 Institutions – Legislative bodies – **Law-making procedure**.

Keywords of the alphabetical index:

Taxation, exempting measures / Taxation, federated entity / Treaty, effect in domestic law / Legal certainty.

Headnotes:

The approval by Congress of provisional measures issued by the president, without the previous opinion of a Joint Committee of Representatives and Senators, is unconstitutional.

Summary:

I. A direct claim of unconstitutionality was filed against Law 11516/2007, which converted Provisional Measure 366/2007 into statute. This Provisional Measure created the Chico Mendes Institute for Biodiversity Conservation (hereinafter, "ICMBio", the Portuguese acronym). The claimant argued that the Provisional Measure was not submitted firstly to the opinion of a Joint Committee of Representatives and Senators, as required by Article 62.9 of the Constitution, since it was passed directly into the floor of each House of the Parliament, following the

guidelines of Resolution 1/2002 of the National Congress. Furthermore, the applicant argued that the Provisional Measure did not meet the criteria of relevance and urgency, required under Article 62 of the Constitution, and that the creation of the Institute weakened the protection of the environment.

II. Preliminarily, the Court affirmed the legitimacy of the claimant (the national union of civil servants of the Brazilian environmental protection agency) to file a direct claim of unconstitutionality, within the requirements of Article 103 of the Constitution, which restricts standing to a limited range of national organs. The Court understood that the enumeration of legitimate claimants, established in Article 103.9 of the Constitution, should not be interpreted narrowly, in order to open the constitutional adjudication to civil society, since participatory democracy is grounded on the generalisation and profusion of means to participate in state decisions.

On the merits, the Brazilian Supreme Court, by majority, denied the claim, despite declaring that the procedure to convert the Provisional Measure breached Article 62.9 of the Constitution. The Court stated that the discussion of provisional measures before the Joint Committee provides a judicious analysis about this kind of act. Besides, such procedure reinforces the check of the Legislative Branch on this exceptional legislative power of the Executive Branch. On the other hand, the Court denied the allegation that the opposition could block provisional measures in the Joint Committee. According to the Court, if it happens, it means that the provisional measure must not be approved.

Furthermore, the Court stated that the judiciary can, exceptionally, assess the requirements of urgency and relevance in the issuance of provisional measures, but, by majority, it understood that, in this case, such requirements were respected. As regards the impact of the ICMBio on the protection of the environment, the Court asserted that the judiciary could not assess the implementation of public policies.

In order to safeguard legal certainty, the Court opted to give purely prospective effects to this ruling. Otherwise, all the acts done by the ICMBio could be challenged before the courts and the same could occur to all provisional measures approved without the previous opinion of the Joint Committee. Hence, the Court denied the claim, but declared unconstitutional the procedure established in Resolution 1/2002 of the National Congress.

III. In a separate opinion, a dissenting Justice argued that the Brazilian Supreme Court could not review internal norms of the legislature, such as Resolution 1/2002. In a second separate opinion, another dissenting Justice argued that there was a lack of the urgency requirement to enact the provisional measure.

Supplementary information:

- Articles 62.9 and 103.9 of the Federal Constitution;
- Resolution 1/2002 of the National Congress;
- Law 11516/2007;
- Provisional Measure 366/2007.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-008

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 12.04.2012 / **e)** 54 / **f)** Claim of Non-Compliance with a Fundamental Precept / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 80, 30.04.2013 / **h)**.

Keywords of the systematic thesaurus:

- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
- 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

Abortion, foetus, viability.

Headnotes:

Anencephaly is an abnormality, equivalent to brain death, lethal in all cases, and brain death is the legal criterion for a declaration of death. Thus, a pregnant woman has the right to choose between keeping the pregnancy and interrupting it, because the interruption is not a crime, due to the absence of the subject of the criminal act.

Summary:

I. This case refers to a claim of non-compliance with a fundamental precept filed by the National Confederation of Health Workers challenging the constitutionality of the interpretation that deems the therapeutic anticipation of the birth of anencephalic foetus a kind of abortion, as established in Articles 124, 126, 128.I and 128.II of the Penal Code.

The claimant argued that the anticipation of the birth was not a kind of abortion, because abortion presupposes a potential life outside the womb. Accordingly, the prohibition of the therapeutic anticipation of the birth of anencephalic foetus would breach the woman's freedom, under the legality principle; her right to health; and the principle of human dignity.

II. The Brazilian Supreme Court, by majority vote, granted the claim. First, the Court emphasised that, according to the fundamental precepts that guarantee the Brazilian secular state, this controversy should be judged without a religious moral bias. The Court explained that, during the imperial period, the Brazilian state was Catholic, but since the first Republican Constitution of 1891, secularism has been established as a constitutional principle and was reiterated in subsequent constitutions, including the current Constitution of 1988.

The Court distinguished the discussion about the therapeutic anticipation of the birth from the decriminalisation of abortion and from prejudice against the deficiency of the foetus (eugenic abortion). Abortion would presuppose a healthy foetus, while the condition of anencephaly, according to the testimony of experts in the public hearing, held to produce evidence for this decision, is an abnormality characterised by the absence of the brain and skull, which is equivalent to brain death and which is therefore lethal in all cases. Accordingly, the Court stated that this case represented a false conflict of fundamental rights, because, opposing the rights of the woman, there was a being which, though biologically alive, was legally dead, as Law 9.434/1997 establishes that brain death is the criterion to declare death. Thus, interruption of the gestation is not a crime, due to the absence of the subject of the criminal act.

The Court added that the Penal Code permits two grounds for abortion: necessity (when there is risk to the life of the woman) and humanitarian (when the pregnancy is the result of rape). To consider therapeutic anticipation of the birth to be illegal, when the foetus has an incurable lethal anomaly, would be disproportionate, as the law establishes humanitarian

abortion, when the foetus is healthy. In both cases the aim is the physical and mental health of the woman. Thus, the Court considered that the legislator did not insert such possibility of "abortion", because the Code dates back to 1940, when no examination existed to diagnose such anomaly.

III. In a separate concurring opinion, with a different basis, a concurring Justice considered that interruption of the gestation is the criminal conduct defined as abortion, as the anencephalic foetus could be born alive, though with a short life. But the anencephaly of the foetus would be a justification for the crime of abortion. He distinguished the situations of brain death and an anencephalic foetus. In the former the person only breathes through medical ventilators, whereas in the latter the person has cardiac and respiratory autonomy. The Justice decided to set a progressive construction that updated the penal law, in accordance with the 1988 Constitution. Thus, he understood that the lack of justification for the interruption of gestation would be a legislative omission, which is not compatible with the Penal Code (as it establishes humanitarian abortion), nor with the Constitution (which protects the woman's right to privacy, intimacy and the autonomy of the will). He emphasised that, in this case, the Court was issuing an interpretative decision with additive effects in penal matters. He highlighted that, as it was an *in bonam partem* decision, the principle of legality and the principle that the elements of the crime must be previously defined were not breached.

In a dissenting opinion, a Justice denied the claim, on the ground that the interpretation of the rule in accordance with the Constitution only can be done when the rule is constitutional. This method does not allow the creation of a new rule to authorise abortion; otherwise the Court would usurp the competence of the National Congress.

In a second dissenting opinion, another Justice denied the claim because the foetus does not enjoy legal protection solely where it is capable of full organic and social development. Hence, as the anencephalic foetus is alive and is not equivalent to brain death, interruption of the pregnancy constitutes the crime of abortion. He added that the argument of the unviable life would provide a basis for abortion in cases of another anomalies and, even, in cases of euthanasia.

Supplementary information:

- Articles 196, 218 and 226.7 of the Federal Constitution;
- Law 9.434/1997;
- Law 11.105/2005.

Languages:

English (translation by the Court).

*Identification:* BRA-2014-1-009

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 29.06.2012 / **e)** 4.430 / **f)** Direct claim of unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 19.09.2013 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Electoral campaign, media access / Electoral coalition / Media, political advertisement / Media, political party, airtime.

Headnotes:

Members of the national party coalition may avail of local free electoral advertising provided to political parties. However, representation in the House of Representatives and its proportion can be taken into account when establishing parameters for the allocation of time for free electoral advertising. Parties formed after the elections can have access to free electoral advertising in line with the number of elected federal deputies they have in the House of Representatives.

Summary:

I. This case refers to a direct action of unconstitutionality filed against provisions of the Elections Act (Law 9.504/1997). The applicant challenged the provision of Article 45.6 of the Law, which allowed, in the local free electoral advertising of a political party, the participation of members or candidates of other parties of the national party coalition. The applicant also challenged the rules of

Article 47.2.I and 47.2.II of the Law, which granted free electoral advertising time on radio and television only to political parties whose members have been elected as federal deputies to the House of Representatives and divided a third of the airtime equally between the parties with members in the House and two-thirds proportionally to their number of members in the House. The applicant argued that such rule would exclude the participation of parties that have no deputies elected and would create an undue distinction among parties that should receive equal treatment. In another lawsuit, jointly decided, the applicant demanded that Article 47.2.II of the Law would not be interpreted to forbid the division of proportional free electoral advertising between new parties that were created after the elections, as the elections were the criteria to identify the amount of airtime to each party.

II. The Full Court, by majority, partially granted the request. The Court held that the permission for members of the national party coalition to participate in local free electoral advertising of political parties is legitimate. This rule reinforces the national character of the parties, as required in Article 17.I of the Constitution.

The Court held that the provision of free access to radio and television only to parties that have elected federal deputies violates Article 17.3 of the Constitution. The Act that regulates the constitutional right to participate in elections cannot impose obstacles to enjoy such right, as it would be a restriction to the right to be a candidate. On the other hand, the Court deemed that the distinction set between parties that have elected members in the House of Representatives and those who have not is legitimate. The Court considered that these groups of parties carry different weight and that the Constitution allows distinctions to be made in other hypotheses, as it grants parties with representation the standing to bring a direct action of unconstitutionality and to sue under a collective writ of *mandamus*.

However, the Court stated that the division of airtime according to the result of the elections violates the freedom to form parties under Article 17 of the Constitution, because it hinders the formation of new parties by disregarding the prerogative of any deputy who is a member of the new party. Thus, the Court held that parties formed after the elections shall be granted access to free electoral advertising in the proportion of their number of deputies in the House. This would ensure the pluralism of parties established in the Constitution. Furthermore, parties formed after the elections should have the same rights as those that resulted from mergers or incorporation, as the freedom to form parties is jointly established with these two rights.

Finally, the Court held that access to television and radio must follow the parameters already set by the Superior Electoral Court: one third of the period is equally divided among all parties and two thirds equally divided among the parties that have members in the House of Representatives, considering the number of deputies of each party.

III. In separate opinions, dissenting Justices held that the request was legally impossible, as the declaration of unconstitutionality could only declare null the rule that unequally divides air and radio time for free electoral advertising, but it could not set other criteria for the allocation of time for such advertising.

Supplementary information:

- Article 17 of the Federal Constitution;
- Articles 45.6 and 47.2 of Law 9.504/1997.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-010

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 06.02.2013 / **e)** 562.045 / **f)** Extraordinary appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 233, 27.11.2013 / **h)**.

Keywords of the systematic thesaurus:

4.10.7 Institutions – Public finances – **Taxation**.
5.3.42 Fundamental Rights – Civil and political rights
– **Rights in respect of taxation**.

Keywords of the alphabetical index:

Tax law / Tax law, inheritance tax, gift tax / Tax, rate / Taxation, progressive system, principle / Tax, contributory capacity.

Headnotes:

The Federal Constitution establishes that taxes shall be graduated, wherever possible, according to the taxpayer's ability to pay, regardless to the nature of

the tax (either real taxes, which are imposed on a good or asset, or personal taxes, which are imposed on the economic capacity of the taxpayer). Thus, a state act that structured the Tax on the Transfer of Assets due to Death and Donation as a progressive tax is constitutional, even though it is a real tax.

Summary:

I. This case refers to an extraordinary appeal filed by the State of Rio Grande do Sul against a decision that deemed unconstitutional Article 18 of the State's Law 8.821/1989, which structured the Tax on the Transfer of Assets due to Death and Donation (hereinafter, "ITCD") as a progressive tax, on the ground that only personal taxes (which are imposed according to the economic capacity of the taxpayer) could be progressive. The appellant argued that Article 145.1 of the Federal Constitution does not forbid the progressiveness of the ITCD, even though it is a real tax (which is imposed on a good or asset). According to this article, "whenever it is possible, taxes should be individualised and should be graduated according to the economic capacity of the taxpayer".

II. The Full Court, by majority vote, granted the extraordinary appeal to declare the constitutionality of the State law. The Court emphasised that the understanding according to which the progressive ITCD is unconstitutional was grounded on the doctrine that Article 145.1 of the Federal Constitution only establishes the progressive charging of personal taxes. However, the Court stated that such Article should be interpreted in the sense that taxes, wherever possible, shall have a personal character and, whenever it is possible, shall be graduated according to the economic capacity of the taxpayer. Thus, the Article establishes how all taxes shall be, not only personal taxes.

Accordingly, the Court considered that all taxes can and must have relation to the taxpayer's ability to pay. In the case of the ITCD, its levying could be progressive (i.e., higher rates for higher earnings) or regressive (i.e., smaller rates for higher earnings). The Court, thus, stated that the norm of Article 145.1 of the Federal Constitution develops the principle of the substantive equality of taxation, according to which States must graduate taxes in accordance with the economic capacity of the taxpayer. The Court emphasised that the Senate is responsible for the control of the limit of ITCD's rates (Article 155.1.IV of the Constitution), which prevents possible moves towards confiscation.

III. In a separate opinion, a dissenting Justice argued that the assessment of the taxpayer's ability to pay

based only on the goods, assets and rights transferred to the heir is impossible. The dissenting Justice claimed that the prohibition of progressive real taxes, established in Article 145.1 of the Federal Constitution, is a constitutional safeguard and an individual right, which cannot be breached by an ordinary state law. Thus, in the case of real taxes, the progression of taxation could only be established by an express constitutional provision.

In another separate opinion, a dissenting Justice argued that the type of tax (personal or real) is not a hindrance to the progression, but that not all taxes could be progressive, as it is impossible to assess the taxpayer's ability to pay. In the case of the ITCD, heirs in absolutely different economic conditions could be forced to pay the same value of tax, which is against the ability-to-pay principle.

Supplementary information:

- Articles 145.1 and 155.1.IV of the Federal Constitution;
- Article 18 of the Law 8.821/1989.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-011

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 07.02.2013 / **e)** 27.840 / **f)** Ordinary Appeal on a request for a writ of *mandamus* / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 167, 27.08.2013 / **h)**.

Keywords of the systematic thesaurus:

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

Keywords of the alphabetical index:

Nationality, deprivation / Naturalisation, revocation.

Headnotes:

Article 112.2 and 112.3 of Law 6.815/1980, which authorises the Ministry of Justice to cancel naturalisation, was not received by the Constitution of 1988. Thus, only a judicial order shall withdraw naturalisation, even if citizenship has been acquired by means of fraud.

Summary:

I. This case refers to an ordinary appeal on a request for a writ of *mandamus* against a ruling that approved the annulment of a naturalisation granting act by the Ministry of Justice. The appellant claimed that only a judicial order could annul such act. The defendant argued that the appellant had submitted a false declaration, stating his lack of criminal conviction, when requesting the naturalisation, and that this would have rendered the granting act null.

II. The Full Court, by majority, granted the appeal to rule that only a judicial order shall withdraw a naturalisation act. The Court stated that nationality is a fundamental human right, a general principle of international law and a legal and political bond that links individuals to the State. Due to the importance of such right, its definition, range and limits are set forth by the Constitution. Thus, under Article 12.4 of the Constitution, the naturalisation act can only be withdrawn by a court order or by the acquisition of another nationality. Therefore, Article 112.2 and 112.3 of Law 6.815/1980 have not been received by the Constitution, given that the provisions authorise the Ministry of Justice to cancel naturalisation acts in case of falsehood in the proceedings whereby the naturalisation is granted.

Furthermore, the Court held that the granting of citizenship is not an administrative act that can be reviewed and annulled by administrative organs in case of an irregularity, as set forth by the Brazilian Supreme Court Precedent 473. Rather, the granting of citizenship is a sovereign act that is completed when the naturalisation certificate is surrendered before a federal court.

III. In another vote, which granted the appeal on different grounds, a dissenting Justice argued that Article 12.4 of the Constitution does not establish the need for a judicial order in all cases, but only as regards annulments based on activity harmful to the national interest when the naturalisation was validly acquired. In this sense, the Justice contended that Article 112.2 and 112.3 of Law 6.815/1980 had been received by the Constitution. However, Article 112.3 was revoked by Article 8.4 of the United Nations

Convention on the Reduction of Statelessness, which has *supralegal status* (above law, but beneath the Constitution). Such rule determines the need for either an order by a court or an independent organ, in case of annulment, even in cases where citizenship has been obtained through fraud.

In a dissenting opinion, the Justice held that a judicial order is only needed in cases of harmful activity performed after naturalisation. In this case, the naturalisation was acquired by means of a fraud; therefore, there was no guarantee of a jurisdictional hearing.

Supplementary information:

- Article 12.4 of the Federal Constitution;
- Article 112.2 and 112.3 of Law 6.815/1980;
- Article 8.4 of the Convention on the Reduction of Statelessness.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-012

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 07.02.2013 / **e)** 508 / **f)** Internal Appeal on Criminal Prosecution / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 161, 19.08.2013 / **h)**

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Communication, telephone tapping, evidence / Criminal law / Due process, procedural / Evidence, obligation to produce / Evidence, right of the defence / Procedure, right of defence / Telephone, tapping, necessary safeguards.

Headnotes:

Wiretapping transcriptions meet the requirement for valid evidence. Providing a defendant in criminal proceedings with all media related to the wiretapping, without transcriptions, does not constitute a denial of the right to be heard.

Summary:

I. This case refers to an internal appeal against a decision that ordered transcription of wiretapping carried out during a criminal investigation. The State, as appellant, argued that the transcription of all wiretapping content could not be ordered during the closing arguments of the criminal proceedings. The defendant's right to be heard would be fulfilled by providing him access to the media, which had already happened, according to the records. The appellant added that, as the defendant had not presented a motion before, his aim would now be merely to postpone the proceedings. Finally, the appellant pointed out the possibility of the statute of limitations expiring.

The respondent, who was the defendant in the trial, argued that the decision was unappealable and he was being denied the opportunity to be heard since, pursuant to Law 9.296/1996, he would have the right to the entire media that had provided the grounds for the prosecution's charges against him.

II. A majority of the Court, in plenary session, denied the appeal. The Court acknowledged that wiretapping transcriptions meet the requirement for valid evidence, pursuant to the Article 6.1 of Law 9.296/1996. The defendant's access to all records' pages on line (known as electronic proceeding) does not withdraw such rule.

In other opinions, that also denied the appeal, but on different grounds, the Justices argued that whether or not the entire audio transcript should be granted is a decision for the rapporteur-judge at trial, as he leads the proceedings and responds for the production of evidence. As so, if he finds the motion justified in order to understand the case, he may grant the order or he may even decide the issue on his own initiative. Moreover, the challenged decision has not determined any nullity, nor brought prejudice to the charges or granted new terms. Therefore, the Full Court could not overrule the decision based on the justice-rapporteur's conviction.

III. In dissenting opinions, the Justices stated that the purposes of the defendant's motion were to postpone the proceedings, as it was only brought before Court at the time of the closing arguments in the criminal proceedings. They added that if the justice-rapporteur

understands that the transcript of all evidence is not indispensable to the defendant, there is no nullity in granting part of it.

Supplementary information:

- Article 6.1 of Law 9.296/1996.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-013

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 14.03.2013 / **e)** 4.425 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 251, 19.12.2013 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**
 3.4 General Principles – **Separation of powers.**
 3.16 General Principles – **Proportionality.**
 3.21 General Principles – **Equality.**
 5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle.**

Keywords of the alphabetical index:

Constitution, amendment / Credit, court, imposition / Creditor, preferences, allocation / Creditor, rights / Discharge, debts / Due process / Judicial protection of rights / Obligation, state / Public interest, government finances / Public interest, serious violation / Unconstitutionality, declaration.

Headnotes:

Constitutional Amendment 62/2009 breaches the principles of administrative morality, reasonableness and substantive due process, because it establishes new restrictions on the payment of certificates of judgment debt of the Government, allowing the nonpayment of governmental debts.

Summary:

I. This case refers to a direct claim of unconstitutionality filed by the National Confederation of Industry against rules of Article 100 of the Federal Constitution (hereinafter, the “Constitution”) and Article 97 of the Temporary Constitutional Provisions Act (hereinafter, “ADCT”), added through Constitutional Amendment 62/2009, which introduced a special regime of payment of certificates of judgment debt of States, the Federal District and Municipalities. The plaintiff argued that the regime breaches the safeguard of the reasonable duration of the process, *res judicata* and the principle of the separation of powers, as it postpones the full payment of debts from definitive judicial decisions for fifteen years. The plaintiff also argued that the mandatory set-off of certificate of judgment debt of the Government with debts of the creditor would violate the right to freedom and the principle of equality before the law. The plaintiff further alleged that adjustment for inflation and the interests for late payment of the Government debts using the savings’ rate breach the principle of morality and the constitutional safeguard of *res judicata*.

II. The Supreme Court, by majority, partially granted the direct claim, in order to declare unconstitutional the rules of Article 100.9, 100.10 and 100.15 of the Constitution and Article 97 of the ADCT, both added through Constitutional Amendment 62/2009. The Court decided that the mandatory set-off of debts, established in Article 100.9, 100.10 e 100.15 of the Constitution, hinders the effectiveness of jurisdiction and the due process of law and violates the *res judicata*. Furthermore, it breaches the principle of equality before the law, as it establishes a great procedural superiority to the Government against citizens because it does not allow citizens to set off their credits with the Government.

The Court decided that the special regime established in Article 100.15 of the Constitution and Article 97 of the ADCT breached the safeguards of free and efficient access to justice, due process of law, reasonable duration of the process and the authority of judicial decisions, as this special regime postpones for 15 years the full payment of debts from judicial decisions and allows creditors to auction their credits and tolerate discounts, in order to receive them. Furthermore, those provisions, as they allow payment by direct agreement or in cash, in a single and increasing value order, breached the principle of impersonality and the rule that binds payment to the chronological order of request of certificates of judgment debts of the Government, because they favour later creditors, notwithstanding earlier ones, who wait longer for the payment.

The Court deemed partially unconstitutional Article 100.2, which gives preferred payment only to those who are sixty years old or older on the date of issuance of the certificate of judgment debt of the Government, because it breaches the equality principle. Such preferred payment shall be given to all creditors that reach sixty years between the issuance of the certificate of judgment debt of the Government and its payment.

The Court also declared partially unconstitutional the adjustment for inflation of the certificate of judgment debt of the Government using the savings' rate, because this rate does not maintain purchasing power, if compared to inflation rates, and infringes *res judicata*. As regards the interest rates for late payment applicable to certificate of judgment debt of the Government, the Court held that, when the debt is related to taxation, the rate should be the same applicable to tax credits.

At last, the Court stated that Constitutional Amendment 62/2009 breached the principles of administrative morality, reasonability and substantive due process, because it placed new restrictions on the payment of governmental debts, allowing the non-payment of governmental debts.

III. In separate opinions, dissenting Justices defended that the regime of payment of the certificate of judgment debt of the Government was not an institutional regression, because it should not be assessed according to an ideal regime, but according to the previous one. They emphasised that the possible declaration of unconstitutionality of the new regime of payment of certificate of judgment debt of the Government would mean a return to the inefficient older regime. The older regime was worse than the new one to creditors, because it, in practice, does not provide a term or penalty for the fulfilment of governmental debts.

In another separate opinion, a dissenting Justice argued that the constitutionally adequate procedure for challenging the non-payment of certificates of judgment debt of the Government is the federal intervention request. However, this measure was inefficient, because federated entities have scarce resources.

Supplementary information:

- Article 100.2, 100.9, 100.10, 100.12 and 100.15 of the Federal Constitution;
- Article 97 of Act of temporary constitutional provisions;
- Amendment 62/2009.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-014

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 04.04.2013 / **e)** 453.000 / **f)** Extraordinary appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 194, 03.10.2013 / **h)**.

Keywords of the systematic thesaurus:

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

5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law**.

Keywords of the alphabetical index:

Court, verification of the constitutionality of laws / *Ne bis in idem*, conditions / Norm, legal, interpretation, application / Penal Code, interpretation / Penalty, enforcement / Penalty, individualisation / Recidivism.

Headnotes:

Using recidivism as an aggravating factor in calculating a prison term. It does not violate constitutional guarantees, such as *res judicata*, *ne bis in idem* or sentence individualisation, since relapsing into criminal behaviour deserves higher repression considering that the previous conviction was not sufficient to inhibit criminal behaviour.

Summary:

I. This case refers to an extraordinary appeal filed against a ruling that declared constitutional the use of recidivism as an aggravating factor in calculating a prison term, as Article 61.I of the Penal Code establishes, on the basis that relapsing into criminal behaviour merits enhanced repression by lawmakers.

The appellant claimed that the use of recidivism for such purposes would violate the constitutional principles of *res judicata*, *ne bis in idem* and the individualisation

of punishment, guaranteed in Articles 5.XXXVI and 5.XLVI of the Federal Constitution respectively. The appellant also claimed that increasing a prison term on the grounds of recidivism implies a double consideration of the same fact, jeopardising the defendant and interfering with his reintegration process.

II. The Full Court, unanimously, denied the appeal and held that using recidivism as a factor for imposing a longer sentence of imprisonment is constitutional.

The Court considered that the sentence focuses on reintegration, retribution and prevention. If a convicted person relapses into criminal behaviour, the sentence did not fulfil its purposes. The Court held that there is no duplication, since recidivism is not considered as a factor in the sentence for the first conviction and it is only enforced after the defendant's criminal responsibility is affirmed, on the grounds of the repeated relapse into criminal behaviour. Moreover, there is no violation of the sentence individualisation principle because it prevents recidivists falling into the same category as first offenders. The Court also deemed that there is no violation of *res judicata*, since no Act is being retroactively enforced.

Finally, the Court stated that there is no unconstitutionality when lawmakers view as negative the defendant's choice in relapsing into criminal behaviour, reflected in higher repression and disapproval.

Supplementary information:

- Article 5.XXXVI and 5.XLVI of the Federal Constitution;
- Article 61.I of the Penal Code.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-015

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 10.04.2013 / **e)** 607.056 / **f)** Extraordinary appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 091, 16.05.2013 / **h)**

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Free movement of goods / Payment of taxes / Public service / Tax, contributory capacity / Water, supply / Water, treatment, charge.

Headnotes:

The supply of drinking water by a public utility company under concession, authorisation or permit is not subject to the application of tax on the circulation of goods and on services of interstate and intermunicipal transportation and communication (ICMS, in the Portuguese acronym) because the supply of drinking water is not a circulation of goods, but an essential public service.

Summary:

I. This case refers to an extraordinary appeal filed against a judicial decision that ordered the restitution to the taxpayer of the amount of tax on the circulation of goods and on services of interstate and intermunicipal transportation and communication (ICMS, in the Portuguese acronym) paid for the supply of water. The Appellate Court stated that the payment was undue, because the water is not a good, but an essential and specific public service. There was, thus, no taxable action that would justify the taxation. The appellant argued that tap water is a good, a fact that justifies the payment of the ICMS, according to Article 155.II of the Federal Constitution.

II. The Supreme Court, by majority, denied the extraordinary appeal. The Court stated that the ICMS tax is not applied to the supply of drinking water by a public utility company under concession, authorisation or permit, because it is an essential public service, under the responsibility of the State. The supply of tap water is not a circulation of a good, because water is a good of common use, unalienable and unsusceptible to economic valuation, according to articles 20.III, 20.VI and 26.I of the Federal Constitution. It cannot, thus, be considered a tradable good.

The Court stated that the concession of the public service of water distribution through pipes is a granting of the rights to use. It is not the sale of the water. Even with chemical treatment to allow human consumption, the water still is a public good of common use. Besides, the sewage service could not

be taxed with the ICMS, because such service was not expressly established in Article 155.II. Furthermore, the levying of the ICMS on the service of treated water is against the public interest, because such taxation would hinder policies aimed at achieving universal access to this service.

III. In separate opinions, dissenting Justices argued that the activity of water supply companies is not restricted to the transportation of the good extracted in natural sources, because the water goes through a chemical treatment, to be fit for consumption. It is, thus, an improved product, which is scarce in the country and in the world. Therefore, the supply of drinking water is not a service, but the circulation of a good that could be taxed with the ICMS.

Supplementary information:

- Articles 20.III, 20.VI, 26.I and 155.II of the Federal Constitution.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-016

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 18.04.2013 / **e)** 567.985 / **f)** Extraordinary appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 194, 03.10.2013 / **h)**.

Keywords of the systematic thesaurus:

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**.

Keywords of the alphabetical index:

Disabled person, social assistance / Person, elderly, social assistance / Social assistance, entitlement, condition.

Headnotes:

Article 20.3 of Law 8.742/1993, which establishes the monthly income per person below one – fourth of the minimum wage as a condition to grant the monthly benefit for disabled or elderly people (set forth under Article 203.V of the Constitution) has an unconstitutional omission, though it is not null. This provision gradually became unconstitutional, due to factual changes (politic, economic and social) and legal changes (issuance of statutes that raised the economic threshold for eligibility to other social security benefits).

Summary:

I. This case refers to an extraordinary appeal filed against a decision of an Appeals Panel of a Small Claims Court that ordered the granting of the monthly benefit, set forth in the Article 203.V of the Constitution (assurance of a monthly benefit of one minimum wage for disabled or elderly people who prove the incapability of providing for their own support or having it provided for by their relatives) to a person who was not eligible according to the threshold established in the Article 20.3 of Law 8.742/1993 (the family who has a monthly income per person below one fourth of the minimum wage is not capable of providing for the support of a disabled or elderly person). The Appeals Panel had explained that, according to precedents, such threshold is not absolute in order to identify the condition of poverty. The appellant alleged that the threshold of Law 8.742/1993 should have been applied, as the constitutional provision of the monthly benefit should have been specified by a non-constitutional norm that could restrict the constitutional provision.

II. The Supreme Court, by majority vote, denied the extraordinary appeal and declared an unconstitutional omission in Article 20.3 of Law 8.742/1993, without declaring it to be null. Despite this, the Court did not reach the quorum to give prospective effects to the decision, establishing a lapse during which the norm would not be considered unconstitutional, in order to allow the issuance by the legislature of a new rule more adequate to accomplishing the constitutional provision of the Article 203.V of the Constitution.

The Court explained that, in a direct claim of unconstitutionality previously judged, it had considered Article 20.3 of Law 8.742/1993 constitutional. However, due to factual changes (politic, economic and social) and legal changes (issuance of statutes that raised the economic threshold for eligibility to other social security benefits), this provision had gradually become unconstitutional.

The Court stated that the enforcement of the threshold set forth by Law 8.742/1993 should have, as substantive parameters, the principle of the human dignity, from which derive the principle of social solidarity (Article 3.1 of the Constitution) and the assurance of the social minimum, besides the rule that establishes the assistance to the destitute (Article 6 of the Constitution).

The Court concluded that, though the threshold established in the statute was objective, it was not enough to implement the constitutional provision in specific cases. The Court highlighted that the government must issue statutes and take action to effectively safeguard fundamental rights, according to the principle that forbids the insufficient implementation of rights. The Court explained that it could strike a balance between the rule set forth by the statute (which, as a rule, implements the principles of legal certainty and equality before the law) and the principle of the human dignity, which should prevail.

III. In a separate opinion, a dissenting Justice, who disagreed only about the declaration of unconstitutionality, argued that the norm could not be applied to some cases, as the one under judgment, but it was not abstractly unconstitutional. He stated that, in cases of unconstitutional omission, the Court does not declare the unconstitutionality, as it could aggravate the situation that already is unconstitutional, because the nullification of the rule would remove the basis for government action.

In other separate opinions, dissenting Justices on the merits granted the appeal, on the grounds that the rule was already deemed constitutional by the Court. They stated that the legislature should act to establish the threshold to prove the poverty, notably due to budget limitations.

Supplementary information:

- Articles 3.I, 6 and 203.V of the Constitution;
- Article 20.3 of Law 8.742/1993.

Cross-references:

- Direct claim of unconstitutionality 1.232.

Languages:

English (translation by the Court).



Identification: BRA-2014-1-017

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 23.05.2013 / **e)** 627.815 / **f)** Extraordinary appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 192, 01.10.2013 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Free movement of goods / Government, taxation, imposition / Tax, payment / Public finance, sales tax / Unconstitutionality, declaration.

Headnotes:

Revenue arising from foreign-exchange revenue, earned in export transactions concerning goods or services, is covered by the tax immunity in Article 149.2.I of the Federal Constitution, and, as a consequence, is exempt from two key taxes related to social security.

Summary:

I. This case refers to an extraordinary appeal filed against a decision that, based on the tax immunity provided for the Article 149.2^o of the Federal Constitution, declared revenues from foreign-exchange revenue on the currency trading in export transactions exempt from two social security tax charges; the Social Intergration Program (PIS, in the Portuguese acronym) and the Contribution for Social Security Financing (COFINS, in the Portuguese acronym). The appellant, besides defending the constitutionality of collecting such taxes, discussed the extension of immunity rules and the fiscal competence of the Union to establish social contributions. The appellant also stated that extensive interpretation of “export revenue” is not authorised by the Federal Constitution and warned that such an interpretation would allow the constitutional tax immunity to be extended to other transactions, for example, those who follow the export act.

II. The Supreme Court unanimously denied the extraordinary appeal. The Court stated that the foreign-exchange contract is inherent to export business, since all foreign trade transactions presuppose the advent of an exchange transaction and it does not allow the exporter to receive payment in foreign currency. Therefore, the Court stressed that revenue arising from foreign-exchange revenue are not tied to any operation in the internal market, being a direct consequence of export transactions of goods or services, for which reason the tax immunity is applied and which, consequently, precludes the application of PIS and COFINS. The Court explained further that the constitutional immunity does not apply to the profits or financial transactions made after export, but to the revenues obtained as an immediate result of the export transaction.

Regarding the constitutional hermeneutics, the Court assumed the teleological interpretation of the provisions of tax immunity, maximising the effectiveness of the constitutional provision. The Court, finally, stated that the constitutional delegate, contemplating, in Article 149.2.I of the Federal Constitution, “export revenue” accorded a higher amplitude to the constitutional exemption for Brazilian companies are not coerced to export taxes that otherwise would be onerous to the export transactions, directly or indirectly.

Supplementary information:

- Article 149.2.I of the Federal Constitution.

Languages:

English (translation by the Court).



Bulgaria Constitutional Court

Statistical data

1 January 2014 – 30 April 2014

Number of decisions: 5

Important decisions

Identification: BUL-2014-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 28.01.2014 / **e)** 22/2013 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 63, 16.07.2013 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Agreement, international, constitutional requirements / Parliament, decision / Rights, basic, limitation.

Headnotes:

In accordance with the principle of the separation of powers, the National Assembly wields legislative power to adopt laws that the executive branch, namely the Council of Ministers, implements. Regarding foreign policy, the government enjoys operational discretion, which includes concluding and amending international treaties whereby the State is a party. While Parliament may oversee and control this activity, it may not prescribe the Council of Ministers to take particular actions for the conclusion or amendment of international treaties. This would breach the principle of the separation of powers.

Domestic law includes the Treaty concerning the Accession of the Republic of Bulgaria and Romania to the European Union (hereinafter, the "TCARBREU") and the Act concerning the conditions of accession and the adjustments to treaties on which the European Union is founded. The TCARBREU and the Act have been ratified and enacted according to a procedure outlined in the Constitution and entered into force. According to Article 5.4 of the Constitution, standards set in international treaties take precedence over domestic laws. Treaties such as the TCARBREU may be amended or denounced only through procedure specified in the TCARBREU. The National Assembly may not prescribe unilateral amendment of an international treaty to which Bulgaria is a party by secondary legislation, such as a resolution.

Basic social relations are regulated durably only by law. Land is a fundamental asset that enjoys enhanced constitutional protection, which, introduced in 1991, established the unqualified ineligibility of aliens to acquire land. The second amendment to the Constitution of 2005, in force as from 1 January 2007, granted foreign nationals and non-resident legal persons the right to acquire land under terms arising from the TCARBREU. After expiration of the seven-year transitional period, as established in the TCARBREU on 1 January 2014, nationals and legal persons of the Member States of the European Union and of the States that are Contracting Parties to the Agreement on the European Economic Area (hereinafter, "AEEA") may acquire land in Bulgaria without restraint. The period of restriction in force until 1 January 2014 may neither be extended unilaterally by a legislative resolution nor assigned, by a resolution, to the government to take actions and adopt acts to amend this part of the TCARBREU. Such an act of parliament would be unconstitutional.

Summary:

I. The judgment was rendered in proceedings that were instituted following a petition from a group of 55 Members of the 42nd National Assembly. The group raised issues about the constitutionality of the National Assembly Resolution on the Imposition of a Moratorium on the Acquisition of a Right to Ownership over Land within the Territory of the Republic of Bulgaria on the Part of Aliens and Non-Resident Legal Persons until 1 January 2020 (promulgated in the *State Gazette* no. 93, 25 October 2013).

According to Article 21.1 of the Constitution, land is a national resource and enjoys special protection. The enhanced protection was introduced in the 13 July 1991 version of the Constitution. According to

Article 21.1 of the Constitution, aliens and non-resident legal persons may not acquire a right to land ownership, with exception of land acquired through legal succession.

The amendment of Article 22 of the Constitution, in force as of 1 January 2007, made aliens and non-resident persons eligible to acquire land within Bulgaria in the following cases:

- under the terms and within the time limits arising from the TCARBREU, after 1 January 2014 by the nationals of the Member States of the EU and of the States that are Contracting Parties to the AEEA, as well as by legal persons formed in accordance with the legislation of those States;
- by legal persons and nationals of States other than EU Member States and AEEA Contracting Parties, by virtue of an international treaty concluded by Bulgaria after 1 July 2007, which has been ratified by a majority of two-thirds of all Members of the National Assembly;
- the possibility of aliens acquiring a right to ownership over Bulgarian land through legal succession is retained.

By the contested Resolution, Parliament assigned the Council of Ministers to take all steps and adopt all acts necessary to declare a moratorium until 1 January 2020 on aliens and non-resident legal persons' right to acquire land ownership within Bulgaria.

II. The Resolution, as adopted, contravenes fundamental constitutional principles.

1. According to Article 4.1 of the Constitution, Bulgaria is a State committed to the rule of law. That is, all subjects governed by law, including the National Assembly, are required to observe the laws and the Constitution accurately and equally in wielding public power. The laws and resolutions adopted by the legislative body should be clear, categorical and consistent.

1.1. The above-mentioned, constitutional requirements were not met upon adoption of the Resolution to declare the moratorium. Besides internal contradiction and discrepancy, the Resolution lacks an explicit, operative content. The legal and logical weakness of the act precludes a clear-cut answer to the crucial question: did the legislative body impose the moratorium, and assign the Council of Ministers to adopt and take necessary steps to implement the acts. Or did the legislative body obligate the Government to effect the declaration of the

moratorium and accordingly, to execute it. Such ambiguity and the legislative body's unclear declaration raise concerns that the rule of law was contravened. Therefore, even on these grounds alone, the contested Resolution was unconstitutional.

1.2. Until they are declared unconstitutional according to due procedure, resolutions adopted by the National Assembly are mandatory and actions assigned in the resolutions must be executed. Consequently, the Resolution on declaration of a moratorium is binding on the Council of Ministers. In this case, however, the Council of Ministers is assigned to take all steps and adopt all acts necessary to exercise power, which the National Assembly lacks. That is, the Resolution is an *ultra vires* act, insofar as the provisions of Articles 84 and 85 of the Constitution do not contain grounds for its adoption. Consequently, the Resolution may not assign the taking of actions intended to amend unilaterally international treaties that have been ratified, promulgated and entered into force for Bulgaria, to which the provision of Article 22.1 of the Constitution refers.

1.3. The constitutional treatment of land as a national resource and the special ownership regime associated with it can be subject to *ex post* statutory regulation only in the form of a law. The reason is that the hierarchy of statutory instruments laws rank below the Constitution and as primary sources, provide sustained regulation of material social relations like the ones subject to the contested Resolution. Owing to their exceptional significance, the social relations subject to the TCARBREU, to which Article 22.1 of the Constitution refers, are regulated by an international treaty. According to the provision of Article 5.4 of the Constitution, the Treaty ranks in legal force immediately after the Constitution (Judgment no. 3 of 5 July 2004 in Constitutional Court no. 3 of 2004). Hence, any amendment, suspension or termination to such treaty, such as imposing a moratorium, should be effected only by law.

2. By the Resolution on Imposition of a Moratorium, the National Assembly denied the Council of Ministers the opportunity to review and evaluate the implementation of the TCARBREU, including the agreed safeguard measures and on this basis, to propose to the legislative body the appropriate measures related to its implementation or the need for amendment. Therefore, the adoption of the Resolution on Imposition of a Moratorium furthermore breached the principle of separation of powers, as proclaimed in Article 8 of the Constitution.

3. Checked against the provision of Article 22.1 of the Constitution, the Resolution on Imposition of a Moratorium shows that parliament attempts to

suspend statutes that enable aliens and non-resident legal persons to acquire a right to land ownership in Bulgaria after 1 January 2014. In this part, the Resolution contradicts Article 22.1 of the Constitution. It does not reckon with the differentiated approach provided for by the second amendment of the Constitution, in force as from 1 January 2007. The prohibition until 1 January 2020 applies to all aliens and non-resident legal persons and is indiscriminate in respect of the kind and assigned use of the land: urbanised or agricultural, as a means of production or as a target of investment.

4. Article 22.1 of the Constitution should be interpreted and applied through the prism of the TCARBREU in light of conditions and requirements of European Union subjects governed by private law specifically as it pertains to the acquisition of land ownership by nationals and legal persons. The link between the blanket constitutional standard and the relevant legal standards of the TCARBREU rules out the possibility of holding the Parliament's Resolution constitutional. The relevant part concerns the Council of Ministers' obligation to take actions and measures to unilaterally extend until 1 January 2020 the period of validity of the transitional restriction on acquiring the right to land ownership by nationals and legal persons of EU Member States or of AEEA Contracting Parties. The reason is that it does not conform to Article 22.1 of the Constitution in conjunction to Article 5.2 of the Constitution and Article 5.4 of the Constitution. In this part and according to the provision of Article 85.3 of the Constitution, the TCARBREU may be amended or denounced solely according to the procedure specified in the Treaty itself. This procedure does not provide for an extension of the period of application of measures restricting the acquisition of a right to land ownership by aliens and by non-resident legal persons. Also, there are no procedures to unilaterally amend or suspend the effect of the Treaty in this part, in which the resolution on declaration of the moratorium would result. Under the circumstances, the only option that can be pursued is to negotiate an adjustment of the Accession Treaty, as provided for in Article 4 of the TCARBREU.

Languages:

Bulgarian.



Canada

Supreme Court

Important decisions

Identification: CAN-2014-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 17.01.2014 / **e)** 34914 / **f)** *R. v. MacDonald* / **g)** *Canada Supreme Court Reports* (Official Digest), 2014 SCC 3, [2014] 1 S.C.R. 37 / **h)** <http://scc.lexum.org/en/index.html>; 366 *Dominion Law Reports* (4th) 381; 453 *National Reporter* 1; 303 *Canadian Criminal Cases* (3d) 113; 7 *Criminal Reports* (7th) 229; [2014] S.C.J. no. 3 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Search, reasonableness / Privacy, expectation, home / Firearm, possession and transport, licence / Safety, public and police.

Headnotes:

A police officer's action of pushing the accused's door open a few inches further when he suspected the accused of concealing a firearm constituted a search for purposes of Section 8 of the Canadian Charter of Rights and Freedoms. However, that search was reasonable because it falls within the scope of the common law police duty to protect life and safety and it constitutes a justifiable exercise of powers associated with that duty.

Summary:

I. Police responded to a noise complaint at the accused's home. When the accused opened the door, an officer observed that the accused had an object in his hand, hidden behind his leg. The officer

twice asked the accused what was the object. Because the accused did not answer, the officer pushed the door open a few inches further to see. A struggle ensued and the accused was disarmed of a loaded handgun. The accused was licensed to possess and transport the handgun in another province, but not this province though he believed he was. At trial, the judge concluded that the officer's pushing the door open further did not breach the accused's right under Section 8 of the Canadian Charter of Rights and Freedoms to be free from unreasonable search, and he convicted the accused. A majority of the Court of Appeal upheld the trial judge's decision.

II. A majority of the Supreme Court of Canada held that the officer's action of pushing the accused's door open further constituted a search for purposes of Section 8 of the Charter. The action went beyond the implied licence to knock on the door and constituted an invasion of the accused's reasonable expectation of privacy in his home. Although the officer's action constituted a search for Section 8 purposes, the majority held that the search was reasonable because it falls within the scope of the common law police duty to protect life and safety and it constitutes a justifiable exercise of powers associated with the duty.

The majority held that to determine whether a safety search is reasonably necessary, and therefore justifiable, a number of factors must be weighed to balance the police duty against the liberty interest in question. These factors include: the importance of the duty to the public good; the necessity of the infringement for the performance of the duty; and the extent of the infringement. According to the majority, the duty to protect life and safety is of the utmost importance to the public good, and an infringement on individual liberty may be necessary when, for example, the officer has reasonable grounds to believe that the individual is armed and dangerous. That infringement will be justified only to the extent that it is necessary for the officer to search for weapons. In other words, and as the Court recognised in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, the powers of the police are limited. Courts must consider not only the extent of the infringement, but how it was carried out. Restraints on safety searches are particularly important in homes, where such searches can often give the police access to a considerable amount of very sensitive personal information.

In this case, the majority held that the officer had reasonable grounds to believe that there was an imminent threat to public and police safety and that the search was necessary to eliminate that threat.

The majority further held that the manner in which the officer carried out the search was also reasonable. The trial judge found that the officer pushed the door open no more than was necessary to find out what the accused had behind his leg. The officer twice asked the accused what he had in his hand but received no answer. In these circumstances, the majority considered it hard to imagine a less invasive way of determining whether the accused was concealing a weapon and thereby eliminating any threat. For these reasons, the majority concluded that the accused's rights under Section 8 of the Charter were not violated.

Languages:

English, French (translation by the Court).



Chile Constitutional Court

Important decisions

Identification: CHI-2014-1-001

a) Chile / **b)** Constitutional Court / **c)** / **d)** 10.04.2014 / **e)** 2435-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Divorce, law, applicable / Marriage, fidelity / Marriage, mutual rights and obligations.

Headnotes:

Homosexual behaviour as a legal ground for 'fault' divorce does not infringe the non-discrimination principle, because it contravenes the duty of mutual fidelity between husband and wife.

Summary:

I. The applicant challenged the constitutionality of a legal ground for 'fault' divorce based on homosexual behaviour, established in civil marriage law. The grounds for a fault divorce in Chilean law are in general any grave infringement to the husband's and wife's reciprocal duties, including adultery and homosexual behaviour, among others.

The applicant's wife had filed for a fault divorce grounded on homosexual behaviour during their marriage. He alleges that this legal cause is discriminatory against sexual orientation and therefore infringes his right to equality, granted by the Constitution and the American Convention on Human Rights (ACHR). The law, according to the applicant's arguments, is redundant since adultery is already established as a ground for a fault divorce. He therefore requested the Constitutional Tribunal to declare the unconstitutionality of this legal ground for a fault divorce, in order that the judge may not invoke it in the pending divorce trial.

II. By majority, the Constitutional Tribunal upheld the constitutionality of the challenged norm. The Court observed that civil marriage law establishes the institution of matrimony as monogamist and heterosexual in accordance with the Constitution, which establishes that family is the base of society and marriage as its main basis. Thus, marriage creates a life community between a man and woman with special duties to one another.

The Court noted that adultery is not the only misconduct that leads to legal grounds for a fault divorce. There are other behaviours that compromise the duties between husband and wife; in particular, their duty to mutual fidelity. There is also infidelity when a husband or wife expresses his or her sentiments of affection and passion to a person other than his or her spouse, in a way that is not proper to a marriage relationship.

The Court held that the legal ground for a fault divorce based on homosexual behaviour does not sanction an orientation or attraction to a person of the same sex, but a conduct, meaning as a concrete fact and not as a mere sentiment.

Languages:

Spanish.



Identification: CHI-2014-1-002

a) Chile / b) Constitutional Court / c) / d) 10.04.2014 / e) 2438-2013 / f) / g) / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.
4.10.2 Institutions – Public finances – **Budget**.

Keywords of the alphabetical index:

Debt, enforcement / Debt, recovery / Municipality, property rights / Municipality, property, confiscation / Municipality, property, protection.

Headnotes:

Legal provisions that establish certain procedural protections for municipal property – prohibiting seizure of non-liquid assets, requiring a mayoral decree to enforce payment, and prohibiting arrest of a mayor where a predecessor incurred the debt – are constitutional and absolutely justified.

Summary:

I. In accordance with the Municipality Act, municipal property may not be the subject of seizure. This Act also establishes that the mayor of the municipality must dictate a decree for credit enforcement, ordering its payment. The enforcement measure available is to petition a judge for the arrest of the mayor, but it is only applicable to the mayor who has incurred the debt. Accordingly, where a new mayor is elected, the only enforcement measure available is a fine for the mayor in office.

The applicant was a creditor demanding payment against the Municipality. He challenged the constitutionality of the norms governing a suit for debt collection against the Municipality. He argued that the protection of municipal property from seizure and the fact that the enforcement for debt payment requires a mayoral decree infringed his right to equal treatment before law and his property rights. He also claimed that the fact that no arrest against the serving mayor in order to enforce payment makes the collection inefficient and breached his process rights.

II. By majority, the Constitutional Tribunal rejected the applicant's allegations and held that the norms of the Act are constitutional. First, the Tribunal saw no unconstitutionality despite recognising that the principle of non-seizure is a procedural privilege and an exception that safeguards the integrity of municipal property. The Court also considered that the protection is not absolute, because it does not mean that citizens' credits will not be paid, but that there are some parts of municipal property excluded from collection. Liquid assets are attachable; i.e., they may be seized.

Second, the Tribunal found the requirement of a mayoral decree, to order enforcement of the payment, to be justified, given that governance of the municipal budget requires efficient and transparent actions by the mayor, according to the law.

Third, the Tribunal considered that the fact that no arrest is permissible against the serving mayor, when a previous mayor has incurred the debt, is reasonably justified, because a new mayor (who could be even of a different political party) cannot assume personal responsibility for a payment default.

Languages:

Spanish.



Identification: CHI-2014-1-003

a) Chile / b) Constitutional Court / c) / d) 29.04.2014 / e) 2506-2013 / f) / g) / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Freedom of information / Information, access, denial / Information, classified, access.

Headnotes:

Where information is sought by individuals under the Access to Information Act, the divisibility principle, established in the Act, permits public bodies to deliver part of the information to petitioners that has to be public and to declare classified the part that is not.

Summary:

I. In the context of a public tender for hiring a District Coordinator for Public Schools, the candidates had to undergo occupational-psychological tests. This tender was led by the National Civil Servant Office (hereinafter, “NCSO”), which is entitled to select a nominee from among the candidates after assigning a

private consultant to carry out an occupational psychological test. The tender concluded without the selection of a candidate, because no candidate fulfilled completely the profile for the position.

Nevertheless, one of the applicants (a private consultant) requested the results of his occupational psychological test from the NCSO but was denied. He appealed to the Transparency Council (hereinafter, the “Council”) against this decision. The Council, under the divisibility principle established in the Access to Information Act, partially granted the request by ordering the NCSO to deliver to the applicant only the score of his test, but declared classified the contents of the test itself. Against this resolution the NCSO filed a jurisdictional claim at the Court of Appeals.

Pending this trial, a third party filed a claim challenging the constitutionality of the divisibility principle, under which the Council granted partially the request of the applicant. The third party argued that this principle allows the Council to deliver sensitive information that infringes his right to freedom of enterprise, because his main business is to develop these kinds of tests and by making public the scores his business may be diminished.

II. The Constitutional Tribunal rejected the applicant’s allegations and holds that the divisibility principle established in Access to Information Act is constitutional.

The Court held that the divisibility principle allows the Public Administration to make proportionate decisions in order to protect privacy rights and also fulfil the right of access to information. Otherwise the decision would be binary and therefore the Administration would have only the possibility to deny completely the request of information or grant this information entirely. The Court considered that under the divisibility principle the Administration has a broader judgment to decide which information is public and which is not. Additionally the requested information involves matters that concern him and to which he is entitled, especially when it relates to information regarding his occupational-psychological records.

Languages:

Spanish.



Identification: CHI-2014-1-004

a) Chile / **b)** Constitutional Court / **c)** / **d)** 06.05.2014 / **e)** 2493-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

4.7.11 Institutions – Judicial bodies – **Military courts.**

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

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

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

Keywords of the alphabetical index:

Military prosecution, constitutionality / Military, access to courts / Victim, right / Police officer, offence.

Headnotes:

Military jurisdiction in criminal cases where victims of military forces are civilians is unconstitutional as it does not safeguard their rights to due process, specifically the rights to an impartial judge and to protection of the victim.

Summary:

I. The applicant challenged the constitutionality of military jurisdiction. He had suffered an eye injury as a result of the police's use of force during a protest and was now suing the police for this injury. According to the Military Justice Code, when the military force, including the police, is involved in a crime, the military has jurisdiction, even when the victim is a civilian. The applicant argued that military jurisdiction does not protect his constitutional rights and, in particular, infringes his right to due process and his protection as a victim of a felony. He also claimed that the impugned provision contravenes the American Convention on Human Rights, considering the prior decision of the Inter-American Court of Human Rights, that the Chilean State breaches the American Convention on Human Rights by applying military jurisdiction in cases where civilians are victims.

II. The Tribunal declared that military jurisdiction concerning civilian cases is unconstitutional, because it does not comply with international standards

concerning this issue and also does not guarantee the plaintiff's right to due process.

The Tribunal determined that the right to be heard by an impartial judge is not safeguarded, because military jurisdiction aims to resolve cases where crimes are committed by military and military legal interests are infringed, which is here not the case. Furthermore, the Court considered that military jurisdiction belongs to military forces and therefore there are not sufficient guarantees of impartial judgment. Finally, the Tribunal declared that the right to a public trial is also not safeguarded, mainly because prosecutorial investigation is not part of a military trial, and an impartial investigation by the prosecutor is not guaranteed.

The Tribunal further observed that, unlike civilian criminal jurisdiction, there is no statute on the protection of victims applicable to the exercise of military jurisdiction. Accordingly, the Tribunal held that a civilian court provides a higher protection of victim's rights than a military tribunal.

Languages:

Spanish.



Croatia

Constitutional Court

Important decisions

Identification: CRO-2014-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.07.2013 / **e)** U-I-1678-2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 13/14 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
 5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction**.
 5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.

Keywords of the alphabetical index:

Public procurement, appeal procedure / Prohibition, case file documents, copy.

Headnotes:

The disputed Articles 102.3 and 165.3 of the Public Procurement Act relating to the appeal stage of public procurement procedures that apply the rules of administrative procedure, allow bidders or parties only to handwrite notes from the tenders of other bidders, or from the case file. They are forbidden from copying, duplicating, reproducing, photographing or recording information from the tenders of other bidders or from other documentation.

The disputed provisions of the Act deviate significantly from the general rule that parties in administrative procedures have the right to make copies at their own expense of acts in the case file. As such, the bidders or parties are hindered from exercising their right to appeal in a simple and effective manner. In this way, the disputed legal provisions represent a restriction on the right to an effective appeal in public procurement procedures

The restriction has no reasonable or objective justification. Therefore the aim of those measures cannot be deemed to be legitimate.

Summary:

I. The applicant challenged Articles 102.3 and 165.3 of the Public Procurement Act (hereinafter, the “PPA”), arguing that they do not conform to Article 16 of the Constitution and Article 18 of the Constitution.

The disputed Articles 102.3 and 165.3 of the PPA, relating to the appeal stage of public procurement procedures that apply the rules of administrative procedure, allow the bidders or the parties only to make handwritten notes from the tenders of other bidders or from the case file. They are forbidden to copy, duplicate, reproduce, photograph or record the information from the tenders of other bidders, or from other documentation.

II. According to the Constitutional Court, the disputed provisions of the PPA deviate significantly from the general rule that parties in administrative procedures possess the right “to make copies at their own expense of acts in the case file” (Article 84.1 of the General Administrative Procedure Act). Therefore, the bidders or parties are hindered from exercising their right to appeal in “a simple and effective manner” (Article 81 of the Act on the State Administrative System). In this way, the disputed legal provisions represent a restriction on the right to an effective appeal in public procurement procedures. The right to appeal is regulated by the provisions of Article 18.1 of the Constitution.

The restrictions of the effective right to appeal prescribed in Articles 102.3 and 165.3 of the PPA (that is, limiting that right to handwrite notes of information from the tenders of other bidders or other documentation of parties to public procurement procedures) is especially visible in situations when the documentation is extensive and complex in content (which is the rule). It is frequently full of charts and tables, with a large amount of numerical information. It should be added here that in Articles 146 to 153 of the PPA, the legislator prescribed extremely short time limits for lodging an appeal. In high-value procedures, an appeal must be lodged within ten days, and in lesser-value procedures within five days. These are time limits for an appeal in open public procurement procedures, in restricted and negotiated public procurement procedures with prior publication, in a competitive dialogue, in negotiated procurement procedures, in the procedure of concluding a public services contract and in cases exempted from the application of the PPA.

In this context, the Constitutional Court examined whether the prescribed restrictions on the right to an effective remedy (an appeal) are consistent with Article 16 of the Constitution.

The Constitutional Court firstly noted that in the Draft Proposal of the Public Procurement Act, with the Final Proposal of the Act, the Government as the proponent of the PPA did not explain the aim it wished to achieve through the disputed statutory measures contained in Articles 102.3 and 165.3 of the PPA. The same note was also found alongside both these provisions. That is, in the law of the EU and the Council of Europe, there are no relevant provisions that parties may only make handwritten notes of information from the case file.

The Constitutional Court considered the statements above and that the rules of the administrative procedures shall apply to the appeal stage of public procurement procedures. It found that the aims of Articles 102.3 and 165.3 of the PPA, which only permit the bidder to make handwritten notes of information from the tenders of other bidders or from the case file, and prohibit them even from copying or reproducing them (on which basic rule administrative proceedings are founded) cannot be deemed to be legitimate.

The fact that the aim of the disputed statutory measures cannot be considered legitimate was indirectly confirmed by the Government. It tried to justify the measures, claiming it was a matter of “technical restrictions”, only relating to the “manner of making notes of the information”. It added that this “in no way affects the scope or content of the information which the party obtains through access to the case file”. Or, in another place, the disputed provisions restrict “only the manner of making notes of information”. However, they completely permit handwritten notation of information, whereby the commercial entity that intends to appeal is permitted to “make handwritten notes of the information, however long that takes, since no time limit for making notes of information is prescribed”.

In the situation where the time limits for an appeal are extremely short (five or ten days), and the effectiveness of the remedy depends on the “technical” conditions under which relevant information for the appeal may be acquired, this justification is shown to be generalised and stretched.

The Constitutional Court concluded that the restrictions (measures) prescribed by Articles 102.3 and 165.3 PPA have no reasonable or objective justification. Therefore the aim of those measures cannot be deemed to be legitimate.

Since the aim of the disputed restrictions contained in Articles 102.3 and 165.3 of the PPA has been found to be illegitimate, their proportionality was not reviewed in these constitutional court proceedings.

Languages:

Croatian, English.



Identification: CRO-2014-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.12.2013 / **e)** U-I-2986-2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 2/14 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.3.3 General Principles – Democracy – **Pluralist democracy**.
3.9 General Principles – **Rule of law**.
3.16 General Principles – **Proportionality**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

Keywords of the alphabetical index:

Political parties, freedom of establishment / Political parties, annual financial report, obligation to publish / Political parties, financial statements, administrative sanctions for non-disclosure.

Headnotes:

The disputed “administrative sanction”, prescribed by Article 42.1 of the Political Activity and Electoral Campaign Financing Act, does not satisfy the principle of proportionality. The severity of the sanction neither depends on the circumstances of the individual case nor on the duration of the formal violation of the law. Accordingly, any exceeding of the statutory time limit for the publication of an annual financial report leads to the suspension of financing from the budget (in the amount the political party is entitled to for the period of three months). It does not matter whether it exceeded the statutory time limit for publication by a specific amount of time (shorter or longer), or whether this was even a matter of a complete failure to publish that financial report.

Summary:

I. On the proposal of a political party, the Constitutional Court initiated proceedings to review the constitutionality of Article 42 of the Political Activity and Electoral Campaign Financing Act (hereinafter, the "Act") and repealed it.

The proponent deemed that Article 42 of the Act was not in conformity with Article 16 of the Constitution (principle of proportionality) in connection with Article 6 of the Constitution (unrestricted right to establish political parties etc.) and Article 43 of the Constitution (the right to freedom of associations).

Article 42 of the Act provides that despite their liability for any offence specified hereunder, political parties, independent deputies and independent members of the representative bodies of local and regional governmental units failing to publicly disclose their annual financial statement within the period specified and stipulated in Article 39.2 of the Act forfeit their right to regular annual financing from the central or, as appropriate, local or regional budget for a period of three months (paragraph 1). Decisions on such forfeiture from the central budget for a period of three months is made by the Committee on the Constitution, Standing Orders and Political System of the Croatian Parliament, at the proposal of the State Audit Office (paragraph 2). Decisions on such forfeiture from local or regional budgets for a period of three months is made by the representative bodies of local and regional governmental units (paragraph 3).

Article 39.2 of the Act provides that political parties, independent deputies, national minority deputies and independent members of the representative bodies of local and regional governmental units disclose their financial statements. They are required to post them on their websites not later than 1 March of the current year for the preceding year.

II. The Constitutional Court held that the disputed statutory measure (the administrative sanction which consisted of the loss of the right to three months of financing from the budget) interferes with the right of political parties to annual financing of a specific amount granted to them by law. Adding to the misdemeanour sanctions in Article 43 of the Act (a fine the political party pays for the same omission, for which it has already had the administrative sanction imposed), it seemed clear that a violation of Article 39.2 of the Act actually has a direct effect on the material capacity of the political party to run its programme and programme activities in their full scope. This is to the extent to which its programme activities are based on the number of its members in the Parliament, or the number of members it has in

the representative body of a unit of local or regional self-government, as the criterion for establishing the amount awarded to a political party from the budget, pursuant to the Act.

Assessing whether the disputed statutory measure in Article 42.1 of the Act was justified, the Constitutional Court established that it has a legitimate aim, namely the public interest. This was to encourage legal and financial discipline in political parties, regarding their statutory obligations related to disclosure of the sources of their finances and how they spend public funding.

The Constitutional Court limited itself to establishing that the disputed statutory measure, prescribed in Article 42.1 of the Act, was not in conformity with the Constitution. The reason is that it was clearly disproportionate to the aim it seeks to achieve. The administrative sanction under Article 42.1 of the Act hit the political party equally when the severity of its omission within the meaning of Article 39.2 of the Act was insignificant (for example, a delay of one day in the publication of the report). When the severity of its omission is significant (for example, when it does not publish the report at all), it does not leave open the possibility for any assessment of the particular circumstances of each individual case. Therefore, the disputed statutory measure did not respect the constitutional requirement that any restriction of the statutory right of political parties to funding from the budget must be "proportionate to the nature of the need (for the restriction)... in each individual case", as prescribed in Article 16.2 of the Constitution.

As a result, the disputed statutory measure, contained in Article 42.1 of the Act, was not in conformity with Article 16.2 of the Constitution in connection with Articles 6 and 43 of the Constitution.

The Constitutional Court has pointed out the need for strict proportionality in the cumulative (administrative or misdemeanour offence) sanctioning of political parties for the same violation of the law, but also the fact that it is unacceptable to prescribe "administrative sanctions" which in fact conceal a (further) misdemeanour offence penalty.

Apart from the fact that paragraphs 2 and 3 of Article 42 of the Act cannot exist in law without the repealed paragraph 1 of that Article, since they are organically linked to it, the Constitutional Court assessed that paragraphs 2 and 3 of Article 42 of the Act should be removed from the legal order. This is due to their vagueness and the uncertain legal effects to which their application could lead in practice. With the legal solutions prescribed in Article 42.2 and 3 of the Act, there were no mechanisms to ensure their correct implementation in practice.

Also, it was completely unclear which path of legal protection would provide the political parties with effective legal protection against unlawful or arbitrary decisions by the competent bodies on the loss of their rights to regular annual financing from the budget for a period of three months. Hence this was not in line with the requirements for laws stemming from the rule of law, the highest value of the constitutional order (Article 3 of the Constitution). These failing were especially visible at the level of regional and local self-government, since the competence for decision-making on the loss of the right of political parties (to financing from the budget) was given exclusively to the local representative bodies.

Cross-references:

European Court of Human Rights:

- *Selmouni v. France* [GC], no. 25803/94, 28.07.1999;
- *The United Communist Party of Turkey and others v. Turkey* [GC], no. 19392/92, 30.01.1998;
- *Vona v. Hungary*, no. 35943/10, 09.07.2013.

Languages:

Croatian, English.



Identification: CRO-2014-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.01.2014 / **e)** SuP-O-1/2014 / **f)** / **g)** *Narodne novine* (Official Gazette), 5/14 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

2.1.2.1 Sources – Categories – Unwritten rules – **Constitutional custom.**

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

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

Keywords of the alphabetical index:

Constitution, amendment, entry into force / Constitution, enactment / Referendum, amendment to Constitution / Referendum, constitutional supervision / Referendum, constitutional, implementation of results / Referendum, national / Referendum, validity.

Headnotes:

The Fifth Amendment of the Constitution was adopted at a national constitutional referendum where “people” within the meaning of Article 1.3 of the Constitution, for the first time, directly decided on a concrete proposal to amend the Constitution based on a popular initiative. That is, the proposal was submitted by the voters. Accordingly, unlike the procedure to amend the Constitution initiated by Parliament, the framer of the Constitution did not prescribe an enactment of the procedure proposed by the voters (a popular initiative to amend the Constitution) and implemented in a popular constitutional referendum. That is to say, the enactment of the constitutional amendment is not necessary in this procedure by its nature because the decision on the constitutional amendment is made directly by the people within the meaning of Article 1.3 of the Constitution.

Summary:

I. Pursuant to the Decision of the Parliament to call a national referendum on 8 November 2013, whereby the Parliament called “a national referendum in the Republic of Croatia in order to adopt a decision on a referendum question based on a petition to call a national referendum submitted by the civil initiative ‘In the Name of the Family’ requesting to amend the Constitution, by introducing in the Constitution the definition of marriage as a living union between a woman and a man” (point I of the Decision), a national referendum was held on 1 December 2013.

II. The Constitutional Court affirmed the completion of the proceedings to supervise the constitutionality and legality of the national referendum held on 1 December 2013, where Article 62 of the Constitution was supplemented with a new Paragraph 2.

The Constitutional Court declared, pursuant to the Decision of the Parliament to call a national referendum, that the national referendum was held on 1 December 2013. Also, the Court declared that the State Election Commission announced in Official Gazette no. 147 of 10 December 2013 that the decision in favour of introducing a provision into the Constitution whereby marriage is a living union

between a woman and a man was adopted at the national referendum by a majority of votes of the voters who took part therein.

Furthermore, the Constitutional Court declared within the meaning of Articles 88 and 90 in connection with Article 96 of the Constitutional Act on the Constitutional Court (hereinafter, the "CACC") that the time limit for supervising the constitutionality and legality of implementing the national referendum expired on 9 January 2014 at midnight. Also, the Court established that the national referendum was held in conformity with the Constitution, with the CACC and with the relevant provisions of the Act on Referenda and Other Forms of Personal Participation of Citizens in Managing the Affairs of State Authorities and Local and Regional Self-government. The proceedings to supervise the constitutionality and legality of the national referendum, and thus the whole referendum procedure are considered completed.

Finally, the Constitutional Court declared that in Point IV of the Decision on calling a national referendum, the Parliament envisaged a constitutional amendment to supplement Article 62 of the Constitution "if the decision in question is adopted at a referendum". Point IV of the Decision in the relevant part that contained the constitutional amendment reads:

"...Article 62.2 of the Constitution of the Republic of Croatia reads:

'Marriage is a living union between a woman and a man.'

Former paragraph 2 of Article 62 of the Constitution of the Republic of Croatia shall become paragraph 3 of the same Article of the Constitution of the Republic of Croatia."

The Constitutional Court also declared that the Constitution did not provide for the enactment of constitutional amendments adopted at a national referendum implemented on the basis of a popular initiative to amend the Constitution. Therefore, the Fifth Amendment of the Constitution came into force on 1 December 2013 in a text defined by the Parliament by means of the constitutional amendment in the relevant part of Point IV of the Decision on calling a national referendum.

The Fifth Amendment of the Constitution was described as: Amendment of the Constitution of the Republic of Croatia (a popular initiative to amend the Constitution), Official Gazette (with corresponding number) – decision of the Constitutional Court number: SuP-O-1/2014 of 14 January 2014.

Cross-references:

- Warning no. U-VIIR-5292/2013, 28.10.2013, *Bulletin* 2013/3 [CRO-2013-3-015];
- Notification no. U-X-5076/2013, 15.10.2012.

Languages:

Croatian, English.



Identification: CRO-2014-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 24.01.2014 / **e)** U-III-351/2014 / **f)** / **g)** *Narodne novine* (Official Gazette), 15/14 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Community law.**
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

Keywords of the alphabetical index:

Extradition, national / European arrest warrant / Criminal prosecution / EU, member states, mutual trust.

Headnotes:

The proceedings for the surrender of a Croatian citizen to another EU Member State are not criminal proceedings but *sui generis* court proceedings. The proceedings aimed at facilitating the implementation of criminal prosecution or the execution of a criminal judgement in another EU Member States, and not at rendering decisions about the guilt of the suspect for a criminal offence or punishment for that offence.

Therefore, the decisions in these proceedings are subject to Constitutional Court review only in relation to a very narrow scope of possible violations that exclusively relate to human rights and freedoms guaranteed by the Constitution (Constitutional rights).

Accordingly, the Constitutional Court has jurisdiction to verify, for example, whether the requested person is at risk of torture, inhuman or degrading treatment or punishment, whether a real risk exists that the requested person (a citizen) would be exposed to a flagrant denial of justice in the state issuing the European arrest warrant, in a manner which would eliminate the very essence of its right to a fair trial. Also, regarding the conduct of national courts in the execution of the European arrest warrant (hereinafter, the "EAW"), the Constitutional Court has jurisdiction to examine whether the assessment made by national courts deciding on the surrender was "flagrantly and manifestly arbitrary" to a degree which would make the surrender of a Croatian citizen to another EU Member State contrary to Article 9.2 of the Constitution.

Summary:

I. The Zagreb County Court decided on the surrender of the requested person (the applicant) to another jurisdiction and relevant precautionary measures. Pursuant to Article 29.4 and 29.5 of the Act on Judicial Cooperation in Criminal Matters with European Union Member States (hereinafter, "AJCCM-EU"), this Court allowed the surrender of the applicant "to the Federal Republic of Germany on the basis of the European arrest warrant issued by the General Federal Prosecutor at the Federal Court, Federal Republic of Germany, no. 3BJs 25/05-2(4) of 28 September 2005, against the requested person Josip Perković, for the purpose of conducting criminal proceedings for the commission of the criminal offence referred to in Article 211 in connection with Article 27 of the Criminal Code of the Federal Republic of Germany..."

The Supreme Court rejected as unfounded the state attorney and the applicant's appeals.

The applicant lodged the constitutional complaint against the above-mentioned rulings of the Supreme Court and Zagreb County Court. He deemed that the manner in which Articles 10.14 and 20.2.7 AJCCM-EU were interpreted was legally relevant for his case. In essence, the constitutional issue came down to the applicant's complaint about his unlawful deprivation of liberty as a consequence of an unlawful ruling allowing his surrender.

II. Article 9.2 of the Constitution was relevant to assess whether the applicant's complaint was well or ill-founded. It stipulates that a citizen may not be extradited to another state, except in the case of execution of a decision on extradition or surrender made in compliance with an international treaty or the *acquis communautaire* of the EU. The concept of

surrender is regulated by the Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures between Member States. The legislator transposed the Framework Decision through the provisions of the separate AJCCM-EU into national legislation.

Regarding the deprivation of liberty on the basis of the EAW that could generally be subject to Constitutional Court proceedings, the Constitutional Court found that it is always only a question of the period of detention. The period starts after the receipt of the EAW in Croatia as the executing Member State, and ends with the applicant's surrender to the EU Member State that submitted the warrant, or by a final refusal of the execution of that warrant by competent national courts.

The circumstances of the case clearly had shown that complaints related to the applicant's deprivation of liberty clearly did not relate to his detention, which could have been the subject of these proceedings before the Constitutional Court. That is, after Croatia received the EAW for the applicant, he was detained for a very short period of time. The applicant did not mention at all his deprivation of liberty.

The applicant raised his complaint about the unlawful deprivation of liberty by anticipating the arrest, which follows the final ruling to allow his surrender to Germany. He based it on the fact that "in this case the German court has already ordered detention, and accordingly the deprivation of liberty will continue after the EAW is executed".

The Constitutional Court has no jurisdiction for the deprivation of liberty "after the EAW is executed", due to the end of jurisdiction of the courts of Croatia.

Accordingly, it appeared that invoking the fundamental human right to liberty actually served the applicant only as an instrument through which he tried to induce the Constitutional Court to assume the role of a regular court of higher instance and review the lawfulness of the challenged rulings allowing surrender. This stemmed from the applicant's allegations: "In essence, we complain that the ruling, *inter alia*, on deprivation of liberty was rendered unlawfully".

The Constitutional Court reiterated that when the question is whether in a specific case the requirements prescribed by national law have been met (by the AJCCM-EU in this case), the role of the Constitutional Court is not to replace the assessment made by competent courts with its own assessment. It is not authorised to bring into question the interpretation given by national courts, when national

law and its application to the specific cases of surrender on the basis of the EAW are in question. The exception occurs when reasons are presented suggesting that the assessment made by national courts in a certain case is “flagrantly and manifestly arbitrary”.

The reasons presented in the constitutional complaint to the Constitutional Court failed to convince it that the assessment made by the courts was of such a nature.

Within the framework of his complaint about the unlawfulness of the challenged rulings, the applicant pointed out that the issue of a possible statutory bar to his criminal prosecution in the Croatia was the main issue when it came to his surrender to Germany.

The Constitutional Court reiterated that it has no jurisdiction to interpret statutory norms applied to specific cases or to review the lawfulness of court and other decisions in specific cases, since it is not a regular court within the meaning of Article 115 of the Constitution.

Within the scope of the Constitutional Court's supervision, the Constitutional Court noted that the issue of a statutory bar to the criminal prosecution of the applicant was resolved by the first-instance and second-instance courts by their application of Articles 10 and 20.2 AJCCM-EU. The courts were guided by the principle of mutual recognition of judgments and court decisions in criminal matters and by an interpretation of national law in a manner that contributes to the realisation of the principle of mutual recognition of court decisions of European Union Member States. They assessed on this basis that the applicant's complaint alleging a statutory bar must be rejected.

Therefore, the Constitutional Court concluded that the challenged court rulings allowing the applicant's surrender to Germany are not “flagrantly and manifestly arbitrary” and that they have remained within the boundaries of Article 9.2 of the Constitution.

Cross-references:

European Court of Human Rights:

- *Ahorugeze v. Sweeden*, no. 37075/09, 27.10.2011;
- *Kononov v. Latvia*, no. 36376/04, 24.07.2008;
- *Chahal v. United Kingdom* [GC], no. 22414/93, 15.11.1996.

Court of Justice of the European Union:

- C-396/11, 29.01.2013, *Ciprian Vasile Radu* [GC];
- C-105/03, 16.06.2005, *Maria Pupino* [GC].

Languages:

Croatian, English.



Identification: CRO-2014-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 30.01.2014 / **e)** U-III-334/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 25/14 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.

Keywords of the alphabetical index:

Constitutional complaint, admissibility / Constitutional Court, jurisdiction, legal regulation, interpretation / European Court of Human Rights, judgment, execution / Human Rights, respect, state / Obligation, international, state.

Headnotes:

The “disputed acts” in the meaning of Article 76.1 and 76.3 of the Constitutional Act on the Constitutional Court, depending on the circumstances of the case in hand, may also refer to acts related to actions or omissions. It does not matter whether they are one-off acts or whether they produce continuous infringements of the Constitution and/or the European Convention on Human Rights. In such cases, the Constitutional Court must establish that the constitutional complaint or the specific complaints of the applicant included in the constitutional complaint, concerning the violation of his constitutional and/or convention rights by a specific act related to an act or an omission (for example, by failing to initiate investigation or by conducting an ineffective investigation), are accepted.

Summary:

I. This is the first case where the Constitutional Court dealt in more detail with the execution of the European Court of Human Rights' judgments in Croatia with regard to finding a violation of the procedural aspect of Article 3 ECHR. The case concerned ill-treatment by the police in the pre-investigation stage of the procedure.

Within this scope, it held that, to respect the international commitments of Croatia and to respect human rights, the highest value of the constitutional order, the Constitutional Court had to review the applicant's complaint "that the violation of Article 3 ECHR established by the decision of the European Court still persists".

Article 76 of the Constitutional Act on the Constitutional Court (hereinafter, the "CACC") provides that by its decision to accept a constitutional complaint, the Constitutional Court repeals the disputed act by which a constitutional right has been violated (paragraph 1). If the disputed act that violated the constitutional right of the applicant no longer produces legal effect, the Constitutional Court shall pass a decision declaring its unconstitutionality. It shall also state in the dictum which constitutional right of the applicant had been violated by that act (paragraph 3).

From a literal interpretation of the above-mentioned provisions, the Constitutional Court must not accept a constitutional complaint unless it simultaneously repeals the disputed individual act.

In case a procedural aspect of Article 3 ECHR was violated, which the European Court of Human Rights established in *Mađer v. Croatia*, there was no such "disputed act" that could have been repealed. The reason is that the infringement was committed by official persons in their capacity as the police through their treatment of the applicant (by factual actions and omissions).

In such a situation, the Constitutional Court relied on Article 2.1 of the CACC that explicitly requires it to "guarantee compliance with and application of the Constitution of the Republic of Croatia". In other words, where there is no written act by which the violation was committed and could be repealed because the violation was committed by the treatment (factual actions or omissions) of the applicant of the constitutional complaint, the relevant Article 76.1 and 76.3 must be interpreted in light of Article 2.1 of the CACC. Moreover, the overall legal framework in terms of constitutional law and international law, which is relevant to the issues related to the

execution of European Court of Human Rights' judgments, must also be taken into consideration. Such consideration must also be balanced with actual and effective protection of human rights and fundamental freedoms.

With regard to the above, the Constitutional Court held that the "disputed acts" in the meaning of Article 76.1 and 76.3 of the Constitutional Act, depending on the circumstances of the case, may also refer to acts related to actions or omissions, whether they are one-off acts or continuous infringements of the Constitution and/or the Convention. In such cases, the Constitutional Court must establish that the constitutional complaint or the specific complaints of the applicant included in the constitutional complaint, concerning the violation of his constitutional and/or convention rights by a specific act related to an act or an omission (for example, failing to initiate investigation or conducting an ineffective investigation), are accepted.

II. The European Court of Human Rights in *Mađer v. Croatia* assessed as well-founded the applicant's complaints concerning the violations of Article 3 ECHR, which occurred during the questioning of the applicant in the Zagreb Police Administration.

The applicant stressed in the constitutional complaint "that the violation of Article 3 established by the decision of the European Court still persists". Considering the European Court of Human Rights' ruling in *Mađer v. Croatia*, the Constitutional Court concluded that the complaint referred to the European Court of Human Rights finding in point 3 of the operative part of this judgment that "there has been a violation of the procedural aspect of Article 3 of the Convention in that no investigation into the applicant's allegations of ill-treatment was made".

The Constitutional Court first noted that the violation of the procedural aspect of Article 3 ECHR, which consisted of the failure to open and conduct an effective official investigation into the applicant's allegations of ill-treatment by the police, for the needs of these constitutional court proceedings, may be considered a stand-alone violation. This had no effect on the conducted criminal proceedings or on the legally effective criminal judgment whereby the applicant was declared guilty of committing the criminal offence.

Consequently, the proceedings for the revision of a domestic criminal judgment, whose institution was requested by the applicant before domestic courts following the European Court of Human Rights' judgment in *Mađer v. Croatia*, were not relevant for

this violation of Article 3 ECHR. The reason is that a “fresh trial” did not constitute a remedy through which, in the circumstances of the present case, this violation could be effectively removed.

Therefore, the Constitutional Court found this complaint of the applicant admissible.

Within this scope, the Constitutional Court held that in order to respect the international commitments of Croatia and to respect human rights, the highest value of the constitutional order (Article 3 ECHR), it had to review the merit of the stated complaint.

By applying the above-mentioned general legal positions, the Constitutional Court obtained from the State Attorney General a report on the measures undertaken with regard to the applicant's allegation that he had been tortured during the questioning by the police authorities. In report number, the State Attorney General had submitted the following:

“(...) it was established that the applicant filed a criminal report against police officer I.S. for the criminal offence of extortion of statements by coercion referred to in Article 126.1 and 126.2 of the Criminal Code, and for the criminal offence of torture and other cruel, inhuman or degrading treatment referred to in Article 176 of the Criminal Code, and also against defence lawyer P.B. for the criminal offence of negligent performance of duty referred to in Article 339 of the Criminal Code and for the criminal offence of making a false statement referred to in Article 303.1, 303.2 and 303.3 of the Criminal Code.

The Municipal State Attorney Office in Velika Gorica assessed that there were no grounds for suspicion that the reported persons had committed the criminal offences referred to in the report, or other criminal offences which are prosecuted *ex officio*, and thus dismissed the criminal report. (...)

The applicant took the criminal prosecution upon himself, but Zagreb County Court rendered a ruling rejecting his request to conduct investigation. The applicant lodged an appeal with regard to this ruling, which was rejected as ill-founded by the three judge panel of Zagreb County Court in ruling no. Kv-1162/08 of 9 December 2008.”

Pursuant to the allegations in the obtained report, the Constitutional Court held that the competent state authorities investigated the applicant's allegations concerning the alleged torture at the police. Therefore it found that the complaint related to the violation of

Article 3 ECHR was manifestly ill-founded.

Cross-references:

European Court of Human Rights:

- *Mađer v. Croatia*, no. 56185/07, 21.06.2011.

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Statistical data

1 January 2014 – 30 April 2014

- Judgments of the Plenary Court: 3
- Judgments of panels: 58
- Other decisions of the Plenary Court: 8
- Other decisions of panels: 1 466
- Other procedural decisions: 30
- Total: 1 565

Important decisions

Identification: CZE-2014-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 15.01.2014 / **e)** I. ÚS 3326/13 / **f)** On the defendant's right to be heard in person when extending detention in the case of an extraordinary event (floods) / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

4.18 Institutions – **State of emergency and emergency powers.**

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

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

5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice.**

Keywords of the alphabetical index:

Detention, extension / Detention hearing.

Headnotes:

In each case where a court resolves to impose detention or to extend it, statutory requirements must be met. The existence of an objectively insurmountable obstacle that precludes hearing a defendant in person when extending detention, as

required by the Charter and the law, must be interpreted narrowly, and it is the duty of the general court to conduct a personal hearing as soon as this becomes objectively possible. Otherwise the Court will violate the defendant's right to personal freedom and to a personal hearing under the Charter of Fundamental Rights and Freedoms.

Summary:

I. The District Court had extended the applicant's detention in a ruling without a detention hearing, justifying this in terms of the flood situation. The Regional Court, in a detention hearing, then rejected the applicant's complaint against the District Court decision. In his constitutional complaint, the applicant contended that the District Court ruled to keep him in detention without a detention hearing, although he expressly requested one. The Regional Court did then rule in a detention hearing, although it normally rules in non-public session, and allowed the applicant to express his views on the matter. This did not, however, cure the defect in the proceedings before the Court of the first instance, because its decision was published only after expiry of the three-month forfeiture period.

II. The Constitutional Court referred to its own case-law and that of the European Court of Human Rights on the right to a personal hearing in proceedings relating to detention. This indicates that the defendant must always be heard when a decision is being made on continuation of detention and several weeks have passed since the previous hearing, unless the personal hearing is prevented by objectively insurmountable obstacles.

The Constitutional Court reviewed the complaint concerning the lack of a detention hearing at the District Court from the viewpoint of Article 38.2 of the Charter, which, in this context, also had to be interpreted in light of the procedural guarantees in Article 5.4 ECHR, as they are interpreted in the case-law of the European Court of Human Rights.

At the time when the District Court was making its decision, almost three months had passed since the applicant's last court hearing. This time delay was excessive; it was the District Court's duty to hear the defendant in person.

The Constitutional Court concluded that conducting a detention hearing, although it was more difficult, was not rendered objectively impossible by an extraordinary event such as the floods. The Court should have held one immediately after the obstacle was removed. The existence of objectively insurmountable obstacles must be interpreted narrowly.

The District Court violated the applicant's right to a personal hearing under Article 38.2 of the Charter and his right to personal freedom under Article 8.2 of the Charter, when it failed to observe Article 73d of the Criminal Procedure Code (hereinafter, "CPC") and extended his detention without holding a detention hearing. The requirements for holding a detention hearing had been met (the applicant asked for it to be held). Not one of the possible grounds which might have excused the Court from holding it, under Article 73d.3 CPC, existed. The present legislative framework does not recognise any exception allowing a detention hearing not to be held for reasons of floods as an extraordinary event. The District Court also violated Article 5.1 ECHR.

The inadequacy of the proceedings, because the applicant did not receive a personal hearing before the District Court, could not be redressed by conducting a detention hearing before the Regional Court. That hearing took place more than a month after the defective District Court decision. The detention hearing before the Regional Court took place almost four months after the applicant's last court hearing.

The Regional Court could not itself redress the District Court's error, and did not even try to make any other corrections to the proceedings. It could, had it believed that continuing the applicant's detention was justified, have overturned the first instance court decision and simultaneously ruled to continue detention under Article 149.1.a CPC. The applicant would then have had an opportunity to seek compensation in damages or appropriate satisfaction for non-property damages from the state. Instead, however, the Regional Court upheld the first instance court decision, thereby also violating the applicant's right under Article 8.2 of the Charter not to be deprived of his liberty except in the manner specified by law.

For these reasons, the Constitutional Court annulled the contested decisions of the general courts.

III. The judge rapporteur in the case was Katerina Simackova. None of the judges filed a dissenting opinion.

Languages:

Czech.



Identification: CZE-2014-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 19.02.2014 / **e)** I. ÚS 3304/13 / **f)** On the rights of the child to attend hearings concerning him or her and to be heard; the best interests of the child / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

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

5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice.**

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

Keywords of the alphabetical index:

Child, best interests / Child, guardian, designation / Child, personal hearing.

Headnotes:

The appointment of a guardian does not absolve the Court from the duty to include the child in the proceedings, unless this conflicts with the child's best interests. The Court must allow the child to attend the hearing and express his or her views on the matter. Any limitation of these rights must always be properly substantiated in view of the best interests of the child. Otherwise, the Court violates the right of the child to attend hearings concerning him or her and to be heard in any proceedings affecting him or her, guaranteed in Article 3.2 of the Charter of Fundamental Rights and Freedoms and Article 12.2 of the Convention on the Rights of the Child.

Summary:

I. The District Court ruled that a gift contract through which the donors (the first applicant and his wife) transferred certain real estate to their children (the second and third applicants, the "minor applicants"), was ineffective *vis-à-vis* the plaintiff. The minor applicants were represented in the proceeding by a conflict-of-interest guardian (the Office for Social and Legal Protection of Children, hereinafter, "OSLPC"), appointed by a different District Court. The OSLPC did not file an appeal against the decision; the appeal was filed directly by the minor applicants and their

parents. In proceedings on approval of a legal act (the filing of the appeal in question), the District Court appointed a guardian, an attorney, for the minor applicants. The District Court stopped the proceedings, as the original guardian did not agree with the appeal and the parents could not file an appeal, because they were precluded from representing their children in those proceedings. The Regional Court confirmed the District Court's decision. In their constitutional complaint, the minor applicants argued that their right to a fair trial and to family and private life was violated because they were not heard in the proceedings before the District Court, or given an opportunity to express their views on the matter, and also that their right to judicial protection was violated, because they could not file an appeal against the Court of the first instance.

II. The Constitutional Court denied the first applicant's complaint as being filed by a person obviously without standing.

The Constitutional Court stated that in this situation, in the interests of effectively protecting the rights of the minor applicants, they should have been assigned an attorney as a guardian, not the OSLPC, i.e., a body specialised in the protection of the rights and interests of children, which does not have its own experts for legal representation. The Constitutional Court does not consider ideal a situation that combines the functions of a guardian protecting (objectively) the best interests of the child and that of the child's legal representative.

The OSLPC was *de facto* in the position of legal representative of the minor applicants. The Constitutional Court emphasised that, unless it conflicts with the best interests of the child, the representative is required to provide the child with relevant information, to explain the consequences of a court agreeing or not agreeing with his or her opinion, as well as possible consequences of any actions taken by the representative, to discern the child's opinions and convey them to the Court.

The Constitutional Court does not question the standard practice, where, if a party to a civil proceeding is represented, the Court sends documents only to the representative and *de facto* communicates only with him or her. Nonetheless, a situation where a court selected legal representative (guardian) was effectively forced on the minor applicants requires the Court to proceed differently, to ensure that the represented party, including a child, can take part in the proceedings and express his or her views on the matter, unless it conflicts with his or her best interests.

The right of a child to be heard and to take part in court proceedings cannot be absolute. The child's best interests must always be taken into account (Article 3 of the Convention on the Rights of the Child). Generally, the Court will not be informed about the child's opinion and the child will not be allowed to be present at a hearing where the child is very young or where the subject matter of the proceeding is harmful to the child. However, in the present case neither of these grounds existed. The District Court did not in any way review or conduct deliberations as to whether the minor applicants, as defendants, would be able to express their views on the matter and whether it would be suitable to inform them about the proceeding in some way and involve them in it. Any exclusion of children from proceedings must always be carefully justified. This did not happen in the present case. Therefore, the District Court violated the rights of the minor applicants guaranteed by Article 38.2 of the Charter and Article 12.2 of the Convention on the Rights of the Child to attend the proceedings in their case and to be heard in judicial proceedings affecting them.

Where the state-appointed guardian did not file an appeal on behalf of the minor applicants, and the appeal filed by the minor applicants themselves and by their legal representative was rejected, the general courts should also have viewed the question of accepting submission of an appeal from the perspective of the right to access to court. The courts did not review whether it was in the best interests of the minor applicants to file an appeal, in view of its content or consider in any way the alleged violation of their fundamental rights in the proceeding before the Court of the first instance. The Constitutional Court also found no grounds on which the appeal would conflict with the interests of the minors and their parents, who filed the appeal on their behalf. Thus, the contested decisions of the District Court and Regional Court violated the minor applicants' right to access to an appeal court, guaranteed by Article 36.1 of the Charter.

III. The judge rapporteur in the case was Katerina Simackova. None of the judges filed a dissenting opinion.

Languages:

Czech.



Identification: CZE-2014-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 05.03.2014 / **e)** I. US 2430/13 / **f)** Opočno Castle; re-opening of proceedings / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Evidence, admissibility / Evidence, assessment / Evidence, new, consideration / Judicial review / Persecution, racial, victim / Proceedings, re-opening / Restitution.

Headnotes:

If a general court reviews evidence submitted with a request for re-opening of proceedings under Article 228 of the Civil Procedure Code inconsistently with the requirement of proper assessment of evidence and rejects the request for re-opening of proceedings (which would have been granted with a correct assessment of evidence), it denies justice to the applicant, which violates the right to access to court, as well as the applicant's right to a fair trial, guaranteed in Article 36.1 of the Charter of Fundamental Rights and Freedoms.

Summary:

I. The applicant lodged a constitutional complaint, seeking annulment of a district court decision that rejected her request to re-open proceedings conducted before that court, and a decision of the Regional Court upholding the contested district court decision on appeal. The applicant believed that her fundamental rights had been violated in the proceedings before the District Court and the Regional Court because the courts did not consider the documentary evidence of her family's Jewish origins to be sufficient to reverse their previous decisions denying her claims in restitution

proceedings which had entered into force concerning Opočno Castle. The applicant also proposed annulment of the word "racial" in Article 3.2 of the Extra-Judicial Rehabilitations Act, as she does not agree with the narrow interpretation of "racial persecution" taken by the Constitutional Court in judgment file no. III. ÚS 107/04, 16 December 2004 (no. 92/35 SbNU 509).

II. The proposal to annul the word "racial" in Article 3.2 of the Extra-Judicial Rehabilitations Act was denied by the relevant panel of the Constitutional Court, in view of Article 74 of the Act on the Constitutional Court, as a manifestly unjustified proposal.

The applicant supported her complaint for re-opening the proceedings with evidence that aimed to prove fulfilment of one of the requirements that an entitled person must meet under the Extra-Judicial Rehabilitations Act, that is, whether the transfer or passing of ownership during the time of totalitarianism was carried out, in her father's case, for reasons of "racial persecution." The Constitutional Court addressed the fulfilment of this requirement in the applicant's case in judgment file no. III. ÚS 107/04; based on the evidence available and submitted at that time, it stated that the requirement had not been met in the case of the applicant's father.

The Constitutional Court has now emphasised that the cited judgment must be interpreted to the effect that nationality-based persecution is not sufficient to meet the requirement of "racial persecution" under Article 3.2 of the Extra-Judicial Rehabilitations Act; the persecution committed by the occupying bodies must also be motivated at least partly on racial grounds, such as that directed against the Jews in particular. Of course, this need not have been the exclusive motive of the occupying bodies; it is sufficient for a racial motive to be one of the motives for persecuting a particular person.

The evidence presented by the applicant was crucial, because it demonstrated that requirements set by the Constitutional Court's case-law had been met, and could have changed the negative position the Constitutional Court adopted over the applicant's claims in its previous judgments. The evidence met the requirements of Article 228.1.a of the Civil Procedure Code (i.e., it was evidence that, through no fault of her own, she could not use in the original proceedings before the First Instance Court or under conditions set forth in Article 205a and 211a before the appeals court). However, the general courts assessed the evidence incorrectly and rejected re-opening the proceedings and never actually reviewed the applicant's case on the basis of all the evidence that she was able to gather. These actions by the general courts led to a denial of justice, in violation of the right to access to courts under Article 36.1 of the Charter.

In addition, in their decision making and assessment of the evidence submitted by the applicant, the general courts should have considered the *favoris restitutionis* principle, i.e. the duty to interpret the law to the benefit of those seeking restitution of property, accepted by the Constitutional Court in judgment file no. Pl. ÚS 10/13 of 29 May 2013 (ST 21/39 SbNU 493; 177/2013 Sb.). If the interpretation of a restitution law leads to doubts as to whether a past injustice should be redressed, in the Constitutional Court's opinion the past injustice should be redressed, especially if the costs of the redress are borne only by the state or a state agency, not by the individual holder of fundamental rights.

The decisions of the District Court and Regional Court contested in the constitutional complaint violated the applicant's fundamental rights. Her right to a fair trial under Article 36.1 of the Charter was breached because the District Court and the Regional Court denied the evidence that the applicant submitted together with her request for re-opening the proceedings; they underestimated the significance of the evidence and assessed it in a manner inconsistent with the requirements for proper assessment of evidence, leading to a denial of justice in her case. Her property rights under Article 11 of the Charter were also violated because the court's actions precluded her from achieving restitution of property that had been unlawfully confiscated from her family.

The Constitutional Court therefore granted the constitutional complaint and annulled all the contested decisions of the general courts, including the Supreme Court decision that rejected an appeal on a point of law against the Regional Court decision.

III. The judge rapporteur in the case was Katerina Simackova. None of the judges filed a dissenting opinion.

Languages:

Czech.



Identification: CZE-2014-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 10.04.2014 / **e)** III. ÚS 3725/13 / **f)** Bank Fees / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

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

5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection.**

5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract.**

Keywords of the alphabetical index:

Bank, loan / Free will, principle / Relationship, private law / Consumer law.

Headnotes:

The consumer relationship is neither directly regulated at the level of a specific constitutional right nor is it isolated from the application of constitutionally guaranteed fundamental rights and freedoms, so that in this legally regulated relationship the application of fundamental rights and freedoms manifests itself as the duty of the state to protect these fundamental rights and freedoms in the consumer relationship (Article 1.1 of the Constitution), both by creating conditions for the conclusion of consumer contracts, and in resolving disputes arising from them. However, the principle of free will in such private law relationships and the principle of freedom to conduct business cannot be replaced by protective state intervention.

Summary:

I. The applicant filed a constitutional complaint against a decision by the Prague 4 District Court, which denied her action against *Česká spořitelna, a. s.*, alleging unjust enrichment in the amount of CZK 7.200 (262 EUR) consisting of charging a monthly fee of CZK 150 (5.50 EUR) for the administration of a loan account. The District Court also ordered the applicant to pay the costs of the Court proceedings. In her constitutional complaint, the applicant argued that it was not clear what services or acts the bank provided for the fees. In her opinion, the provision in the loan contract regarding the fee was uncertain and unintelligible and inconsistent with good morals and the requirement of good faith, resulting in a considerable imbalance in the rights and obligations of the parties. She argued that the District Court inadequately assessed the principle of consumer protection. She also disagreed with the District Court decision on the costs of the proceedings; in particular the effectiveness of the bank's expenses for legal representation. According to the applicant, the Constitutional Court should intervene in the process of decision making on account fees and unify the decision-making practices of general courts.

II. The Constitutional Court emphasised that it was ruling on the constitutionality of the alleged unconstitutional interference in the District Court's decision, not on the policy of bank fees. The constitutional complaint was not joined with a request for review of the constitutionality of any of the provisions of the relevant statutes regulating this area of consumer law.

The Constitutional Court stated that the term "trivial constitutional matters" is a reflection of the significance the legislature accords to such disputes in civil trials. Although the legislative framework for proceedings before the Constitutional Court, under Article 88.1 of the Constitution, does not contain this term, the review of such court decisions by the Constitutional Court cannot be entirely ruled out. This can only be allowed, however, under conditions where the intensity of the interference conflicts with the essence and significance of a fundamental right and freedom under Article 4.4 of the Charter of Fundamental Rights and Freedoms or if the legal certainty of parties to court proceedings is cast in doubt as a result of a lack of recognition by higher level courts, or significant divergence in the decision making of trial courts.

The unifying role of the Constitutional Court can be applied to the case-law of general courts only at the level of the constitutional order, specifically, in areas where the Constitution expressly presumes that general courts will be included in performing the role of protecting the fundamental rights and freedoms of a human being and a citizen (see Article 1.1 *in fine* and Article 4 of the Constitution), or where excessive application of ordinary law can lead to violation of the constitutional order. The Constitutional Court cannot otherwise replace the role of the legislator or the mission of the highest level courts.

Review of so-called trivial disputes is also precluded by the fact that under Article 157.4 of the Civil Procedure Code (*a contrario* Article 157.2 of the Civil Procedure Code) the reasoning of a decision contains only the subject matter of the proceeding, the conclusion of facts, and a brief legal assessment of the matter. This would mean that in the event of a review of such a decision (and its reasoning) far higher demands would be made on the procedures followed by the Constitutional Court than on the decision making of the general court.

The Constitutional Court stated that the number of disputes before general courts could also not be grounds for intervention (not only for purposes of unification) by the Constitutional Court, when what exceeded the applicant's personal interests did not meet the justification criteria and fell into the category of obviously unjustified constitutional law arguments.

The Constitutional Court also noted that although the consumer relationship is not directly regulated at the level of a specific constitutional right, it is not isolated from the application of constitutionally guaranteed fundamental rights and freedoms. Within this legally regulated relationship the application of fundamental rights and freedoms manifests itself as the duty of the state to protect these rights and freedoms in the consumer relationship (Article 1.1 of the Constitution) both by creating conditions for the conclusion of consumer contracts, and in resolving disputes arising from them. However, the principle of free will in these private law relationships and the principle of freedom to conduct business cannot be replaced by unilaterally protective state intervention.

Legal protection of consumers in terms of fundamental rights and freedoms can be derived from the special circumstances of the consumer's generally weaker position in a contractual consumer relationship. The state must take this position of disparity into account in the regulation of the legal relationship in the form of legal and institutional means for consumer protection. Therefore, intervention by the Constitutional Court would come into consideration in a situation where one party to this relationship *de facto* unilaterally determined contractual conditions that the other party had no choice but to accept, because, in contrast to a situation of weighing the public interest and possibilities of limiting fundamental rights and freedoms in the case of evaluating the proportionality of interference by public authorities, the issue here is that of contractual freedom, where the principle of free will, protected by Article 2.3 of the Charter and Article 2.4 of the Constitution, applies on both sides of the relationship.

The Constitutional Court considered the applicant's individual objections, but did not find them justified, so it rejected that part of the constitutional complaint. It also rejected as unjustified that part of the constitutional complaint concerning the District Court's decision on payment of costs of the proceedings.

III. The Judge Rapporteur in the case was Jan Filip. None of the judges filed a dissenting opinion.

Languages:

Czech.



France

Constitutional Council

Important decisions

Identification: FRA-2014-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 14.02.2014 / **e)** 2013-366 QPC / **f)** SELARL PJA, in the capacity of liquidator of the Maflow France company [Legislative validation of the deliberations of the intermunicipal consortiums instituting the “transport payment”] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.02.2014, 2724 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

2.3 Sources – **Techniques of review.**

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

3.18 General Principles – **General interest.**

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

Keywords of the alphabetical index:

Law, validating / General interest, overriding ground.

Headnotes:

Under the terms of Article 16 of the 1789 Declaration of the Rights of Man and the Citizen: “Any society in which rights are not secured and the separation of powers is not determined has no Constitution”. The implication of this provision, that the legislator can retroactively amend a rule of law or validate an administrative or private-law act, is subject to some conditions. That is, the amendment or validation must comply not only with judicial decisions having *res judicata* force but also with the principle of non-retroactivity of penalties and sanctions. Also, interference with personal rights arising from the amendment or validation must be justified by an overriding ground of general interest. Furthermore, the amended or validated act should not infringe on any rule or principle with constitutional force, unless the overriding ground of general interest itself has constitutional force. Lastly, the scope of the amendment or validation must be strictly defined.

Summary:

On 21 November 2013, the Court of Cassation referred to the Constitutional Council a priority question of constitutionality raised by SELARL PJA. The question was, whether Article 50 of the corrective finance law no. 2012-1510 of 29 December 2012 (hereinafter, “LFR”) conformed to the rights and freedoms secured by the Constitution.

Article 50 of the LFR for 2012 validates the deliberations instituting the transport payment, which were adopted by the intermunicipal consortiums before 1 January 2008. Their legality, however, might be contested on the ground that intermunicipal consortiums are not public organs of intermunicipal co-operation.

In Decision no. 2013-366 QPC of 14 February 2014, the Constitutional Council altered its recital establishing the principle of review of validating laws, which remains based on Article 16 of the 1789 Declaration with the reference to an “adequate general interest”. It has been replaced by reference to the stipulation that interference with personal rights resulting from the validating law must be justified by an “overriding ground of general interest”. In so doing, the Constitutional Council’s expressly intended to emphasise the necessity of its review. Namely, the review of validating laws, which it performs on the basis of Article 16 of the 1789 Declaration, has the same effect as that carried out on the basis of the requirements following from the European Court of Human Rights.

Applying these principles, the Council found it consistent with the Constitution that Article 50 of the corrective finance law no. 2012-1510 of 29 December 2012 validated the deliberations instituting the “transport payment”. They were adopted by the intermunicipal consortiums before 1 January 2008, in so far as their legality might be contested because the consortiums lacked authority to establish this levy.

As to the existence of an overriding ground of general interest, the Council thus considered that the legislator had intended to end years of litigation over the deliberations of the intermunicipal consortiums instituting the “transport payment”. The Council also deemed that the legislator had intended to avert a profusion of complaints founded on the legislative shortcoming revealed by the cited Court of Cassation judgments and complaints seeking recovery of the levies already paid. Lastly, the Council viewed that the legislator aimed to end the resultant disorder in the management of the bodies in question (recital 6). The overriding ground of general interest thus lay essentially in the legislator’s determination to dispel a

legal uncertainty generating copious litigation and to avert the many complaints arising from the recognition by the Court of Cassation of the intermunicipal consortiums' lack of authority to order the "transport payment" before the law of 24 December 2007 was passed.

The impugned provisions, the Council also acknowledged, made an express reservation in respect of decisions that had acquired *res judicata* force. Finally, it made sure that the validating law complied with the principle of non-retroactivity of penalties and sanctions, secured by Article 8 of the 1789 Declaration. It therefore made a reservation in order that retroactive validation of the deliberations instituting the "transport payment" should not give rise to sanctions that might be ordered against taxpayers not having paid this levy.

Languages:

French.



Identification: FRA-2014-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 28.02.2014 / **e)** 2013-370 QPC / **f)** Digital exploitation of unavailable books / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.03.2014, 4120 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.4.12 Fundamental Rights – Economic, social and cultural rights – **Right to intellectual property.**

Keywords of the alphabetical index:

Book, digital, exploitation.

Headnotes:

The impugned provisions of the Intellectual Property Code permit the storage and release to the public, in digital form, of unavailable books published in France before 1 January 2001, which are not yet in the public domain, by means of a legal offer that ensures the remuneration of copyright beneficiaries. They pursue an aim of general interest.

The regulation of conditions enabling copyright holders to enjoy their intellectual property rights in respect of these books does not disproportionately prejudice these rights in regards to the aim pursued.

Summary:

The Constitutional Council considered a priority question of constitutionality referred to it by the *Conseil d'État* on 19 December 2013. It concerned Articles L. 134-1 to L. 134-8 of the Intellectual Property Code (CPI), which derived from Article 1 of law no. 2012-287 of 1 March 2012 on Digital Exploitation of Unavailable 20th Century Books.

The purpose of these provisions is to allow the digital release of "unavailable books". A public database of "unavailable books" is accordingly created, operated by the *Bibliothèque nationale de France*. Under Article L. 134-3 of the CPI, a company, approved by the Minister for Culture to collect and apportion royalties, exercises the right to authorise the reproduction and representation in digital form of any book entered into the database for over six months. The company also ensures the apportionment of the sums collected for this exploitation among copyright beneficiaries. Article L. 134-4 defines the conditions for the author and the publisher of an "unavailable book" to contest the exercise of this right of authorisation by the company collecting and apportioning royalties. Article L. 134-6 lays down the conditions for the author and the publisher holding the right to reproduce an unavailable book in printed form to withdraw the right to authorise reproduction and representation of the book.

The Constitutional Council found the impugned provisions constitutional. Firstly it observed that these provisions were intended to allow unavailable books published in France before 1 January 2001 and not yet in the public domain to be stored and digitally released to the public by means of a legal offer that ensures the remuneration of copyright beneficiaries. Thus they pursued an aim of general interest.

The Constitutional Council further considered that the regulation of the conditions under which the copyright holders enjoyed their intellectual property rights did not disproportionately prejudice these rights in regard to the aim pursued.

Languages:

French.



Identification: FRA-2014-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 13.03.2014 / **e)** 2014-690 DC / **f)** Law on consumption / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.03.2014, 5450 / **h)** CODICES (French, English).

Keywords of the systematic thesaurus:

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

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

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

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

5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection.**

Keywords of the alphabetical index:

Class action / Consumer credit, database.

Headnotes:

The class action procedure is not contrary to any constitutional requirement, specifically neither to personal freedom nor to the right to fair and equitable proceedings. The reasons are that no consumer is amenable to the procedure without having been able to consent to it, and, a professional can adduce all arguments serving to defend his interests during the procedure.

The creation of the national register of credit granted to individuals interferes with the right to respect for private life, as it is not proportionate to the aim pursued. This is in light of the nature of the data recorded, extent of processing of the data, frequency of the register's use, large number of persons likely to have access to it, and inadequacy of the guarantees concerning access to it.

Summary:

In Decision no. 2014-690 DC on 13 March 2014, the Constitutional Council opined on the Law on

Consumption, which was referred to it by more than sixty members of parliament and more than sixty senators. The Constitutional Council was principally concerned with Articles 1 and 2 on class action, and Article 67 on the consumer credit database (*fichier positif*). It found Articles 1 and 2 consistent with the Constitution. However, it censured Article 67 and consequently Articles 68-72, which were inseparable from it.

Articles 1 and 2 of the Law relate to class action. According to the new Article L. 423-1 of the Consumer Code, the object of a class action is to allow compensation for individual pecuniary losses resulting from material damage sustained by consumers placed in a similar or identical position. The common cause shared by the consumers is that one professional, or the same professionals, breached their legal or contractual obligations whether in connection with the sale of assets or the provision of services, or where these losses result from certain anti-competitive practices. The law establishes a procedure in three stages: an approved consumers' association alleges the liability of the professional before a civil court; the consumers receive information and compensation for their loss; further judicial phase for ruling on any difficulties.

The Constitutional Council observed, firstly, that no consumer was amenable to the procedure without having been able to consent to it. Secondly a professional could adduce all arguments serving to defend his interests during the procedure. On balance, the Constitutional Council found that the class action procedure was not contrary to any constitutional requirement, specifically neither to personal freedom nor to the right to fair and equitable proceedings.

Article 67 establishes personal data processing that records the consumer credit granted to natural persons not acting for the fulfilment of occupational needs and designated "national register of credit to individuals".

The Constitutional Council observed that this article inserted by amendment had an indirect connection with the initial provisions of the draft law. Its adoption procedure, moreover, did not transgress any constitutional requirement.

In substance, by creating this register, the Council found that the legislator had pursued a purpose in the general interest of preventing over-indebtedness. However, the Council observed that the register was intended to comprise the personal data of a very large number of persons (over 12 million), the retention period was several years (the entire term of the credit or of the over-indebtedness plan), there

were very many reasons for consultation (granting of consumer credit but also of a loan against material security, extension of a renewable loan contract, three-yearly verification of the borrower's solvency, and verification relating to the persons standing surety for a money loan) and some tens of thousands of credit establishment employees would be authorised to consult the register.

The Council considered the nature of the data recorded, the extent of the data processing, the frequency of the register's use, the large number of persons likely to have access to it and the inadequacy of the guarantees concerning access. It held that the creation of the national register of credit to individuals interfered with the right to respect for private life, which could not be considered proportionate to the aim sought.

The Constitutional Council also observed that Articles 37 and 39 on the sale of optical goods showed an indirect connection with the initial draft of the law. They did not form riders, so that their introduction by amendment was not contrary to the Constitution. Likewise, Article 54, concerning the right of unilateral termination of the insurance contract securing a mortgage, had not been introduced at the second reading but was already debated at the first reading of the draft law, so that its adoption procedure had not infringed the rule that only provisions not agreed upon at a previous reading need be further debated.

The Council also examined Articles 76, 113, 121, 123, 125 and 130, which institute administrative or criminal sanctions for offences against the law of consumption and competition, or increase the amount of the sanctions incurred. The Council censured the two different fines for the same acts and made the reservation that constitutionality depended on a specific interpretation of the aggregation of administrative and criminal sanctions. As such, it found the impugned provisions of these articles to be constitutional.

Languages:

French.



Identification: FRA-2014-1-004

a) France / **b)** Constitutional Council / **c)** / **d)** 25.03.2014 / **e)** 2014-693 DC / **f)** Law on geolocation / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.03.2014, 6125 / **h)** CODICES (French, English).

Keywords of the systematic thesaurus:

5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle.**
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

Keywords of the alphabetical index:

Geolocation.

Headnotes:

Subject to judicial authorisation and control, the legal measures limiting the use of geolocation aim to guarantee that the restrictions placed on constitutionally guaranteed rights are necessary to the revelation of the truth. The measures are not disproportionate, considering the seriousness and complexity of the offences committed.

The provisions on the procedural file are partially censured so that a conviction should not be based on evidence for which the person charged would be unable to contest the conditions of its collection.

Summary:

In Decision no. 2014-693 DC of 25 March 2014, the Constitutional Council ruled on the Law on Geolocation, which was referred to it by over sixty members of parliament. It examined, firstly, provisions on the use of geolocation (which it deemed constitutional). It considered, secondly, provisions on the procedural file (which it partially censured in order that a conviction should not be decided based on evidence whose conditions of collection could not have been contested by the person charged).

The Council, in the first place, verified the encroachments of geolocation on the right to respect for private life and to sanctity of the home.

The Council noted that use of geolocation was excluded for inquiries or investigations concerning trivial acts. Such use is placed under judicial supervision and control. Moreover, where the installation or removal of the technical device allowing geolocation necessitates entry into a private place, this should be authorised, depending on the case, by the State Prosecutor, the investigating judge or the judge responsible for release and detention.

The Constitutional Council considered the provisions as a whole. It noted that the legislator had hedged the use of geolocation with measures to guarantee that, being subject to the authorisation and control of the judicial authority, the restrictions placed on constitutionally guaranteed rights were necessary for the revelation of the truth. Hence, it deemed that they were not disproportionate, in light of the seriousness and complexity of the offences committed. It therefore considered the provisions in question consistent with the Constitution.

In the second place, the Constitutional Council examined Articles 230-40 to 230-42 of the Code of Criminal Procedure (CPP) concerning the case file. It verified the conformity of these provisions to Article 16 of the 1789 Declaration of the Rights of Man and the Citizen, guaranteeing in particular respect for the rights of the defence and the principle of adversarial proceedings.

Article 230-40 of the new CPP makes it permissible, with the consent of the judge responsible for release and detention, for the procedural file not to show particulars of the date, time and place at which the geolocation device has been installed or removed. It would also not reveal the recording of the location data and the elements allowing identification of a person who has helped install or remove the device. It is a matter of protecting these persons against risks of retaliation. The information not included in the file is written in a report placed in a file separate from the procedure, to which the parties do not have access.

For one thing, Article 230-41 provide that the person under investigation or the assisted witness has ten days to ask the president of the investigating chamber to review the use of the procedure prescribed by Article 230-40. The Council held that this period ought to run only from the time when the person implicated had been formally notified of the application of the procedure.

Besides, Article 230-42 provide that no conviction may be decided “on the sole ground” of the evidence collected under the conditions prescribed in Article 230-40. The Council considered it inimical to the principle of adversarial proceedings for a

conviction to be decided on the basis of evidence when the person implicated had not been placed in a position to challenge the conditions under which the evidence was collected. Thus evidence obtained under the conditions prescribed in Article 230-40 should not be transmitted to the trial court unless the information contained in the separate file was placed in the procedural file.

Languages:

French.



Identification: FRA-2014-1-005

a) France / **b)** Constitutional Council / **c)** / **d)** 27.03.2014 / **e)** 2014-692 DC / **f)** Law for the restoration of the real economy / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 01.04.2014, 6232 / **h)** CODICES (French, English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Real economy / Takeover bid / Information, obligation / Penalty.

Headnotes:

The obligation imposed on an enterprise to accept a serious takeover bid for an establishment whose closure it contemplates, and the competence assigned to the commercial court to determine this obligation and penalise a refusal not founded on a legitimate reason, subject the economic choices of the enterprise. Such constraints, particularly the disposal of its assets and its management, unconstitutionally prejudice the right of property and freedom of enterprise.

The penalty prescribed in Article L. 773-1 of the Commercial Code, which is only for non-compliance with the obligation to seek a new owner, may be as high as twenty times the monthly value of the basic wage per job suppressed. Thus, it is not proportional with the seriousness of the transgressions punished.

Summary:

In Decision no. 2014-692 DC of 27 March 2014, the Constitutional Council opined on the provisions of the Law for the Restoration of the Real Economy. The application was referred to it by more than sixty members of parliament and more than sixty senators.

The Council considered the provisions on refusal to transfer the ownership of an establishment in the event of a takeover bid and the penalisation of such refusal. It found that they were contrary to the freedom of enterprise and the right of property. It also censured the provisions prescribing a penalty for non-compliance with the obligation to seek a new owner.

Article 1 of the Law introduces into the Labour Code rules requiring an enterprise to seek a new owner when it contemplates the closure of an establishment. The applicants contested the obligations to provide information imposed on the employer in that case. The Council noted that the legislator intended to enable potential new owners to have access to the useful information on the establishment whose closure was contemplated, though without compelling the disclosure of information that may prejudice the assigning enterprise. In light of this regulatory framework, the Council held that the obligation to provide information did not have an unconstitutional effect on freedom of enterprise.

Furthermore, Article 1 supplemented the Commercial Code in prescribing a penalty ordered by the commercial court in the event of refusal to transfer ownership of an establishment and a penalty for failure to meet the obligation as to information.

On one hand, the Council noted that Article 1 did not permit the enterprise to refuse to transfer ownership of the establishment, in the event of a serious takeover bid. One exception occurs where the refusal was prompted by danger to the continuation of the assignee enterprise's entire activity. It held that this deprived the enterprise of its ability to anticipate economic difficulties and carry out economic trade-offs. Besides, Article 1 of the Law gave the commercial court responsibility to determine whether a takeover bid was serious, leading the judge to substitute his own assessment for that of the business manager regarding economic choices for the conduct and development of the enterprise.

The Constitutional Council considered that the obligation to accept a serious takeover bid in the absence of a legitimate ground for refusal, and the competence assigned to the commercial court to determine that obligation and penalise its non-fulfilment. Accordingly, it held that the enterprise is subjected to economic constraints, particularly disposing of its assets and its management, which unconstitutionally prejudiced the right of property and freedom of enterprise.

The Council further noted that, owing to this censure, the penalty prescribed in Article L. 773-1 of the Commercial Code only sanctioned non-compliance with the obligation to seek a new owner. This penalty could be as high as twenty times the monthly value of the basic wage per job suppressed. Such a sanction was out of proportion to the seriousness of the transgressions punished.

The Constitutional Council, moreover, deemed that the impugned provisions of Article 8 (information to the works committee in the event of a public purchase offer) and Article 9 (arrangements to distribute free shares) consistent with the Constitution.

Languages:

French.



Georgia

Constitutional Court

Important decisions

Identification: GEO-2014-1-001

a) Georgia / **b)** Constitutional Court / **c)** Plenary / **d)** 28.06.2010 / **e)** N1/466 / **f)** Public Defender v. Parliament / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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:

Discrimination, foreign persons, stateless persons, legal entity.

Headnotes:

The right of access to court is enshrined within the Constitution and is applicable to all, irrespective of citizenship. The wording of the Constitution does not imply that only those residing within the territory of Georgia are protected by this right.

Summary:

I. The applicant in these proceedings contended that under the Constitution, the State must guarantee the right of access to court for all individuals who fall under its jurisdiction. Citizens of foreign countries and persons without citizenship may fall under its jurisdiction too, irrespective of whether they reside there, along with legal entities regardless of their place of registration. Discrimination based on citizenship, which prevents certain people from enjoying rights which are recognised as universally applicable, is inadmissible. The right to access to court falls into that category of rights.

The representative of the Respondent put forward the view that the norm under challenge, from the Law on the Constitutional Court, did not restrict the circle of subjects who could apply to the Constitutional Court. It actually widened it, giving other individuals residing in Georgia (not just citizens) the right to lodge claims, by contrast to Article 89.1 of the Constitution, which only named citizens as subjects of this right.

The respondent also observed that the Constitutional Court undertakes norm-making activities through its decisions. The type of legislation and the specific norms which should apply within the country and the regulation of various affairs can all be the subject of deliberation at the Constitutional Court, but only through the participation of citizens of Georgia. It is up to them to define the rights they should have and the format for this.

II. The Constitutional Court noted the duty incumbent on the State under Article 7 of the Constitution to recognise and protect human rights. Recognition by the State implies an obligation to recognise the rights as every individual's concomitant good. Protection implies a duty to provide all necessary safeguards to allow the enjoyment of these rights, including the possibility of protecting them before a court.

The Court stated that the Constitution is not confined to recognising the rights of citizens of its country. Everyone is an object of protection by the Constitution, though a citizen of any country residing in any country or a stateless person may not be protected by the Constitution if they have no legal ties with Georgia.

The aim of the Constitution to protect human rights would be completely ineffective if restrictions were imposed confining protection to persons residing in Georgia.

The Court observed that the most important safeguard for the enjoyment of any right is the ability to protect it through the court system. If there is no opportunity to avoid a right being breached or to restore a right that has been violated, doubt will be cast over the enjoyment of the right. A prohibition or disproportionate restriction on the right to apply to court for protection of rights and freedoms not only breaches the right to fair trial but also strikes at the heart of the right the person was seeking to protect by applying to court. Restrictions on the right of access to court are possible but these must not be based on a person's citizenship.

The Court stated that the Constitutional Court is not there to establish a new legal order in the country. It is there to uphold the supremacy and efficiency of the Constitution, promoting its fulfilment by the state and the people.

Individuals apply to the Constitutional Court for redress after a right has been violated, restoration of that right or the avoidance of its violation. Their dispute will take place within the scope of specific constitutional review; they will not be getting involved in or seeking to influence the process of norm-making in the country.

Individuals who apply to the Constitutional Court do not have the possibility to change the content of their rights through their participation. Neither are they entitled to establish a content that is different from that of specific right; they cannot apply to the Constitutional Court to this end. The sole purpose of their claims is the protection of their constitutional rights.

The Court held that its decisions cannot be altered depending on whether the person who has applied to it is a citizen or a foreigner. Neither can the Court take the applicants' status as citizen or foreigner into account in its deliberations. It cannot therefore be contended that foreigners and stateless persons become engaged in deciding upon the sovereign matters of the country.

The ability to protect a right at common court is very important. All three instances must be fully accessible to foreigners and stateless persons. In certain instances though, the only way to prevent the violation of a right is by recourse to the Constitutional Court.

The Constitutional Court accordingly resolved that regulations determining that individuals who were not citizens of Georgia and legal entities that were not registered there were not entitled to lodge a constitutional claim were unconstitutional.

Languages:

Georgian, English.



Identification: GEO-2014-1-002

a) Georgia / **b)** Constitutional Court / **c)** Plenary / **d)** 18.04.2011 / **e)** N2/482, 483, 487, 502 / **f)** Political Union of Citizens "Movement for Unified Georgia", Political Union of Citizens "Conservative Party of Georgia", Citizens of Georgia – Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, Citizens – Datchi Tsaguria and Jaba Jishkariani, Public Defender v. Parliament / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Assembly, manifestation, right, restriction, termination / Expression, opinion / Activity, political.

Headnotes:

If those taking part in an assembly break the Law on Assemblies and Manifestations or mass violations of law are committed, government interference in the realisation of their right represents a proportionate means of pursuing a reasonable and legitimate aim. However, if the assembly or demonstration has to be broken up directly a breach of the law occurs, this will not be proportionate. If demonstrators are occupying a road or blockading a carriageway in disregard of the law, this should be grounds for a requirement to bring the assembly in compliance with the law, rather than immediate termination.

Summary:

I. The applicants argued that a norm introducing a 20 meter radius rule constituted a ban on assembly in general, not simply a restriction of rights. A 20 meter radius was too strict a regulation. Because of the location of the buildings, the norm made it practically impossible to communicate the protest to the addressees.

The applicants were of the view that the Constitution does not only grant the right of assembly and demonstration to citizens of Georgia. Being the

designated person responsible for assembly or demonstration does not represent political activity. Assemblies and demonstrations can be cultural, educational or political, but organising can only be a political activity when it is carried out by political parties and the assembly has political content. Finally, provided that constitutional values are not endangered, immediate termination of assembly is unjustified.

The respondent stated that the aim of an assembly or demonstration is to influence the activities of government, which lends them a political character. Even if a specific assembly or demonstration is non-political in nature, the organisation of an assembly is always related to political activity since it is aimed at channelling the efforts of society in such a way as to influence public and decision-making organs. Assemblies always relate to an unspecified group of people, which again lends them a political content.

A total blockade of the carriageway poses a real risk to the legal order; it means that the police, fire brigade and emergency services face significant impediments to their operations. It also breaches the rights of third parties.

II. The Constitutional Court stated that the right to assembly is linked to the scope of Article 24 of the Constitution; it is a way of disseminating opinions. A gathering of people (or a demonstration), which is devoid of ideas does not serve the dissemination or exchange of ideas and information and has no connection with the right to assembly enshrined in the Constitution. This is a constitutional right; its goal and substance, which determines logical and substantive link between Articles 24 and 25 of the Constitution. Article 25 of the Constitution protects opportunity of collective expression of ideas and is thus a continuation of Article 24.

The right to assembly has two equally important and indispensable aspects: the expression of opinion and a specific opinion promoted by assembly or demonstration. The State or society's interest in a human belief or opinion can emerge when these take the form of a specific act (or failure to act), or social activity.

The Constitution does not protect the possibility of occupying or blockading the streets *per se*. Such actions will only be related to the constitutional right if they are related to the content or form of expression of opinion. Words or acts without political, social, artistic or other value are outside the scope of Constitution when they clash with public order and security and the rights and freedoms of others.

The Court held that expression of opinion on the carriageway would amount to violation of traffic rules. The state has discretion to establish norms regulating traffic movement; in practice, most of these rules will conflict with the right to assembly and manifestation.

The right of assembly enshrined within Article 25 implies a right to choose a specific place for assembly. The disputed norm imposes a general prohibition on assemblies and meetings within a 20 metre radius from the entrances of buildings without reference to any specific conditions. This applies even when the assembly does not pose any risk to the normal functioning of administrative organs or public establishments.

The Court noted that the landscape of cities and populated areas, as well as the location of administrative organs and establishments, makes it virtually impossible to realise the right to assembly or demonstration in certain cases. Establishments may be so close to each other that territories of 20 metres radius from their entrances can overlap.

The Constitutional Court stated that assemblies or demonstrations may be restricted if they represent a significant impediment to judicial litigation or they hamper the operation of courts or other establishments, irrespective of whether they take place within the radius. Territorial restrictions are not justified, however, if the assembly does not pose a threat to public order or violate the rights of third parties.

Constitutional rights cannot be aimed at the infringement of the democratic order entrenched in the Constitution or represent grounds for the implementation of unlawful acts.

Being the designated responsible person for an assembly or demonstration does not always entail the implementation of political activities. The political nature of an assembly should be identified case by case in the light of its initiator and purposes.

A meeting, as a form of expression of opinion, can be related to a person's civil or social attitudes and to his or her ideas (including political beliefs) but this does not necessarily mean political activity. The organisation of an assembly or demonstration should not be considered as a political activity in each and every case. The right to assembly implies the right not only to participate in it but also to organise it.

The Constitutional Court accordingly declared unconstitutional the regulation which restricted the right to demonstrate or hold an assembly within a 20 meter radius of the entrances of buildings and which only gave Georgian citizens the right to be

responsible for the organisation and process of an assembly. The Court also declared unconstitutional the regulation allowing government to require the immediate termination of an assembly or demonstration.

Languages:

Georgian, English.



Identification: GEO-2014-1-003

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 22.12.2011 / **e)** N1/1/477 / **f)** Public Defender v. Parliament / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**
 5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**
 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, reserve / Objection, conscientious.

Headnotes:

Maintaining a reasonable balance between freedom of religion and the defence of the country requires the coexistence of these interests, rather than one being protected at the expense of the other. Establishing a civilian service rather than military service is a way of balancing these interests. However, the legislator did not extend this possibility to those who objected to military reserve service, as opposed to military service, on conscientious grounds.

Summary:

I. The applicant questioned the compliance of Article 2.2 of the Law on Military Reserve Service” (hereinafter, the “law”) with Articles 14, 19.1 and 19.3 of the Constitution, noting that the Law declared it to be the duty of each and every citizen to serve in the Military Reserve, which was directly linked to the study and implementation of battle operations. There was no scope for individuals to refuse to serve on the basis of conscientious objection. The applicant contended that the right to refuse compulsory military service and to substitute it with non-military alternative labour service is a fundamental aspect of belief and conscience, which is protected under Article 19 of the Constitution.

The applicant also argued that the norm violated Article 14 of the Constitution. There was a fundamental inequality; those subject to reserve who had conscientious objections and those who had no such objections had the same burden imposed on them by the legislator. People who had conscientious objections were allowed to substitute alternative service for military service but the law did not allow this option for people with similar beliefs who were subject to reserve.

The respondent contended that the norm was in full conformity with the general obligation that has its origin in Article 101 of the Constitution. It set out the imperative requirement under which the protection of country and discharge of military obligation are incumbent from every citizen with the appropriate abilities. Reserve service is one way of fulfilling discharging military obligation.

The respondent noted that military legal service does not automatically imply that somebody is obliged to participate in certain battlefield activities. Conscientious objectors can take part in reserve activity but will be carrying out different types of activity, not of a military character.

The respondent also observed that the norm did not contradict Article 14 of the Constitution. Under Article 101, all citizens with the relevant abilities must discharge the duty of military service. As this is a universal obligation, a waiver of obligation on the basis of mentality would violate the principle of equal treatment.

II. The Constitutional Court noted that the freedom of belief means sharing, choosing, ascribing to oneself or rejecting a particular belief without state interference. The freedom of belief also comprises its external expression: the right to live in accordance with a particular belief. Beliefs and perceptions behind conscientious objection do not have to be religious in content.

The Constitutional Court noted that the source for “conscientious objection” is the personal belief that forbids taking away someone’s life. Conscientious objectors generally reject armed service during both war and peace as war necessarily includes using force and taking away human life. As long as military service serves the defence capabilities of a state, it will entail preparation for warfare.

The Constitutional Court stated that the aim of the reserve forces is to maintain a high level of military preparedness and mobilisation activity; the main purpose of individual reserve is the rotation and supplementing of sub-regiments of armed forces. There is no substantial difference between the activities of reservists and military personnel; on the other hand, the purpose of this category of reserve is participating in and preparing for hostilities.

It went on to observe that military reserve service, in terms of content and gravity, equates to mandatory military service, and, as is the case with mandatory military service, it may give rise to legitimate grounds for conscientious objection. The current national legislation does not allow individuals called up for military reserve service or individuals serving in the reserves to request non-military, alternative labour service where conscientious objection exists. The norm in question therefore impinges on the freedom of religion.

The Court did not share the respondent’s view that the obligation set out in Article 101 excludes the possibility of protecting the right of conscientious objection by the Constitution. Defending the country does not simply entail defending it with a weapon in one’s hands. It is indeed associated with participating in military operations, but these operations do not exhaust the substance of “defending” the country. Military duty might not even be related to using weapons at all. Non-military, alternative labour service, despite it being a civil service, might be a way to reach a reasonable compromise between the constitutional right and the constitutional obligation to defend the country.

The Constitutional Court held that military reserve service is a way of realising a legitimate goal, but it does not ensure a fair balance between the interests. It represents an unjustifiably severe interference in freedom of religion, almost rendering it impossible to exercise the right. The same goal could be achieved with less impingement on the right.

In terms of the right to equality, the Constitutional Court stated that in the given situation, the regulation could not be in compliance with Article 14 of the Constitution. When a legal norm violates the freedom

of religion of group of people and draws a distinction between them on the ground of religion, it cannot meet the requirements of equality before law. It represented a disproportionate means of reaching a public goal and caused a breach of the right to equality.

The disputed norm which imposes a duty to serve in the military reserve on people who object to doing so on the basis of freedom of belief was declared to be in breach of Articles 14, 19.1 and 19.3 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2014-1-004

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 29.02.2012 / **e)** N2/1/484 / **f)** Georgian Young Lawyers’ Association” and citizen of Georgia Tamar Khidasheli v. Parliament / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
 5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications.**

Keywords of the alphabetical index:

Invasion, privacy / Operative investigation measure, timeframe, extension / Video recording.

Headnotes:

In the absence of a law, the executive authorities do not have discretion to corroborate the necessity to restrict the inviolability of private communications without a court decision. Even in instances where the situation meets the constitutional criteria for urgent necessity, in conditions of absence of the law, interference with the right remains impermissible.

Summary:

I. The applicants claimed that the initial timeframe for conducting an operative investigation measure was not set out by the Law on Operative Investigation Activities. However, the disputed norm provided for the extension of such a timeframe.

In the applicants' opinion, the norm left agencies conducting operative investigation activity without judicial control, eavesdropping on telephone calls, conducting secret filming or recording over a period of 6 months without a court decision or urgent necessity as prescribed by the Constitution.

The applicants also argued that extension of the timeframe of an operative investigation measure, without a court decision based on the disputed norm should not be justified by urgent necessity either. No threat can be so pressing that executive governmental agencies can only eliminate it if they are empowered to interfere with the private life of an individual for six month period without judicial control.

The respondent took the view that the operative measures mentioned above were connected with a court decision and their legitimacy tied to a judge's consent.

According to the Representative of the Parliament, the Law on Operative Investigation Activities cannot be interpreted as allowing for the possibility to extend, without judicial control, the timeframe of those operative investigation measures which require a judge's order and it is therefore in full conformity with Article 20.1 of the Constitution.

II. The Constitutional Court held that the norms determining powers for carrying out an operative investigation measure by the public authority must be clear and not allow for the slightest threat of violation of human rights as a result of unambiguous interpretation.

It noted that the disputed norm did not rule out the possibility of it becoming necessary to extend the timeframe for an operative investigation measure even if the measure is carried out when the investigation is already underway.

The Constitutional Court concluded that the norm could be interpreted as allowing for the extension of the timeframe for an operative investigation measure with the consent of a prosecutor in cases where the investigation has yet to begin, as well as to cases where the investigation is under way.

The prosecutor's power to extend the timeframe of those operative investigation measures, the conduct of which is based on a judge's order pursuant to Article 7.2.h and 7.2.i of the Law on Operative Investigation Activities amounts to interference with the human right protected by Article 20.1 of the Constitution.

The Constitutional Court stated that where a judge has issued an order allowing an operative investigation measure to be carried out for a certain period of time, continuation of the measure after the expiration of the timeframe amounts to interference with the right. The norm gives the prosecutor the discretion to decide on the need for an extension of the time span for carrying out an operative investigation measure, entitling him or her to issue consent to extend the duration of interference with the right.

The norm has placed an extra obstacle in the way of the realisation of the right to inviolability of an individual's place of private activities and communications. It determines the independent case of restriction of the right, with no scope for judicial control.

The Constitutional Court held that the realisation of human rights as supreme and inalienable values also entails an obligation to tolerate certain nuisances from the part of state and society. The rationale behind restrictions on human rights should always be the protection of other constitutional values. The realisation of the values protected by Article 20.1 of the Constitution generally take places in the private sphere of an individual; the intensity of contact with the outside world is very low and the likelihood of conflict with the rights of others is correspondingly low.

The Court noted that operative investigation measures, by contrast with other forms of restriction of rights, are characterised by their secret nature. They mostly remain totally invisible to the public and are beyond their control. The temptation for executive authorities to disproportionately interfere with the right and the risk of this happening are higher by comparison to other cases. Control over the actions of the executive authorities by a neutral person reduces the risks and represents an important guarantee for correct application of the law.

Even if the situation meets the constitutional criteria of urgent necessity, under the conditions of absence of the law, interference with the right is impermissible.

The norm was accordingly found to be in contravention of Article 20 of the Constitution.

Languages:

Georgian, English.

*Identification:* GEO-2014-1-005

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.04.2012 / **e)** N1/1/468 / **f)** Public Defender v. Parliament / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.

Keywords of the alphabetical index:

Media broadcasting, television, license / Satellite, cable, broadcasting / Dissemination, information, opinion.

Headnotes:

Questions had arisen over the constitutionality of licensing for terrestrial stations of TV or radio broadcasting satellite systems or broadcasting through cable networks, the rules for issuing a licence and the obligation to modify licences once granted.

These regulations could be said to form part of the implementation of the basic function by the state. However, in exercising this power, the state is restricted by the constitutional rights and freedoms of individuals. Interference with these rights and freedoms can only be justified in special circumstances. Where restrictions are the only way to achieve the legitimate aim defined by the Constitution, the state should apply the means that is least restrictive and proportionate to achieve the aim, which could have been done in this particular case. Examples of less restrictive means included placing entities seeking to broadcast under an obligation to submit certain information to the Commission.

Summary:

I. The applicant had raised issues over norms linked with the right of an individual to disseminate information by using cable network and satellite systems, and the right of a broadcaster, as a legal entity to carry out broadcasting without hindrance. In the applicant's view, the licensing obligation introduced by the disputed norm represents the restriction of activity of media broadcasting and thus entails interference with the right envisioned by Article 24 of the Constitution.

The applicant acknowledged the power the state enjoys to exert control over licensing, but contended that restrictions on licensing can only be justified if they serve the purpose of legitimate public goal. Media licensing is only justified with regard to television and radio broadcasting carried out by using a frequency spectrum. This resource exists in limited form and represents a specific public good. By contrast, broadcasting through cable network or satellite does not require the use of limited resources. Any subject can enter the market without detriment to the interest of other social groups or circles.

The respondent's representative explained that broadcasting represents a sphere of business that deals with increased public interest and sometimes increased risks too. Licensing is the mechanism of preliminary control, deriving from the increased interest of society and state in the broadcasting sphere.

The respondent noted that in order for a licence to be issued, an entity must meet certain technical standards. The state will inspect the minimum requirements, and determine the extent to which a broadcaster can satisfy the public interest existing technical means.

The respondent also pointed out that the legislation contains a clear and exhaustive definition of the preliminary conditions for issue of a licence and that this process is carried out in accordance with the principle of impartiality, using open and transparent procedures.

II. The Constitutional Court began by noting that Article 24 of the Constitution protects the right to receive and impart information and to express and impart opinions. This protection also extends to the possibility of dissemination of opinion and information through different means.

It proceeded to examine the effectiveness of the licensing system for cable and satellite broadcasting, with regard to the legal and practical consequences

stemming from the disputed norms. It also assessed the issues of the constitutionality of the norms regulating the broadcasting by cable network and satellite independently from one another.

The Constitutional Court held that the commencement of broadcasting implies that the obligations set out by the law are to be extended to broadcasters. Its requirements are equally obligatory for licensed media as well as for media operating without a license.

The Court stated that every person is obliged to comprehend the consequences related to the violation of the law. Therefore, the licensing of a cable broadcaster (the creation of an additional mechanism in the form of permit) is not necessary. Licensing may, to an extent, simplify the regulation of a broadcaster but this does not mean that the licensing of a broadcaster represents a necessary condition for achieving the legitimate aim.

In order to protect public safety and the rights of others, the state is entitled to demand from an entrepreneurial entity, including an entity seeking to carry out broadcasting by cable network, to submit information about its identity. However, it would overstep this aim if it associated the commencement of broadcasting by cable network with the issuance of a permit by an administrative authority. The obligation to obtain a permit in order to start cable broadcasting amounts to unjustified interference with the right to freedom of expression. Consequently, the norm determining different types of license for broadcasting by cable network cannot be viewed as a reasonable way of achieving the goals of the Constitution.

The Constitutional Court isolated broadcasting by cable network from broadcasting by satellite on the basis of their respective technical natures. It noted that the state enjoys relatively wide margins of appreciation when setting out compulsory requirements for those persons whose activities are related to the jurisdiction of another state. The state had, in the Court's view, established a formal, substantially neutral but reasonably restrictive procedure, thus applying the means proportionate to achieve the aim in terms of broadcasting by satellite. The Court also noted constitutional regulations which determine the procedures for issuing, modifying, suspending or revoking a license.

Once licenses for broadcasting by using cable networks were recognised as unconstitutional, it became impossible to issue, modify, suspend or revoke such licenses. The regulations determining the procedures related to issuing, modifying, suspending or revoking licenses for cable

broadcasting no longer establish a legal regulation, making it impossible to modify or grant licenses for cable broadcasting.

The introduction of a licensing mechanism automatically implies the necessity to determine certain timeframes for issuing licences. Commencement of broadcasting activity within thirty business days does not restrict the right in such a way as to cast doubt over its effectiveness, neither does it impede the dissemination of opinion and information in a way that is unjustifiable in a democratic society. The mechanism is not, therefore, in contravention of Article 24.1 and 24.4 of the Constitution.

Languages:

Georgian, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2014-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 11.12.2013 / **e)** 1 BvR 194/13 / **f)** Whacko woman / **g)** / **h)** *Neue Juristische Wochenschrift* 2014, 764; *Zeitschrift für Urheber- und Medienrecht* 2014, 223; *Archiv für Presserecht* 2014, 133; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

General right of personality / Public figure / Right to personal honour.

Headnotes:

1. The general right of personality (Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) is affected by statements that can negatively influence the image of a public figure.
2. The general right of personality is limited *inter alia* by the freedom of expression (first sentence of Article 5.1 of the Basic Law), which again is limited by the provisions of general laws (Article 5.2 of the Basic Law).
3. When interpreting a statement, the courts must consider its context in the text or speech as well as other accompanying circumstances.

Summary:

I. The applicant is a former District Administrator and was until September 2013 a member of the Bavarian *Landtag* (state parliament). In 2006, she posed for a society magazine, which published the photo series in one of its editions. This took the defendant in the initial proceedings, an online publication, as an

opportunity to publish a text on its website, which contains, *inter alia*, the following passage:

“Let me tell you: you are the most frustrated woman I know. Your hormones are so messed up that you no longer know who is what. Love, desire, orgasm, feminism, reason.

You are a whacko woman, but do not blame your state on us men.”

The applicant claimed a violation of her general right of personality (*allgemeines Persönlichkeitsrecht*) and requested damages, as well as that the defendant refrain from making certain statements, (*inter alia* calling her a “whacko woman”). The constitutional complaint challenged the judgment of the Higher Regional Court, which had dismissed her claim.

II. The Federal Constitutional Court decided that the contested decision violated the applicant's general right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law. It thus reversed and remitted the decision.

The decision is based on the following considerations:

Calling the applicant a “whacko woman” violates her general right of personality. Pursuant to Article 2.1 of the Basic Law, the general right of personality is limited by the constitutional order, including the rights of others, which include the freedom of expression under the first sentence of Article 5.1 of the Basic Law. The courts are called to understand the different interests affected and the extent to which they are impaired. They must give effect to the opposing positions and balance them in a way that does justice to the specific aspects of the individual case at hand.

The Higher Regional Court does not accord sufficient weight to the applicant's general right of personality. It overlooks the right to personal honour, which is expressly mentioned as a limit in Article 5.2 of the Basic Law.

By requesting from the defendant to refrain from calling her a “whacko woman”, the applicant opposes this statement as a summary of the previous paragraph. In that paragraph, the defendant moves the public debate about the applicant to purely speculative claims about the core of her personality as a private person. It bases this speculation on assessments that relate to the innermost private sphere, without having any factual core.

It is true that they are linked to the applicant's behaviour, who posed for a society magazine and thus has to accept public discourse about this. The defendant may thus comment on the applicant's behaviour even in an exaggerated or polemic way.

However, the defendant's conclusions, which are summarised in calling the applicant a "whacko woman", are not based in any way in the applicant's conduct. Rather, the defendant seeks to deliberately discredit the applicant not only as a public figure and because of her behaviour, but denies her in a provocative and intentionally hurting way any claim to respect as a private person. Considering this behaviour, the freedom of expression cannot prevail. It should also be noted that in the case at hand, the text was deliberately written and meant to hurt, and not a spontaneous utterance in connection with an emotional discussion.

Languages:

German.



Identification: GER-2014-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 17.12.2013 / **e)** 1 BvL 6/10 / **f)** Challenge of paternity / **g)** to be published in the Court's Official Digest / **h)** *Monatsschrift für deutsches Recht* 2014, 225; *Zeitschrift für das gesamte Familienrecht* 2014, 449; *Das Jugendamt* 2014, 88; *Das Standesamt* 2014, 80; *Asylmagazin* 2014, 92; *Europäische Grundrechte-Zeitschrift* 2014, 254; *Neue Juristische Wochenschrift* 2014, 1364; *Neue Justiz* 2014, 155; *Zeitschrift für Kindschaftsrecht und Jugendhilfe* 2014, 151; CODICES (German).

Keywords of the systematic thesaurus:

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

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

Keywords of the alphabetical index:

Paternity, challenge, by public authorities / Citizenship, deprivation / Citizenship, loss / Principle obliging parliament to restrict fundamental rights only by or pursuant to a law (*Gesetzesvorbehalt*) / Parenthood / Paternity, by acknowledgment / Social and family relationship with the child / Legal paternity / Requirement of specifying the fundamental right affected and the Article in which it appears (*Zitiergebot*) / Rights of parents / Right of the child to parental care and upbringing.

Headnotes:

1. The regulation on the challenge of paternity by the authorities (§ 1600.1 no. 5 of the Civil Code) constitutes a deprivation of citizenship within the meaning of the first sentence of Article 16.1 of the Basic Law, which is absolutely prohibited, because the parties affected are, in some cases, unable to exert any influence on such a loss of citizenship or, in other cases, cannot be reasonably expected to do so.
2. The regulation does not meet the constitutional requirements for a loss of citizenship for other reasons (second sentence of Article 16.1 of the Basic Law) because it leaves no room for considering whether the child will become stateless, and because there are no provisions regarding deadlines and the age of the persons concerned that meet the requirements of the principle obliging parliament to restrict fundamental rights only by or pursuant to a law (*Gesetzesvorbehalt*).
3. Constitutionally protected parenthood (first sentence of Article 6.2 of the Basic Law) also exists in case of paternity established through acknowledgment when the acknowledging father is neither the child's biological father nor has established a social and family relationship with the child. However, the level of protection afforded by the Constitution depends on whether the legal paternity is reflected in the social interactions.

Summary:

I. With an order of 15 April 2010, the Hamburg-Altona Local Court (*Amtsgericht Hamburg-Altona*) suspended proceedings concerning a challenge of paternity by public authorities in order to obtain a decision from the Federal Constitutional Court as to whether the regulations relevant to the matter are compatible with the Basic Law.

The challenge of paternity by public authorities was introduced in 2008. The legislator was of the impression that, in certain scenarios, an acknowledgement of paternity is used to circumvent the rules of immigration law, in particular, to obtain German citizenship for the child, which results in the foreign mother's right to residence in Germany.

Public authorities are entitled to challenge legal paternity established by acknowledgment if – in addition to the lack of biological paternity – the person having acknowledged paternity does not actually bear responsibility for the child (“social and family relationship”) nor has done so at the time the acknowledgment was made or the acknowledger died, and if the acknowledgment creates the legal prerequisites for legal entry into Germany, stay or residence of the child or a parent (§ 1600.3 of the Civil Code). Moreover, the challenge must be brought within a certain time limit, which may not commence prior to 1 June 2008 (Article 229.16 of the Introductory Law of the German Civil Code). Once the decision on the non-existence of paternity has become final, the legal paternity ends, which means that the child no longer fulfils the prerequisites for the acquisition of German citizenship and its citizenship, as well as the foreign parent's right of residence, lapse. These legal consequences are retroactive up to the time of the child's birth.

II. The Federal Constitutional Court decided that the regulations on the challenge of paternity by the authorities were unconstitutional and void.

The decision is based on the following considerations:

Article 16.1 of the Basic Law protects Germans against deprivation and loss of their citizenship. This protection is also accorded to children who have acquired German citizenship as a result of an acknowledgment of paternity. Accordingly, a successful challenge of paternity by public authorities interferes with these constitutional guarantees.

Because the parties affected are, in some cases, unable to exert any influence on such a loss of citizenship or, in other cases, cannot be reasonably expected to do so, the challenge of paternity by public authorities constitutes a deprivation of citizenship within the meaning of the first sentence of Article 16.1 of the Basic Law, which is absolutely prohibited.

The children themselves cannot influence the loss of their citizenship. Inasmuch as acknowledgments of paternity are covered that were made before the regulations on challenges of paternity by public authorities entered into force, the loss of citizenship is also beyond the parents' influence. But inasmuch as

acknowledgments of paternity are affected that were made after the regulations on challenges by public authorities entered into force, it was possible, but could not in all cases reasonably be expected, to influence the loss of citizenship by the parents forgoing any acknowledgment of paternity that might end up being challenged by the authorities.

Moreover, the regulations on challenges by the authorities violate the second sentence of Article 16.1 of the Basic Law. Pursuant to this provision, the loss of citizenship may occur against the will of the persons affected only if they do not become stateless as a result. The legislator would have had to make arrangements for cases resulting in statelessness. Furthermore, the regulations constitute a violation of the principle obliging parliament to restrict fundamental rights only by or pursuant to a law (*Gesetzesvorbehalt*). Contrary to the second sentence of Article 16.1 of the Basic Law, the fact that a challenge of paternity by public authorities will lead to the loss of citizenship has not been expressly provided for by law, but only follows from the application of unwritten legal rules. This also violates the requirement of specifying the fundamental right affected and the Article in which it appears (*Zitiergebot*, second sentence of Article 19.1 of the Basic Law). Additionally, the principle of proportionality is violated, because there are no appropriate provisions regarding deadlines and the age of the persons concerned.

Furthermore, the regulations on challenges by the authorities violate the rights of parents (first sentence of Article 6.2 of the Basic Law) as well as the right of the child to parental care and upbringing (Article 2.1 in conjunction with the first sentence of Article 6.2 of the Basic Law). Constitutionally protected parenthood also exists when paternity was established through acknowledgment and the acknowledging father is neither the child's biological father nor has established a social and family relationship with the child. However, the level of protection afforded by the Constitution depends on whether the legal paternity is reflected in the social interactions. If – due to the overly broad wording of the legal requirements – the authorities can also challenge paternities acknowledged for other purposes than circumventing immigration law, the interference is disproportionate.

Finally, the regulations violate the fundamental right to family life under Article 6.1 of the Basic Law. The unnecessarily broad conditions based on which challenges can be made tend to subject unmarried foreign or bi-national parents who do not live together to the suspicion of having acknowledged paternity solely for residence-related reasons, and burden their

family life with investigations by the authorities. Constitutional law requires a more precise wording of the prerequisites for challenges in this regard as well.

Languages:

German; English press release on the Court's website; English (translation by the Court is being prepared for the website).



Identification: GER-2014-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 26.12.2013 / **e)** 1 BvR 2531/12 / **f)** / **g)** / **h)** *Strafverteidiger Forum* 2014, 65; *Europäische Grundrechte-Zeitschrift* 2014, 266; CODICES (German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.

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

Keywords of the alphabetical index:

Human dignity, violation, monetary compensation / Legal aid, proceedings / Security measures during a prisoner's stay in hospital / Public liability, claim / General right of personality / Right to equal legal protection.

Headnotes:

1. It contravenes the principle of equal legal protection if a regular court interprets civil procedural law to the effect that it can already make a substantive decision during legal aid proceedings even when difficult and contentious legal issues are concerned.
2. In cases of violations of human dignity, denying monetary compensation generally requires an examination and a balancing of interests during the regular proceedings, since the threshold for the obligation to pay compensation is usually lower than for mere violations of the general right of personality.

Summary:

I. In November 2009, the applicant, who is serving a life sentence with subsequent preventive detention for murder, was taken by several prison officers to a hospital because of sudden cramping in his abdomen. He was placed in handcuffs and shackles which were not even removed during his treatment in hospital. In the presence of the prison officers and police officers he was given a number of enemas in the examination room. He was not permitted to visit the windowless toilet in the examination room. Instead, he had to relieve himself in the presence of the officers by using a commode in the examination room.

A final judgment by the *Strafvollstreckungskammer* [chamber of the Regional Court for the execution of prison sentences] declared that the security measures, in particular the fact that the applicant was continuously shackled during his stay in hospital, were illegal.

The applicant applied for legal aid in order to file a public liability claim. The Regional Court and the Higher Regional Court denied this application due to insufficient prospects of success. They held that while the shackling constituted a significant interference with the applicant's general right of personality as well as his human dignity, it was, even without monetary compensation, sufficiently compensated by the decision of the *Strafvollstreckungskammer*.

II. The constitutional complaint is admissible and clearly well-founded. The challenged decision of the Higher Regional Court violates the applicant's right to equal legal protection under Article 3.1 in conjunction with Article 20.3 of the Basic Law and must therefore be reversed.

It contravenes the principle of equal legal protection if a regular court interprets civil procedural law to the effect that it can already make a substantive decision during legal aid proceedings even when difficult and contentious legal issues are concerned. This is the case when legal aid is denied in a contentious compensation claim which has not yet been clarified by case-law and substantially depends on a case-by-case assessment, and if the claim is based on a violation of human dignity which the regular court believes to be valid.

It is true that there is established case-law by the regular courts which – in the abstract – states that not every violation of human dignity must lead to monetary compensation. There is, however, as yet no case-law by higher courts that could be used in the case at hand to already decide conclusively

during the summary proceedings whether there is an obligation to provide monetary compensation. To shift this examination to the legal aid proceedings, and to thus exchange the regular proceedings with a mere summary examination, overstretches the requirement of legal aid proceedings to likely have success in the regular proceedings. This applies particularly considering that in case of a violation of human dignity, the material threshold for the obligation to pay compensation must be lower than for mere violations of the general right of personality.

Languages:

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



Identification: GER-2014-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 14.01.2014 / **e)** 1 BvR 2998/11, 1 BvR 236/12 / **f)** Law firm and firm of patent attorneys / **g)** to be published in the Court's Official Digest / **h)** *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2014, 368; *Neue Juristische Wochenschrift* 2014, 613; *Anwaltsblatt* 2014, 270; *Monatsschrift für Deutsches Recht* 2014, 309; *Neue Zeitschrift für Gesellschaftsrecht* 2014, 258; *GmbH-Rundschau* 2014, 301; *Deutsches Steuerrecht* 2014, 669; *Deutsches Verwaltungsblatt* 2014, 438; *Die Steuerberatung* 2014, 182; *BRAK-Mitteilungen* 2014, 87; *Mitteilungen der deutschen Patentanwälte* 2014, 185; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Company prior to registration, rights / Simultaneous admission as a law firm and as a firm of patent attorneys / Legal entity, freedom of occupation.

Headnotes:

1. In case of a limited liability company (GmbH), which was established so that lawyers and patent attorneys could practise jointly, regulations violate the fundamental right to freedom of occupation if they stipulate that one of the professional groups must hold the majority of shares and votes in the GmbH (first sentence of § 59e.2 of the Federal Lawyers' Code and first sentence of § 52e.2 of the Patent Attorneys' Code) as well as have management authority (first sentence of § 59f.1 of the Federal Lawyers' Code and first sentence of § 52f.1 of the Patent Attorneys' Code) and a majority of managing directors (*Geschäftsführer*) (second sentence of § 59f.1 of the Federal Lawyers' Code), and disqualify the GmbH from being admitted as a firm of lawyers or patent attorneys if the above-mentioned stipulations are not met.
2. A company prior to registration can rely on the freedom of occupation at least insofar as is required by its function as a necessary preliminary stage for the intended formation of the corporate organisation.

Summary:

I. The applicant in both constitutional complaint proceedings is a limited liability company in formation. The founders and shareholders are two patent attorneys and one lawyer, who each hold equal shares in the share capital and are each managing directors with the authority to represent the company alone. The applicant was seeking dual admission to practise as a law firm and as a firm of patent attorneys. The relevant applications for admission with the responsible professional associations and all judicial instances had been unsuccessful. The constitutional complaints challenged these rejections.

II. The Federal Constitutional Court found that the *de facto* refusal of simultaneous admission as a law firm and as a firm of patent attorneys for a limited liability company (GmbH), in which lawyers and patent attorneys have joined together to practise, constitutes a violation of the freedom of occupation under Article 12.1 of the Basic Law. The provisions of the first sentence of § 59e.2 and § 59f.1 of the Federal Lawyers' Code are void insofar as they prevent a firm in which lawyers and patent attorneys practice their professions from trading as a firm of lawyers if the lawyers do not hold the majority of shares and voting rights and exercise responsibility for management and provide the majority of managing directors in the firm. The same applies analogously to the first sentence of § 52e.2 and the first sentence of § 52f.1 of the Patent Attorneys' Code, which similarly

stipulate the precedence of patent attorneys for a firm of patent attorneys. The Panel thus reversed the decisions of the professional courts and remitted the matters to them.

The decision is based on the following considerations:

The applicant may invoke the fundamental right of freedom of occupation (Article 12.1 of the Basic Law). As a company with limited liability prior to registration, it meets the requirements for a legal entity within the constitutional meaning of Article 19.3 of the Basic Law.

The decisions which are the subject of the proceedings and the provisions of law underlying them interfere with the applicant's freedom of occupation. This interference is not justified.

The suitability of the challenged provisions for achieving the established legitimate aims (protecting the independence of active professionals) is irrelevant, since they are not, in any case, necessary for achieving them. The legislator could have chosen other means that would be equally effective without restricting the fundamental right, or restricting it less heavily. The protection of professional independence is already ensured via statutory professional duties for the lawyers and patent attorneys involved, which are less onerous for those practicing the profession than the challenged restrictions of company law. Thus, lawyers and patent attorneys, and firms of lawyers and patent attorneys formed for practicing professional activities, are prohibited from entering into any kind of association that endangers their professional independence. This alone comprehensively prohibits corporate structures which create or involve risks for the independence presumed by law for the two professions. The rules governing their professions moreover prohibit shareholders from influencing the professional activities of individual lawyers or patent attorneys. Any instructions contrary to this prohibition are void and may be disregarded. Inadmissible influencing is also a violation of professional duties that is subject to sanctions. Inter-professional collaboration between lawyers and patent attorneys does not create any specific risks justifying additional interference with the freedom of occupation.

Less onerous but equally suitable means are also available under the relevant professional rules insofar as the challenged provisions are intended to secure qualification requirements. In this regard, the comprehensive professional reservation applicable to both professional companies is already sufficient. Nor are the challenged provisions necessary to protect against actions that contravene professional rules. A

less intrusive means of ensuring this than the challenged provisions is the fact that all professionals in the company are personally bound by the relevant professional rules applicable to the company. The direct approach is moreover justified by the presumption of at least equal if not increased effectiveness.

Languages:

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



Identification: GER-2014-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 14.01.2014 / **e)** 2 BvR 1390/12 (partly separated as 2 BvR 2728/13); 2 BvR 1421/12 (partly separated as 2 BvR 2729/13); 2 BvR 1438/12 (partly separated as 2 BvR 2730/13); 2 BvR 1439/12; 2 BvR 1440/12; 2 BvR 1824/12 (partly separated as 2 BvR 2731/13); 2 BvE 6/12 (partly separated as 2 BvE 13/13) / **f)** / **g)** to be published in the Court's Official Digest / **h)** *Wertpapiermitteilungen* 2014, 650; *Europäische Grundrechte-Zeitschrift* 2014, 193; *Recht der internationalen Wirtschaft* 2014, 284; CODICES (German).

Keywords of the systematic thesaurus:

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

3.26 General Principles – **Principles of EU law.**

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

Keywords of the alphabetical index:

Manifest transgression of powers / Technical features of Outright Monetary Transactions (OMT) / European law / European monetary policy / Compatibility with primary law of the European Union / Act, *ultra vires* / Constitutional identity of the Basic Law / Structurally significant shift in the allocation of powers between the EU and the Member States / Interpretation in conformity with primary law / Integration, responsibility (*Integrationsverantwortung*).

Headnotes:

1. The question of whether the Outright Monetary Transactions (hereinafter, "OMT") Decision of the Governing Council of the European Central Bank of 6 September 2012 is compatible with primary law of the European Union is decisive for the decision of the Panel.
2. There are important reasons to assume that the OMT Decision exceeds the European Central Bank's monetary policy mandate and thus infringes the powers of the Member States, and that it violates the prohibition of monetary financing of the budget.
3. While the Panel is thus inclined to regard the OMT Decision as an *ultra vires* act, it also considers it possible that if the OMT Decision were interpreted restrictively in the light of the Treaties, conformity with primary law could be achieved.

Summary:

I. The applicants challenged, first, the participation of the German *Bundesbank* in the implementation of the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (hereinafter, "OMT Decision"), and secondly, that the German Federal Government and the German *Bundestag* failed to act regarding this Decision. The OMT Decision envisaged that the European System of Central Banks can purchase government bonds of selected Member States up to an unlimited amount if, and as long as, these Member States, at the same time, participate in a reform programme as agreed upon with the European Financial Stability Facility or the European Stability Mechanism. The stated aim of the Outright Monetary Transactions is to safeguard an appropriate monetary policy transmission and the consistency or "singleness" of the monetary policy. The OMT Decision has not yet been put into effect.

The Panel separated the matters that relate to the OMT Decision of the Governing Council of the European Central Bank of 6 September 2012, stayed these proceedings and referred several questions to the Court of Justice of the European Union for a preliminary ruling.

II. The subject of the questions referred for a preliminary ruling was in particular whether the OMT Decision is compatible with the primary law of the European Union. In the view of the Panel, there were important reasons to assume that it exceeds the European Central Bank's monetary policy mandate and thus infringes the powers of the Member States, and that it violates the prohibition of monetary

financing of the budget. While the Panel was thus inclined to regard the OMT Decision as an *ultra vires* act, it also considered it possible that if the OMT Decision were interpreted restrictively in the light of the Treaties, conformity with primary law could be achieved. The Panel decided with 6:2 votes; Justice L bbecke-Wolff and Justice Gerhardt both delivered a separate opinion.

The Panel's decision is based on the following considerations:

According to the established case-law of the Federal Constitutional Court, the Court's powers of review cover the examination of whether acts of European institutions and agencies are based on manifest transgressions of powers or affect the area of constitutional identity of the Basic Law, which cannot be transferred and is protected by Article 79.3 of the Basic Law. If the OMT Decision violated the European Central Bank's monetary policy mandate or the prohibition of monetary financing of the budget, this would have to be considered an *ultra vires* act. Pursuant to the Federal Constitutional Court's *Honeywell* decision (Federal Constitutional Court's Official Digest – *BVerfGE* 126, 286), such an *ultra vires* act requires a sufficiently qualified violation, meaning that the act of authority of the European Union must be manifestly in violation of powers, and that the challenged act entails a structurally significant shift in the allocation of powers to the detriment of the Member States.

If one assumes – subject to the interpretation by the Court of Justice of the European Union – that the OMT Decision is to be qualified as an independent act of economic policy, it clearly violates this distribution of powers. Such a shifting of powers would also be structurally significant. Should the OMT Decision violate the prohibition of monetary financing of the budget (Article 123 of the Treaty on the Functioning of the European Union), this, too, would have to be considered such a transgression of powers. The existence of an *ultra vires* act as understood above creates an obligation of German authorities to refrain from implementing it and a duty to challenge it. These duties can be enforced before the Constitutional Court at least insofar as they refer to constitutional organs. It is derived from the responsibility with respect to integration that the German *Bundestag* and the Federal Government are obliged to safeguard compliance with the integration programme and, in case of manifest and structurally significant transgressions of powers by European Union organs, to actively pursue the goal to reach compliance with the integration programme. They can retroactively legitimise the assumption of powers by initiating a corresponding change of primary law, and

by formally transferring the exercised sovereign powers in proceedings pursuant to the second and third sentence of Article 23.1 of the Basic Law. However, insofar as this is not feasible or wanted, they are generally obliged within their respective powers, to pursue the reversal of acts that are not covered by the integration programme, with legal or political means, and – as long as the acts continue to have effect – to take adequate precautions to ensure that the domestic effects remain as limited as possible.

A violation of these duties violates individual rights of the voters that can be asserted with a constitutional complaint. According to the established case-law of the Panel, the first sentence of Article 38.1 of the Basic Law is violated if the right to vote is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people. On the other hand, the first sentence of Article 38.1 of the Basic Law does not entail a right to have the legality of decisions taken by a democratic majority reviewed by the Federal Constitutional Court. *Vis-à-vis* manifest and structurally significant transgressions of the mandate by the European institutions, the safeguard provided by the first sentence of Article 38.1 of the Basic Law also consists of a procedural element: In order to safeguard their democratic influence in the process of European integration, citizens who are entitled to vote generally have a right to have a transfer of sovereign powers only take place in the ways envisaged, which are undermined when there is a unilateral usurpation of powers. A citizen can therefore demand that the *Bundestag* and the Federal Government actively deal with the question of how the distribution of powers can be restored, and that they decide which options they want to use to pursue this goal. An *ultra vires* act can further be the object of *Organstreit* proceedings [proceedings relating to disputes between constitutional organs].

Subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with primary law; another assessment could, however, be warranted if the OMT Decision could be interpreted in conformity with primary law. Whether the OMT Decision and its implementation could also violate the constitutional identity of the Basic Law is currently not clearly foreseeable and depends, among other factors, on the content and scope of the OMT Decision as interpreted in conformity with primary law.

In their respective separate opinions, Justice Lübbecke and Justice Gerhardt both held that the

constitutional complaints and the application in the *Organstreit* proceedings, in so far as they relate to the OMT Decision, were inadmissible.

Languages:

German; English (translation by the Court).



Identification: GER-2014-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 15.01.2014 / **e)** 1 BvR 1656/09 / **f)** Tax on secondary residences / **g)** to be published in the Court's Official Digest / **h)** *Deutsches Steuerrecht* 2014, 420; *Städte- und Gemeinderat* 2014, no. 4, 33; *Wertpapiermitteilungen* 2014, 669; *Deutsche Wohnungswirtschaft* 2014, 108; *Höchstrichterliche Finanzrechtsprechung* 2014, 366; *Verwaltungs-rundschau* 2014, 138; CODICES (German).

Keywords of the systematic thesaurus:

- 1.4.3.1 Constitutional Justice – Procedure – Time-limits for instituting proceedings – **Ordinary time-limit.**
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

Keywords of the alphabetical index:

Tax, economic capacity / Expected level of care when lodging constitutional complaints / Degressive tax scale.

Headnotes:

1. Where a degressive tax scale for secondary residences is not justified by sufficiently weighty factual reasons, it violates the requirement to tax according to economic capacity derived from the right to equality under Article 3.1 of the Basic Law.
2. When lodging constitutional complaints, a person has regularly exercised a reasonable level of care when he or she has allowed a 20-minute safety margin before the expiry of the time-limit in excess of the expected time needed

for the transmission of the briefs to be faxed, including annexes. This safety margin also applies when sending a fax after a weekend or a public holiday.

Summary:

I. The City of Konstanz, the defendant of the initial proceedings, imposed a byelaws-based tax on secondary residences on the applicant for the years 2002 to 2006. The tax scales are based on the annual rental expense as a basis of tax assessment and generalise the tax amount by establishing five (1989 Byelaw on the Taxation on Secondary Residences) or eight (2002/2006 Byelaws on the Taxation on Secondary Residences) rental expense groups respectively. In relation to the rental expense, the specific design of the tax scales leads to an overall degressive tax scheme. The absolute amount of the tax on secondary residences increases gradually as the annual rent increases. However, as rental expenses increase, the tax rate resulting from the rental expense together with the tax amount decreases across all tax brackets not only within the respective bracket.

From 1 January 2002 to 31 August 2006, the applicant occupied a secondary residence within the municipality of Konstanz, which his parents had provided to him. The defendant imposed a tax on secondary residences on the applicant in the amount of (most recently) EUR 2,974.32 for this time period. Both the objection lodged and the action brought against the imposition of the tax were unsuccessful.

II. The Federal Constitutional Court decided that the constitutional complaint was admissible and, in essence, well-founded. The degressive design of the tax scales for secondary residences as well as the decisions of the defendant and the regular courts violate Article 3.1 of the Basic Law.

The decision is based on the following considerations:

The applicant lodged the constitutional complaint after the respective time limit had expired. However, he was prevented from observing the time limit without fault of his own, as the fax line of the Federal Constitutional Court was busy between the first transmission attempt at 22:57 and 24:00 hours on 29 June 2009. Therefore, the applicant must be reinstated to his former position on the basis of his timely application.

The degressive tax scale in the Byelaws on the Taxation on Secondary Residences from 1989, 2002 and 2006 violates the right to equality of Article 3.1 of the Basic Law in its manifestation as a requirement to tax according to economic capacity.

Being a local expenditure tax within the meaning of the first sentence of Article 105.2a of the Basic Law, the tax on secondary residences must satisfy the requirement to tax according to economic capacity derived from the general principle of equality. The essential characteristic of an expenditure tax is to target the economic capacity reflected in the use of the income; the economic capacity is reflected by the respective rental expense, which is used as a basis of assessment for the tax on secondary residences. The degressive tax scale leads to unequal treatment of the taxpayers, as it places a higher burden, as a percentage, on taxpayers who have less economic capacity than those who have greater economic capacity. This is the case because the bracket tariff results largely in a decreasing tax rate as rental expenses increase.

Degressive tax scales are not generally prohibited, because the legislator is not obliged to implement the capacity principle in a pure manner and without exception. However, with respect to the justification of exceptions, the legislator is bound by limits which go beyond the prohibition of arbitrariness imposed by the capacity principle as a substantive measure of equality. In this respect, the Federal Constitutional Court is merely called upon to examine whether the legislator has exceeded the constitutional limits of its discretion, not whether it has found the most appropriate or most equitable solution.

The unequal treatment caused by the degressive tax scales is no longer justified in the case at hand. Categorisation and simplification requirements may generally constitute objective reasons for a limitation of taxation according to capacity. However, the overall degressive development of the tax scale, that is, the degressive development across different brackets, is, from the outset, unsuitable for simplification. Nor do steering purposes justify unequal treatment in the present case.

The Byelaws on the Taxation of Secondary Residences from the years 1989, 2002 and 2006 are therefore null and void. The challenged assessments of the defendant and the decisions by the Administrative Court and the Higher Administrative Court are reversed. The matter is remitted to the Higher Administrative Court for a decision on the costs of the proceedings.

Languages:

German; English press release on the Court's website; English (translation by the Court is being prepared for the website).



Identification: GER-2014-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 12.02.2014 / **e)** 1 BvL 11/10, 1 BvL 14/10 / **f)** / **g)** to be published in the Court's Official Digest / **h)** *Steuer-Eildienst* 2014, 196; *Gewerbearchiv* 2014, 223; *Zeitschrift für die Anwaltspraxis* EN-no. 192/2014; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Number-of-units taxation standard / Case-law, change, transition period for the legislator / Amusement tax on gambling machines.

Headnotes:

1. Decision regarding the standards for applying the general principle of equality (Article 3.1 of the Basic Law) to the taxation of slot machines.
2. The Federal Constitutional Court may order that provisions it declared incompatible with the Basic Law continue to apply, if there are constitutional concerns that warrant such a decision.
3. The legislator could only assume that its respective tax law requiring the number-of-units standard complied with the Federal Administrative Court's case-law until this case-law changed; the legislator has to be granted a period of approximately six months for reassessing the situation and adapting its regulations.

Summary:

I. Parties to the initial proceedings 1 BvL 11/10 are a Bremen operator of a gambling hall and the Tax Office. They argue about the amount of amusement tax due between December 2007 and February 2009. The operation of coin slot machines was subject to amusement tax pursuant to the Bremen amusement

tax law in force at the relevant time. The taxation was based on the number of gaming machines. Since 1 January 2010, the law has been changed; the tax is now assessed on the basis of a percentage of the amount brought in by the gaming machines.

Parties to the initial proceedings 1 BvL 14/10 are a Saarland operator of a gambling hall and the mayor of the municipality in which the gambling hall is located. They argue about the amount of amusement tax due between January and December 2007. Operating gaming machines in gambling halls was subject to an amusement tax under the Saarland entertainment tax law applying during the relevant time. The amount of the tax could be set by municipal statutes up to a statutory maximum. Since 1 March 2013, the tax is assessed on the basis of a percentage of the amount brought in by the gaming machines.

II. The Federal Constitutional Court decided that the number-of-units taxation of the former Bremen and Saarland amusement tax laws for coin slot machines is unconstitutional. The former rules could only continue to apply until the legislator had to recognise that, due to the change in the Federal Administrative Court's case-law in April 2005, a number-of-units taxation standard is unconstitutional. An approximately six-month deadline for transition had to apply.

The decision is based on the following considerations:

§ 3.1 of the Bremen Amusement Tax Act and § 14.1 of the Saarland Amusement Tax Act in the respective former versions violate – insofar as they relate to coin slot machines – the general principle of equality (Article 3.1 of the Basic Law). The Federal Constitutional Court has already defined the guidelines for applying the general principle of equality to the tax on gaming machines.

The referred provisions do not stand up to a review under constitutional law. There is no viable justification for the use of a number-of-units taxation standard instead of a standard that reflects the amusement expenses of each player.

For the following reasons, the referred provisions can only be applied until 31 December 2005:

The unconstitutionality of a legal provision generally renders it void. However, this usually does not apply if it is Article 3.1 of the Basic Law that is violated, because the legislator has different ways to remedy the constitutional violation. In these cases, the Constitutional Court usually declares the provision incompatible with the Basic Law. The Federal

Constitutional Court may order that provisions it declared incompatible with the Basic Law continue to apply, if there are constitutional concerns that warrant such a decision.

Arguments for having the contested provisions apply until 31 December 2005 are the need of the Free Hanseatic City of Bremen and the Saarland to be able to reliably plan their finances and their budgets, as well as the fact that the application of the number-of-units standard burdens the operators relatively little. The unconstitutional equal treatment under their tax rates does not necessarily disadvantage them, but could also result in relatively favourable taxation.

However, the legislator could only assume that their tax laws requiring the number-of-units standard complied with the Federal Administrative Court's case-law until this case-law changed with the Judgment of 13 April 2005. After this event, the legislator had reason to examine whether the new principles established by the Federal Administrative Court required a different assessment of its respective tax law. This was not done, even though it was possible and reasonable for both the Free Hanseatic City of Bremen and the Saarland to react within about six months to the Federal Administrative Court's change in case-law.

Languages:

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



Identification: GER-2014-1-008

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 26.02.2014 / **e)** 2 BvE 2/13, 2 BvE 5/13, 2 BvE 6/13, 2 BvE 7/13, 2 BvE 8/13, 2 BvE 9/13, 2 BvE 10/13, 2 BvE 12/13, 2 BvR 2220/13, 2 BvR 2221/13, 2 BvR 2238/13 / **f)** Three-percent electoral threshold / **g)** to be published in the Court's Official Digest / **h)** *Neue Juristische Wochenschrift* 2014, 619; *KommunalPraxis Wahlen* 2014, 28; *Europäische Grundrechte-Zeitschrift* 2014, 226; *Deutsches Verwaltungsblatt* 2014, 507; *Neue Zeitschrift für Verwaltungsrecht* 2014, 439; CODICES (German).

Keywords of the systematic thesaurus:

- 3.3 General Principles – **Democracy**.
- 4.5.10 Institutions – Legislative bodies – **Political parties**.
- 4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament**.
- 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.
- 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

Keywords of the alphabetical index:

Political parties, equal opportunities / Three-percent electoral threshold / Safeguarding the functionality of the parliament / Strict constitutional review.

Headnotes:

1. Under the current legal and factual circumstances, the serious interference with the principles of electoral equality and equal opportunities of political parties which the three-percent threshold entails cannot be justified.
2. A different constitutional assessment may be warranted if the conditions change significantly. While the legislator, when observing and assessing the current circumstances, as it is obliged to, is not prevented from already considering precisely foreseeable future developments, they can only be accorded significant importance if, due to sufficiently reliable factual evidence, the future development can already at present be reliably predicted.

Summary:

I. The *Organstreit* proceedings [proceedings relating to disputes between constitutional organs] and the constitutional complaints challenge § 2.7 of the European Elections Act, which provides for a three-percent electoral threshold for elections to the European Parliament. This provision was inserted by the Fifth Act amending the European Elections Act of 7 October 2013. In European law, the so-called Direct Elections Act requires that the members of the European Parliament be elected in each Member State under the system of proportional representation. Subject to the other provisions of this Act, the electoral procedure is governed in each Member State by its national provisions. With Judgment of 9 November 2011, the Federal Constitutional Court declared the five-percent electoral threshold, which applied to the 2009 European elections, incompatible with Articles 3.1 and 21.1 of the Basic Law and therefore void.

II. The Court decided that the applications in the *Organstreit* proceedings, to the extent they were admissible, and the constitutional complaints were successful. It held that under the current legal and factual circumstances, the three-percent electoral threshold in the law governing European elections violated the principles of electoral equality (Article 3.1 of the Basic Law) and equal opportunities of political parties (Article 21.1 of the Basic Law).

The decision is based on the following considerations:

The Direct Elections Act provides a legal framework for the adoption of national electoral law, which is, however, subject to the constitutional commitments of the respective Member State. Neither the wording nor the interpretation of the Direct Elections Act allows the conclusion that the possibility to impose a threshold of up to 5% of the votes cast under the Direct Elections Act implies, on its own, that this would also be permissible under the constitutional law of the respective Member States. The standards underlying the Judgment of 9 November 2011 were also applicable in the present proceedings.

The principle of electoral equality, which follows for the election of the German Members of the European Parliament from Article 3.1 of the Basic Law, safeguards the equality of citizens which the principle of democracy presupposes, and constitutes one of the essential foundations of the state order. From this principle, it follows that each electorate's vote must generally count the same and have the same legal chance of success. In proportional representation, this principle moreover requires that each voter's voice must also have the same influence on the composition of the representation that is to be elected, because the objective of the system of proportional representation is that all parties are represented in the organ to be elected in a ratio that as much as possible approximates the number of votes.

The principle of equal opportunities of political parties that follows from Article 21.1 of the Basic Law requires that, in general, each party is given the same opportunities throughout the electoral process and thus equal chances in the distribution of seats.

There is a close relationship between electoral equality and equal opportunities of the political parties. The justification of limitations under constitutional law follows the same standards. Neither principle is subject to an absolute prohibition of differentiation; however, it follows from their formal character that the legislator is only left with little leeway. Differentiations in electoral law can only be justified by constitutionally legitimised reasons which

are weighty enough to balance the principle of electoral equality. This includes in particular safeguarding the functionality of the parliament to be elected. While the current conditions are decisive, a different constitutional assessment may be warranted if the conditions change significantly.

The design of electoral law is subject to strict constitutional review. This follows from the general consideration that, in a way, the parliamentary majority acts in its own interest with regulations that affect the conditions of political competition, and that the risk that the respective parliamentary majority is guided by the aim to preserve its power, instead of considerations of the common good, is especially high in electoral law. For this reason, the constitutional review cannot be scaled back by granting leeway for forecasts that could largely be filled at will.

According to these standards, the three-percent electoral threshold (§ 2.7 of the European Elections Act) is incompatible with Articles 3.1 and 21.1 of the Basic Law. In the Judgment of 9 November 2011, the Panel found that the factual and legal circumstances that existed during the 2009 European elections, and which continued to exist, did not provide sufficient reasons to justify the serious interference with the principles of electoral equality and equal opportunities of political parties which the five-percent threshold entails. Since then, no significant change in the factual and legal circumstances has occurred.

The legislator rightly assumes that, if the government and opposition raised their profiles at the European level more aggressively, this could justify a threshold clause in the German law governing European elections, if the legal and factual conditions were comparable to those at the national level, where the formation of a stable majority is needed for the election and continued support of a viable government. While such a development of the European Parliament is aspired to politically, it is still in its infancy. An actual impact on the European Parliament's ability to function is currently not foreseeable, which means that there is no basis for the legislator's prognosis that, without the three-percent electoral threshold, an impairment of the European Parliament's functioning is looming.

III. The decision was taken with 5:3 votes; Justice Müller delivered a dissenting opinion, arguing that the Panel placed too high demands on establishing an impairment of the European Parliament's ability to function, and thus insufficiently addressed the legislature's mandate to design electoral law.

Cross-references:

- 2 BvC 4/10, 6/10 and 8/10, 09.11.2011, *Bulletin* 2011/3 [GER-2011-3-019].

Languages:

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

*Identification:* GER-2014-1-009

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 27.02.2014 / **e)** 2 BvR 261/14 / **f)** Examination of a witness by audio-visual means / **g)** / **h)** *Strafverteidiger Forum* 2014, 111; *Neue Juristische Wochenschrift* 2014, 1082; *Europäische Grundrechtezeitschrift* 2014, 269; CODICES (German).

Keywords of the systematic thesaurus:

1.5.4.7 Constitutional Justice – Decisions – Types – **Interim measures.**
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

Keywords of the alphabetical index:

Preliminary injunction, requirements / Constitutional complaints against procedural interim decisions / Witness, examination, by audio-visual means.

Headnotes:

1. Decision regarding the requirements for a preliminary injunction pursuant to § 32.1 of the Federal Constitutional Court Act.
2. Constitutional complaints against procedural interim decisions in criminal proceedings are only admissible as an exception, namely if the interim decision would lead to a lasting, irreparable legal disadvantage for the person affected.

Summary:

I. The applicant is an alleged victim of the defendant, who was accused of sexual offences and assault. She had been summoned to appear on 4 March 2014 as a witness in a criminal trial in the Waldshut-Tiengen Regional Court (*Landgericht*). The Public Prosecutor's Office accused the defendant of having on several occasions secretly slipped consciousness-altering substances into the drinks of women, including the applicant, while on dates with them, and then having sexual intercourse with them against their will. The defendant rejected these accusations, claiming that in each case sexual intercourse had been consensual.

The applicant petitioned that the witness examination be carried out via an audio-visual link pursuant to § 247a.1 of the German Code of Criminal Procedure, as otherwise there would be a risk of serious detriment to her mental well-being. She stated that she had suppressed what happened and closed it off from emotional access. The witness examination by the police had, she stated, already brought her life into disarray. Initial therapeutic progress may be put at risk, she stated, if she was again confronted with the accused in the same room or had to describe what allegedly happened, even if the general public were excluded from the principal proceedings. This would, she stated, be tantamount to reliving the experience with spectators.

In its decision of 5 February 2014, the Regional Court rejected this petition. The applicant filed a constitutional complaint against this decision, linking the complaint with an application for the granting of a preliminary injunction.

II. Via a preliminary injunction until a decision is made in the principal proceedings, the Third Chamber of the Second Panel of the Federal Constitutional Court has forbidden the Waldshut-Tiengen Regional Court to examine the witness unless this examination is carried out by audio-visual means. The Chamber based its decision on a consideration of consequences, namely that carrying out the examination in the courtroom would run the risk of an irreparable legal detriment if, as claimed by the applicant, direct confrontation with the defendant would actually lead to re-traumatisation.

The decision is based on the following considerations:

Under § 32.1 of the Federal Constitutional Court Act, the Federal Constitutional Court may in a dispute deal with a matter provisionally via a preliminary injunction if this is urgently needed to avert serious disadvantages, prevent imminent violence, or for

another important reason urgently needed in the interest of the common good. In general, the reasons claimed for the unconstitutionality of the sovereign act being challenged do not come into consideration here, unless the constitutional complaint was inadmissible from the outset or clearly unfounded. If the outcome is open, the Federal Constitutional Court must balance the consequences which would ensue if the preliminary injunction were not granted but the constitutional complaint were to be successful against the disadvantages which would be likely to accrue were the desired preliminary injunction to be granted but the constitutional complaint were to be rejected.

The constitutional complaint is neither inadmissible from the outset nor clearly unfounded.

It appears that it cannot be ruled out that the Regional Court has overlooked the significance and scope of the applicant's fundamental right to physical integrity under the first sentence of Article 2.2 of the Basic Law. In the present case, there is reason to believe that the Regional Court reached its decision by considering the factors in the interests of the accused and of criminal justice, without being able reliably to consider the opposing interests of the applicant at all. In view of the specific indications of post-traumatic stress disorder as attested by a medical report and a report by the safe house for women and children, in which attention is explicitly drawn to the risk of "long-term mental destabilisation" in the event of a direct examination, the Regional Court should not have referred simply to what is, in its opinion, the not clearly established risk to the mental health of the applicant. One ought to be able to assume that the court was obliged to remove any existing doubts as to the extent of the imminent detriment and the degree of danger of its being realised by means of additional questioning of the attending doctor or calling on an expert witness, taking into account the applicant's individual stress factor, so as to be able to make its decision on the basis of considerations with a sound foundation in fact.

Nor does the violation claimed by the applicant of the prohibition of objective arbitrariness under Article 3.1 of the Basic Law appear, according to the applicant's testimony, to be clearly ruled out. If the court's decision were to have been affected by an assessment based on inadequate technical means, this would constitute an extraneous consideration, which would in no way be legally justifiable without representing a culpable act on the part of the court. Insofar, and regardless of the specific circumstances, the prospects for success of the constitutional complaint remain open.

The reasons in favour of granting a preliminary injunction predominate in the considerations thus rendered necessary. Were the injunction not to be granted, but the constitutional complaint subsequently held to be well-founded, the examination of the applicant in the presence of the accused and the necessary other persons could have been carried out in the meantime. This risk of an irreparable legal disadvantage is not outweighed by the disadvantages that would accrue if a preliminary injunction were to be granted but the constitutional complaint were to fail in the principal proceedings.

Languages:

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



Identification: GER-2014-1-010

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 06.03.2014 / **e)** 1 BvR 3541/13, 1 BvR 3543/13, 1 BvR 3600/13 / **f)** / **g)** / **h)** *Wertpapiermitteilungen* 2014, 766; *Neue Zeitschrift für Kartellrecht* 2014, 191; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Action, civil, Public Prosecutor, files, investigation, use / "Double door model" (*Doppeltürmodell*) / Protection, trade and business secrets / Right to informational self-determination / Use of transmitted files on the basis of a balancing of interests / Files, access, plaintiff.

Headnotes:

1. The use of the Public Prosecutor's investigation files in antitrust proceedings in a civil action pursuant to § 273.2 no. 2 of the Code of Civil Procedure and to § 474 and the first sentence of § 477.4 of the Code of Criminal Procedure does not violate fundamental rights.
2. The use of the so-called "double door model" (*Doppeltürmodell*), when applying § 299.1 of the Code of Civil Procedure leaves the Court some leeway to balance the affected interest with regard to granting access to the requested files.

Summary:

I. The Third Chamber of the Federal Constitutional Court's First Panel did not admit the constitutional complaints of several companies that used to belong to a cartel of European elevator manufacturers. The constitutional complaints challenged that the public prosecutor's investigation files, which *inter alia* contained confidential information from the antitrust proceedings, had been used in a lawsuit for damages against the applicants.

II. The Chamber did not admit the constitutional complaints because the questions they raised had already been resolved on a fundamental level, and the constitutional complaints were unfounded according to these standards. In particular, there was no violation of the protection of trade and business secrets deriving from Article 12.1 of the Basic Law.

The Higher Regional Court interpreted the relevant provisions of criminal and civil procedure as meaning that, as a general rule, the prosecutor's office which is asked by a court for access to files only examines its competence on an abstract level. The Court held that neither the applicant's references to an impending violation of the protection of trade and business secrets and the right to informational self-determination, nor the fact that the investigation files contained information from leniency applications and the confidential decision by the European Commission, had to create a specific cause for the prosecutor's office to further examine the permissibility of the transmission. It was the Regional Court requesting the access to files that was responsible for the permissibility of the transmission. Having received the investigation files, but before granting access to them, the Regional Court would have to balance the affected interests of the applicants and of the plaintiffs suing for damages.

This interpretation of the criminal and civil procedural provisions is not objectionable under the Constitution. In the case at hand, the interference with the protection of trade and business secrets deriving from Article 12.1 of the Basic Law by granting access to the files is not disproportionate.

According to the comprehensible interpretation of the Higher Regional Court, the interplay of criminal and civil procedure is based on the concept that the court requesting access to files balances the affected interests, taking into account the legitimate interests of the applicants, and thus examines whether information from the requested investigation files may be used in civil proceedings – and thus for different purposes. This corresponds to the "double door model" (*Doppeltürmodell*, cf. the Federal Constitutional Court's Official Digest – BVerfGE 130, 151), which, as a model for the exchange of data for official duties, requires an individual legal basis for each of the corresponding interferences. The provisions of the Code of Criminal Procedure provide the basis for the transmission, while the Code of Civil Procedure provides the basis for the request and the further use in civil proceedings.

According to the interpretation of these provisions by the Higher Regional Court – which corresponds to the legal view of the requesting court – the Regional Court can only use the transmitted files on the basis of a balancing of interests; under this balancing, the fundamental rights of the applicants can and must be sufficiently taken into account. This balancing must comprehensively and as a whole take into account how the legal interests of all parties are affected, and what the respective advantages and disadvantages are. If, like in the case at hand, the legislator leaves the conflict of legal interests to the court to balance without setting any criteria for this, the court must ensure that it describes in its decision the criteria that informed its balancing of interests in a way that significantly helps to specify the balancing programme, to rationalise the balancing process, and to ensure the accuracy of the balancing result. It is recognised under the law of civil procedure that the conflicting parties do not have an absolute right to access the files of other authorities that are used in the proceedings. If the transmitting authority limits the plaintiffs' access to the files completely or in part, this has the consequence that, due to Article 103.1 of the Basic Law, the part of the transmitted file to which no access can be granted cannot be used in civil proceedings. If the Higher Regional Court thus requires the Regional Court to conduct a balancing of interests before potentially granting the plaintiffs in the proceedings for damages access to the files, this forces the court to consider all constitutionally relevant issues under ordinary law.

Languages:

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

*Identification:* GER-2014-1-011

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 17.03.2014 / **e)** 2 BvR 736/13 / **f)** / **g)** / **h)** Wertpapiermitteilungen 2014, 768; CODICES (German).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
4.16 Institutions – **International relations**.

Keywords of the alphabetical index:

Public international law and foreign relations / Act, sovereign / Enforcement, judgments against foreign states / Immunity, act, sovereign / Sovereignty, interference with.

Headnotes:

Germany does not have jurisdiction to rule on a case in which the Hellenic Republic retained withholding tax from a Greek national whom it employed in Germany.

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 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 had 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.

II. The Federal Constitutional Court decided that the constitutional complaint was admissible and well-founded.

The decision is based on the following considerations:

The constitutional complaint is admissible, because even though the applicant is a foreign state, it can claim a violation of the second sentence of Article 101.1 of the Basic Law, which is a right that is equivalent to a fundamental right. Since this right has less to do with securing the autonomy of the individual than with minimum requirements for procedural justice, it must apply to both domestic and foreign legal persons under public law, including foreign states.

The constitutional complaint is also well-founded. The contested decisions violate the principle of state immunity (Article 25 of the Basic Law) and thus the applicant's right to a lawful judge under the second sentence of Article 101.1 of the Basic Law.

The jurisprudence of the Federal Constitutional Court distinguishes between the immunity of sovereign acts (as universally recognised under public international law), and non-sovereign acts of foreign states. In line with general international practice, the Federal Constitutional Court considers sovereign acts of foreign states (so-called *acta jure imperii*) to always be covered by state immunity. This applies also to the execution of judgments when foreign assets that serve sovereign purposes are to be seized in Germany. Since public international law does not divide government activities into sovereign and non-sovereign acts, this distinction has to be made pursuant to national law. The use of national law is only limited where the generally recognised range of governmental activity is affected.

In the present case, such an *actus jure imperii* exists even pursuant to the German legal system. Subject of the dispute is the applicant's taxation by the Greek government, not the failure to fully pay the salary of an employee. Even under national law, the imposition of taxes is a sovereign activity of the state. The retention and payment of payroll tax by the employer is considered a public service mission by German law. It can also not be assumed that the applicant had submitted to German jurisdiction and thus waived its sovereign immunity.

In so far as the labour courts ruled in the present case on the taxation of a Greek national by the Hellenic Republic, they ruled at the same time on the substantive legality of the exercise of foreign state power in Germany, and thus disregarded the Hellenic Republic's sovereign immunity. Decisions taken in violation of the principle of state immunity are void. This must also apply to granting an order for enforcement of such a judgment.

In the case at hand, the violation of the principle of sovereign immunity also entails a violation of the applicant's right to a lawful judge (second sentence of Article 101.1 of the Basic Law), because the courts fundamentally misunderstood the meaning and scope of this provision. Since the principle of sovereign immunity prohibits from the outset the judicial assessment of the sovereign acts of foreign states, a judicial decision is seriously flawed and thus arbitrary at least in cases where measures are concerned which belong to the core area of internationally recognised government activities. This is the case in the present proceedings. For these reasons, the Federal Constitutional Court reversed the challenged decisions and remitted the case to the Munich Labour Court.

Cross-references:

- BvR 736/13, 16.10.2013, *Bulletin* 2013/3 [GER-2013-3-025] – application for a preliminary injunction in the same case.

Languages:

German.



Identification: GER-2014-1-012

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 18.03.2014 / **e)** 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12, 2 BvE 6/12 / **f)** / **g)** to be published in the Court's Official Digest / **h)** *Wertpapiermitteilungen* 2014, 650; *Europäische Grundrechte-Zeitschrift* 2014, 193; *Recht der Internationalen Wirtschaft* 2014, 284; CODICES (German).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states**.
5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

Keywords of the alphabetical index:

Responsibility, budgetary, German *Bundestag* / Relationship, legitimising, between the European Stability Mechanism and parliament / *Ultra vires* act / Constitution, identity / Responsibility with respect to integration (*Integrationsverantwortung*) / Budget, right to decide / German *Bundestag*, rights / Inter-governmental governance, system / Economic policy.

Headnotes:

1. The limitation of liability pursuant to Article 8.5 of the Treaty establishing the European Stability Mechanism in conjunction with Annex II of the Treaty, the joint interpretative declaration of the parties to the ESM Treaty of 27 September 2012, and the identical unilateral declaration of the Federal Republic of Germany sufficiently ensure that the Treaty establishing the European Stability Mechanism does not establish unlimited payment obligations.
2. Considering its assent to Article 4.8 of the Treaty establishing the European Stability Mechanism, the legislator is obliged to make comprehensive arrangements under budgetary law to ensure that the Federal Republic of Germany can fully and in time meet capital calls that are made according to the Treaty establishing the European Stability Mechanism.
3. In the interpretation given to them by the declarations of 27 September 2012, Articles 32.5, 34 and 35.1 of the Treaty establishing the European Stability Mechanism do not stand in the way of sufficient parliamentary control of the European Stability

Mechanism by the German *Bundestag*, and do not prevent providing comprehensive information to it.

4. The German *Bundestag*'s overall budgetary responsibility requires that the legitimising relationship between the European Stability Mechanism and parliament is not interrupted under any circumstances. Since the accession of new members pursuant to Article 44 in conjunction with Article 5.6.k of the Treaty establishing the European Stability Mechanism requires a unanimous decision by the Board of Governors, it is possible to ensure that Germany's present veto position, which is required under constitutional law, will also be maintained under changed circumstances.

Summary:

I. The *Organstreit* proceedings and the constitutional complaints challenge German and European legislation dealing with the establishment of the European Stability Mechanism (hereinafter, "ESM") and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact), measures of the European Central Bank (unless separated under procedural law) and, in this context, certain omissions of the federal legislator and the Federal Government.

By judgment of 12 September 2012, the Panel refused under certain stipulations to issue a temporary injunction against the ratification of the ESM Treaty and the Fiscal Compact and against the national Acts approving and accompanying the Treaties. According to the stipulations, it had to be ensured that the amount of all payment obligations of the Federal Republic of Germany under the ESM Treaty remain limited to its share in the authorised capital stock of the ESM, which amounts to EUR 190.0248 billion, and that the provisions on the inviolability of all official papers and documents of the ESM and the professional secrecy of all persons working for it do not stand in the way of the comprehensive information of the *Bundestag* and of the *Bundesrat*.

The ESM Members agreed on a joint declaration, which was made on 27 September 2012. At the same time, the Federal Republic of Germany issued a unilateral declaration with the same content.

II. The Federal Constitutional Court held that the constitutional complaints and the *Organstreit* proceedings lodged against the establishment of the European Stability Mechanism, the Fiscal Compact and the national Acts of Assent and accompanying

legislation, against the Act approving Article 136.3 of the Treaty on the Functioning of the European Union, the TARGET2 system, and the so-called Six-pack are partly inadmissible and for the remainder unfounded.

The decision is based on the following considerations:

The constitutional complaints and the *Organstreit* proceedings are, in part, inadmissible.

The constitutional complaints are inadmissible to the extent that the applicants challenge, with reference to the first sentence of Article 38.1 of the Basic Law, the unconstitutionality of the ESM Financing Act because of a violation of formal requirements for the legislative process, the functional allocation of competences between the plenary of the *Bundestag*, its committees and other subsidiary bodies, and the fact that no two-thirds majority is required for particularly important measures. Outside of *ultra vires* situations, these issues are not covered by the substantive content of the right to vote, which is protected by the first sentence of Article 38.1 of the Basic Law.

The constitutional complaints are further inadmissible to the extent that the complaints challenge the establishment and implementation of the TARGET2 system as well as various omissions of German constitutional organs in this context. The applicants have not sufficiently substantiated how this could lead to a violation of the overall budgetary responsibility of the *Bundestag* and thus of their own rights under the first sentence of Article 38.1 of the Basic Law.

The constitutional complaints are further inadmissible to the extent that they challenge the application of certain secondary legislation of the European Union (so-called Six-pack) and of the Euro Plus Pact in Germany. Their allegations neither suffice to substantiate that the right to vote is eroded because the German *Bundestag* loses indispensable powers to decide, nor to substantiate a possible right to a declaration that the European Union acted *ultra vires*.

The application in *Organstreit* proceedings is only admissible to the extent that the applicant asserts that through the challenged Acts, the German *Bundestag* divests itself of its overall budgetary responsibility; as a parliamentary group of the German *Bundestag*, it is entitled to make such an application.

To the extent that they are admissible, the constitutional complaints and the *Organstreit* proceedings are unfounded. However, considering its assent to Article 4.8 of the ESM Treaty, the legislator is obliged to make comprehensive

arrangements under budgetary law to ensure that the Federal Republic of Germany can fully and in time meet capital calls that are made according to the Treaty establishing the European Stability Mechanism.

As a right that is equal to a fundamental right, the right to vote, which is protected by Article 38.1 of the Basic Law, guarantees the self-determination of the citizens and guarantees free and equal participation in the exercise of public power in Germany. Its guarantees include the principles of the requirement of democracy within the meaning of Article 20.1 and 20.2 of the Basic Law; Article 79.3 of the Basic Law protects these principles as the identity of the Constitution even against interference by the constitution-amending legislator. In view of this, the legislator must take sufficient measures to be able to permanently meet its responsibility with respect to integration (*Integrationsverantwortung*). In particular, it may not relinquish its right to decide on the budget, not even in a system of intergovernmental governance.

The principle of democracy requires that the German *Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made, including those with regard to international and European liabilities. Furthermore, the principle of democracy requires that the German *Bundestag* is able to have access to the information which it needs to assess the relevant background and consequences of its decision. It is not from the outset an infringement of the democratic principle if the legislator is restricted to a particular budget and fiscal policy. However, the Federal Constitutional Court must ensure that the democratic process remains open, that legal re-evaluations may occur on the basis of other majority decisions, and that an irreversible legal prejudice to future generations is avoided.

According to these standards, the constitutional complaints and the *Organstreit* proceedings are unsuccessful. The Act of Assent to the Amendment of Article 136 of the Treaty on the Functioning of the European Union does not violate the rights of the applicants under Articles 38.1, 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law. In particular, Article 136.3 of the Treaty on the Functioning of the European Union does not lead to a loss of the German *Bundestag's* budget autonomy, but merely enables the Member States of the euro currency area to establish a stability mechanism to grant financial assistance on the basis of an international agreement; to this effect, Article 136.3 TFEU confirms that the Member States remain the masters of the Treaties.

Ultimately, the provisions on the integration of the German *Bundestag* in the decision processes of the ESM are also compatible with the constitutional requirements. The *Bundestag's* rights of participation are sufficient – at least when interpreted in conformity with the Constitution with regard to the national procedure before decisions pursuant to the fourth sentence of Article 8.2 of the Treaty establishing the European Stability Mechanism. The rights of information of the German *Bundestag* satisfy the requirements of the second sentence of Article 23.2 of the Basic Law. Under the point of view of democratic legitimation of the ESM, which Article 20.1 and 20.2 of the Basic Law requires, there are no concerns against Germany's representation in these bodies either.

Finally, the Act of Assent to the Fiscal Compact does not violate Articles 38.1, 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law either. Its essential content goes along with the requirements of constitutional law and of European Union law. The Treaty grants the bodies of the European Union no powers which affect the overall budgetary responsibility of the German *Bundestag* and does not force the Federal Republic of Germany to make a permanent commitment regarding its economic policy that can no longer be reversed.

Cross-references:

- 2 BvR 1390/12, 1421/12, 1438/12, 1439/12, 1440/12 and 2 BvE 6/12, 12.09.2012, *Bulletin* 2012/3 [GER-2012-3-022];
- 1 BvR 2998/11 and 1 BvR 236/12, 14.01.2014, *Bulletin* 2014/1 [GER-2014-1-004].

Languages:

German, English (translation by the Court).



Identification: GER-2014-1-013

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 25.03.2014 / **e)** 1 BvF 1/11, 1 BvF 4/11 / **f)** ZDF State Treaty / **g)** to be published in the Court's Official Digest / **h)** *Kommunikation und Recht* 2014, 334; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Public broadcasting corporations, supervisory bodies, institutional composition / Principle of ensuring diversity / Principle of *Staatsferne* (“detachment from the state”, or independence from state intervention) / Public broadcasting corporations / Dual public and private broadcasting system / Content, diversity / Public broadcasting, state authority, detachment.

Headnotes:

1. Pursuant to the second sentence of Article 5.1 of the Basic Law, the institutional composition of the supervisory bodies of public broadcasting corporations is to be guided by the principle of ensuring diversity. This means, that persons with as wide a variety of perspectives and horizons of experience as possible, from all areas of the community, are to be included.
 - a. In the composition of the collegiate bodies, the legislator must see to it that the widest possible variety of groups are represented and that, apart from major associations which determine public life, smaller groupings are included in an alternating manner, and perspectives which are not organised in a coherent structure also be presented.
 - b. In order to ensure diversity, the legislator may, apart from members who are nominated by specific groups in society, also include members of the different levels of government.
2. As an expression of the principle of ensuring diversity, the organisation of public broadcasting must adhere to the principle of *Staatsferne* (“detachment from the state”, or independence from state intervention). Accordingly, the influence of the members who are part of state authority or close to it has to be limited consistently.

- a. The total share of members who are part of state authority or close to it may not exceed a third of the statutory members of the respective body.
- b. For the rest of the members, the composition of the supervisory bodies of public broadcasting corporations have to be consistently structured in a way that is detached from state authority. Representatives of the executive may not have a controlling influence on the selection of the members who are detached from state authority; the legislator must create incompatibility regulations which ensure that on the personal level, these persons are independent from the state.

Summary:

I. The broadcasting corporation ZDF (*Zweites Deutsches Fernsehen*) is based on the Inter-state Agreement on the Establishment of the Public Corporation *Zweites Deutsches Fernsehen* (ZDF State Treaty, hereinafter, the “Treaty”), which entered into force by Acts of assent of the *Länder* (states). Apart from the *Intendant* (Director General), who, as the central organ, manages the business of the corporation and has the ultimate responsibility for the programme, the Treaty establishes two internal supervisory bodies, the Television Council and the Administrative Council. With their application for abstract judicial review proceedings, the governments of Rhineland-Palatinate and of the Free and Hanseatic City of Hamburg challenge what they regard as excessive state influence in the Television Council and the Administrative Council.

II. The Federal Constitutional Court decided that the applications were admissible and for the most part well-founded.

The decision is based on the following considerations:

The mandate contained in the second sentence of Article 5.1 of the Basic Law to guarantee broadcasting freedom is aimed at establishing a system which ensures that the diversity of existing opinions is presented in broadcasting as broadly and comprehensively as possible. It is for the legislator to create the set-up of this system, and the legislator has a broad margin of appreciation for this.

Under constitutional law, the requirements placed on the institutional composition of the broadcasting corporations must follow the aim of ensuring diversity. There is a close interaction between these requirements and the legislator's fundamental decision in favour of a dual public and private

broadcasting system. In this system, public broadcasting corporations must contribute to the diversity of content, which cannot be provided via the free market alone. The mandate of public broadcasting is not restricted to providing a minimum supply, or to filling gaps and niches that are not covered by private providers. Instead, it covers the breadth of the classical mandate of broadcasting in its entirety.

The composition of the collegiate bodies must be aimed at including persons with as wide a variety of perspectives and horizons of experience as possible, from all areas of the community. Here, the legislator must see to it in particular that not primarily official perspectives and other perspectives that are decisive for the formation of opinions in state and politics are presented. Apart from major associations which determine public life, smaller groupings which do not *per se* have access to the media, and perspectives which are not organised in a coherent structure, must, in an alternating manner, be presented as well. The fact that members are nominated according to their affiliation to specific groups in society does not mean that they are appointed as representatives of their respective specific interests. Instead, the supervisory bodies are advocates of the interest of the general public. At the same time, the organisation of public broadcasting must adhere to the principle of *Staatsferne* ("detachment from the state", or independence from state intervention), which is given concrete shape by the principle of ensuring diversity. In this context, the following restrictive provisos ensue from constitutional law:

The share of members who are part of state authority or close to it may not exceed a third of the statutory members of the respective body. The function which a member exercises determines who is deemed part of state authority or close to it. The requirements connected with ensuring diversity apply to both the selection of the members who are part of state authority or close to it, and to those who are detached from state authority. This means in particular that the different political currents and other differences in perspective, which are for instance due to the federal structure of Germany or are of a functional nature, are represented in as great a diversity as possible. Apart from this, the mandate of gender equality under the second sentence of Article 3.2 of the Basic Law must be complied with. The legislator must counteract a dominance of majority perspectives and a petrification of the composition of the broadcasting bodies. It must be ensured that all members of the supervisory bodies of the public broadcasting corporations are not bound by instructions, and that they can only be dismissed for important reasons. It is

for the legislator to set out the details, and to enact regulations which ensure a minimum of transparency with regard to the work of the supervisory bodies of public broadcasting.

For these reasons, the regulations concerning the composition of the Television Council pursuant to § 21 of the Treaty violate the second sentence of Article 5.1 of the Basic Law in several respects: The share of the members of the Television Council who are directly appointed as persons who are part of state authority or close to it exceeds the constitutional threshold of one third. Furthermore, the appointment of the members mentioned in § 21.1.r of the Treaty does not satisfy the requirements placed on an appointment of members who are detached from state authority. In addition to this, § 21.1 of the Treaty does not satisfy the requirements constitutional law places on ensuring detachment from state authority. Finally, the regulations concerning the composition of the Administrative Council pursuant to § 24 of the Treaty violate the second sentence of Article 5.1 of the Basic Law for the same reasons.

To the extent that §§ 21 and 24 of the Treaty violate the second sentence of Article 5.1 of the Basic Law, it is only established that they are incompatible with the Basic Law, connected with the order that they can be applied on a transitional basis until new legislation is enacted. The *Länder* are to enact new legislation that satisfies the requirements under constitutional law by 30 June 2015.

III. Justice Paulus delivered a dissenting opinion, stating that he disagreed with the judgment to the extent that it declares permissible under constitutional law the participation of members of the executive in the *Zweites Deutsches Fernsehen*, a broadcasting corporation which is required at the same time to be independent or at least detached from state authority.

Languages:

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



Identification: GER-2014-1-014

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 26.03.2014 / **e)** 1 BvR 3185/09 / **f)** Flash mob / **g)** / **h)** *Der Betrieb* 2014, 956; *Neue Zeitschrift für Arbeitsrecht* 2014, 493; *Zeitschrift für Tarifrecht* 2014, 262; CODICES (German).

Keywords of the systematic thesaurus:

5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike.**

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

Keywords of the alphabetical index:

“Flash mobs” / Industrial action / Specific labour-related goals (*koalitionsspezifische Zwecke*) / Collective bargaining / Industrial action, participation of third parties / Disputes, labour.

Headnotes:

Decisions by labour courts which hold that union-organised “flash mobs” accompanying a strike are permissible do not violate the freedom of association protected under Article 9.3 of the Basic Law or other rights equal to fundamental rights.

Summary:

I. During a strike in retail in 2007, the labour union – the defendant in the initial proceedings – published a virtual pamphlet asking “Do you want to take part in a flash mob?” Those interested were requested to leave their mobile phone number to alert them via text message, to engage in some “targeted shopping” together, “in a branch where workers are on strike but people who have crossed the picket line are working”, “for example like this: Many people buy a penny product at the same time and thus block the checkout area for a long time. Many people fill their shopping carts at the same time (please no fresh produce!!!) and then abandon them.”

In December 2007, the union conducted such a “flash mob” in one store of a retail company. There were about 40 to 50 participants; the event lasted between 45 and 60 minutes. The applicant is an employers’ association for the retail sector. Its legal action, aimed at prohibiting the union from calling for participation in other flash mobs such as this, did not succeed in all instances of the labour courts. The constitutional complaint challenged these decisions.

II. The Federal Constitutional Court held that the challenged decisions by the regular courts do not violate the applicant’s freedom of association protected under Article 9.3 of the Basic Law.

The decision is based on the following considerations:

The protection of Article 9.3 of the Basic Law is not limited to strikes and lockouts as the traditionally recognised forms of industrial actions. In general, Article 9.3 of the Basic Law leaves it up to the coalitions to choose the means that they consider suitable for reaching their specific labour-related goals (*koalitionsspezifische Zwecke*). The Basic Law does not prescribe how to define the conflicting fundamental rights positions in detail; it does not require an optimisation of the conditions of a dispute. Instead, controversial industrial actions are reviewed under the principle of proportionality, so that the use of industrial actions does not lead to the dominance of one side in collective bargaining. It is thus not objectionable that in this case, the Federal Labour Court was guided by the principle of proportionality.

According to these considerations, the Federal Constitutional Court cannot establish a violation of the applicant’s freedom of association by the challenged judgments. The Federal Labour Court considered, in particular, that the participation of third parties in a flash mob may increase the risk that these actions get out of control, because third parties are less likely to be influenced by the unions. It thus sets legal limits for the participation of third parties – which was indeed restricted in the case at hand. Furthermore, the flash mob must be recognisable as a union-supported industrial action, which is also important for damages that the employer may demand in case of illegal actions. In addition, the Federal Labour Court has dealt extensively with the question of effective countermeasures that an employer could use against a flash mob accompanying a strike. It is not the task of the Federal Constitutional Court to substitute its own assessment of the effectiveness of possible responses by the employers for that of the regular courts, as long as they do not subscribe to a clear error of judgment. Such an error is not evident in the case at hand. In particular, the Federal Labour Court also takes the employers’ interests into account. There are thus no concerns under constitutional law regarding the regular courts’ assessment that the exercise of property rights and a temporary closure of the store could be considered effective means of defence.

Furthermore, the applicant cannot successfully claim a violation of its fundamental rights under Article 9.3 of the Basic Law in conjunction with the second

sentence of Article 20.2 and with Article 20.3 of the Basic Law, based on the argument that the challenged judgments disregard the constitutional limits of the judicial development of the law. Due to their obligation to provide justice, the courts have to provide effective legal protection. If the statutory parameters are inadequate, the courts must use established methods for the development of the law, to deduce from the existing legal basis what applies in the specific case at hand. If the labour courts did not decide on labour disputes because of a lack of legal regulations, they themselves would act in an unconstitutional way.

There are no further concerns under constitutional law that, based on the applicable law and pursuant to detailed deductions from the principle of proportionality, the Federal Labour Court does not consider union-driven flash mobs to be generally impermissible.

Languages:

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



Hungary Constitutional Court

Important decisions

Identification: HUN-2014-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 07.03.2014 / **e)** 7/2014 / **f)** On the criticism of public figures / **g)** *Magyar Közlöny* (Official Gazette), 2013/3 / **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.**

Keywords of the alphabetical index:

Debate, public, restriction / Personality right, public figure.

Headnotes:

The provision of the new Civil Code which allows wider criticism of public figures only if it is justified by “acknowledgeable public interest” violates the freedom of speech and press.

Summary:

I. In 2013 Parliament adopted a new Civil Code (Act V of 2013). Section 2.44 of the Civil Code only allowed for wider criticism of public figures if this was justified by acknowledgeable public interest (to the necessary and proportional extent). This provision would have entered into force on 15 March 2014.

The former Parliamentary Commissioner for Fundamental Rights had concerns over the constitutionality of this provision and submitted a petition for *ex post facto* norm control. Under the provision, public figures can only be made subject to heavy criticism if the criticism does not violate the human dignity of the person concerned, if its extent is necessary and proportionate, and if the existence of “acknowledgeable public interest” can be verified.

The Commissioner contended that the requirement of having an “acknowledgeable public interest” would pose a disproportionate restriction on the free speech and press; it would not offer adequate protection for the debating of public affairs and criticism of the use of public power.

II. Although the Civil Code approaches the issue from the viewpoint of personality rights protection, the Court evaluated the contested provision from the aspect of enforcing free speech and press. The Court found that speaking about public figures is a central element of expressing political opinion. Making statements about the activities, views or credibility of those in the public eye is an essential element of discussing public affairs. In addition it is the mission of the press to control those who exercise public power, and to represent and to criticise (potentially in strong terms) the activities of the individuals and institutions that participate in the formation of public affairs. Therefore, in the field of protecting the personality of public figures, a narrower restriction of the free speech and press is considered to comply with Article IX of the Fundamental Law. Citizens and the press should be able to participate in public debate without uncertainty and fear. It would be against this interest if those who speak in public affairs had to fear the legal consequences resulting from the protection of the public figures’ personality rights. The wide range of potential indemnification payment (to be introduced by the new Civil Code) could be a significant factor deterring people from participation in public debate.

The Commissioner only challenged the condition of “acknowledgeable public interest”, deeming the other two conditions constitutional. The constitutionality of one element of a regulation cannot be assessed independently from the others, and so the Constitutional Court examined the petition with regard to all three conditions.

According to the first, free public debate may only restrict the personality rights of a public figure “to the necessary and proportional extent”. The Court held that this condition provides an adequate and necessary margin for the judiciary to elaborate the standards for setting the limits of expressing political opinions. The judiciary must, during this process, take into account that all speeches related to public affairs are under extra constitutional protection, thus, the restriction of the personality rights of public figures is considered “necessary and proportionate” to a wider extent than in the case of other persons.

According to the second condition, the boundaries of freedom of expressing political opinion should be drawn by the judiciary in a way that prevents the

violation of human dignity in the case of public figures. The Court held this condition to be compatible with Article IX of the Fundamental Law, since this can be an absolute limit on free speech only in a very narrow scope of opinions expressed that negate the foundations of human status.

Under the third condition, free public debate can be restricted in the interest of an “acknowledgeable public interest”. The Court held this condition to be unconstitutional, emphasising that free public debate is itself an “acknowledgeable public interest”. There is therefore no need to justify any further indescribable “public interest” still less the “acknowledgeable” nature of it to open the possibility of criticising public figures. The contested condition of the Civil Code would narrow in an unjustified way the scope of free speech, as criticising public figures to a wide extent would only be allowed after verifying the existence of further public interest in addition to the constant social interest related to debating public affairs. The Court repealed the text “on the basis of acknowledgeable public interest” in Section 2.44. It did not therefore enter into force on 15 March 2014.

III. Justices István Balsai, Egon Dienes-Ohm, Imre Juhász, Barnabás Lenkovics, Béla Pokol, László Salamon and Mária Szívós attached dissenting opinions to the decision.

Languages:

Hungarian.



Identification: HUN-2014-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 20.03.2014 / **e)** 8/2014 / **f)** On the interpretation of the Fundamental Law regarding foreign-currency loan contracts / **g)** *Magyar Közlöny* (Official Gazette), 2013/23 / **h)**.

Keywords of the systematic thesaurus:

1.2.1.3 Constitutional Justice – Types of claim – Claim by a public body – **Executive bodies**.
3.10 General Principles – **Certainty of the law**.
5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract**.

Keywords of the alphabetical index:

Contract, foreign currency loan / Contract, change by law.

Headnotes:

A legal regulation may, in exceptional cases, where there have been significant and unanticipated changes to the circumstances that surrounded the conclusion of the contracts amend the content of contracts that had been concluded before it came into force.

Summary:

I. The government had asked the Constitutional Court for constitutional review regarding a problem that had arisen in the context of foreign-currency loans. The petition referred to unexpected and excessive changes in the rate of exchange and increases in the instalment payment of the loans. These were now causing problems for broad swathes of society.

The government noted in its petition that the Constitutional Court must interpret the Fundamental Law against any abuse of dominant position and the protection of the rights of consumers. The government queried the constitutionality of those contractual conditions which are defined unilaterally and which cause significant disadvantage for consumers, along with the judicial verdicts which confirm them or those legal provisions which are the basis of these judgments, against the background of the above provisions of the Fundamental Law. It also asked for an interpretation from the Constitutional Court of the right to human dignity and legal certainty in order to define in which constitutional conditions existing contracts can be modified by law.

II. The Constitutional Court noted that under the Fundamental Law, the State is under an obligation to create and maintain an institutional system which protects the interests of consumers and to act against any abuse of dominant position; and to adopt legal regulations to ensure the rights of consumers. Consumer rights in private contractual relations are not enforceable directly from the Fundamental Law; intermediate legal regulations are needed. The specific features of judicial verdicts that may cause unconstitutionality (based on the provision on the protection of consumer rights) cannot be defined within the competence of the interpretation of the Fundamental Law.

It also observed that although the Fundamental Law ensures freedom of contract, this does not mean that concluded contracts can never be modified. In exceptional cases, where significant and unanticipated changes have occurred to the circumstances surrounding the conclusion of the contract, amendments can be made to the content of those contracts that had been made before the entry into force of the legal regulation concerned. The Constitutional Court explained that the requirements of legal certainty, freedom of contract and trust in the fulfilment of concluded contracts will be satisfied provided that the State only modifies the content of the contracts by law under the same conditions which must apply in cases of judicial amendment. Any amendments must take the equitable interests of both parties into account and weigh the various interests, in the light of the new circumstances.

III. Justices Imre Juhász, Barnabás Lenkovics and László Salamon attached a concurring opinion and Justice Béla Pokol attached a dissenting opinion to the decision.

Languages:

Hungarian.

*Identification:* HUN-2014-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 21.03.2014 / **e)** 9/2014 / **f)** On the unconstitutionality of continuous national security control / **g)** *Magyar Közlöny* (Official Gazette), 2014/42 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

National security control / State surveillance, continuous.

Headnotes:

Certain amendments to the legislation on national security which allowed continuous national security control and covert information-gathering for thirty days twice a year on somebody under national security control exceeded the extent of the necessary and proportional restrictions of the right to respect for private life in such circumstances and were unconstitutional.

Summary:

I. The former Parliamentary Commissioner for Fundamental Rights submitted a petition to the Constitutional Court challenging the regulations of Act LXXII of 2013 which pertained to national security control. They allowed for continuous national security control and covert information gathering for thirty days twice a year, both before the commencement of a legal relationship and during its entire term. These measures affected persons occupying important or confidential positions or applicants for them, as well as persons occupying positions within organisations which allowed them the possibility of access to information designated, at the very least, “confidential”.

II. The Constitutional Court had previously suspended the entry into force of some provisions pending its examination. In its current decision, it noted the universal right under the Constitution to respect for private and family life, home, communications and good reputation. It held that these particular amendments created a regulatory framework that allowed the observation and recording of intimate details of the life, lifestyle and connections of the person under control and his or her family. It resolved to repeal them, on the basis that they exceeded the extent of the necessary and proportional restrictions of the right to respect for private life when continuous and secret information gathering is permitted.

The Constitutional Court also declared unconstitutional the new provision which meant that somebody subject to such control had no recourse to legal remedy (in an external forum) in case of refusal of the commencement of the legal relationship which was the basis of the national security control.

III. Justices István Balsai, László Salamon and Mária Szívós attached a dissenting opinion to the decision.

Languages:

Hungarian.



Korea

Constitutional Court

Important decisions

Identification: KOR-2014-1-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 21.03.2013 / **e)** 2010Hun-Ba70, 132, 170 / **f)** On the conformity with the Constitution of Presidential Emergency Decrees / **g)** 25-1 (B), *Korean Constitutional Court Report* (Official Digest), 180/... / **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.**

3.3 General Principles – **Democracy.**

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

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

Keywords of the alphabetical index:

Presidential Emergency Decree / *Yushin* Constitution / Judicial review / Liberal democracy / Crisis, national.

Headnotes:

The national emergency right including martial law or emergency decree can be exercised only under national crisis such as war and natural disaster. The right should be asserted to protect national security and uphold basic orders of a liberal democracy. Moreover, it should be temporary and provisional because of its exceptional nature to manage the temporary emergency.

Summary:

I. Petitioner Jong-sang Oh was charged for violating the Presidential Emergency Decree no. 1 (enacted by Presidential Emergency Decree no. 1 on 8 January 1974 and repealed by Presidential Emergency Decree no. 5 on 23 August 1974, hereinafter “Decree no. 1”) at the Emergency Common Court-Martial established by the Presidential Emergency Decree no. 2 (enacted by Presidential Emergency Decree no. 2 on 8 January

1974, hereinafter, “Decree no. 2”) under the *Yushin* Constitution of 1970s (hereinafter, “*Yushin* Constitution”) and sentenced to imprisonment.

The petitioner filed for a retrial and a motion to request for the constitutional review of Decree nos. 1 and 2 at Seoul High Court. After his motion was dismissed, he filed this constitutional complaint with the Constitutional Court on 3 February 2010.

The underlying court began the retrial. The Supreme Court cleared him of charges in violation of Decree no. 1 on 16 December 2010 (Supreme Court 2010Do5986).

The rest of the petitioners were sentenced to imprisonment for violating the ‘Presidential Emergency Decree for National Security and Public Orders’ (enacted by Presidential Emergency Decree no. 9 on 13 May 1975 and repealed by Presidential Announcement no. 67 on 7 December 1979, hereinafter “Decree no. 9”) under the Constitution.

The petitioners filed for a retrial and a motion to request for the constitutional review of Article 53 of the Constitution and Decree no. 9 at the Seoul High Court and Seoul Central District Court. After their motion was dismissed, they filed the constitutional complaints on 16 February 2010 and 14 April 2010.

II. In this case, the Constitutional Court ruled unconstitutional the Presidential Emergency Decree nos. 1, 2 and 9, which invoked Article 53 of the 1970s *Yushin* Constitution (the Constitution of the Fourth Republic of Korea) that allowed for these national measures. The decrees granted extensive legislative powers to law enforcement bodies to repress citizens and the press. The measures specifically prohibited any act of denial, rejection, distortion or slander of the *Yushin* Constitution; any act of speech, suggestion, petition for revising or repealing the *Yushin* Constitution; and any act of fabrication and distribution of rumours; and tried any person who violated the Decrees by court-martial as punishment.

Constitutionality of Decree nos. 1 and 2

The preamble and the body of the Constitution emphasise the importance of a constitutional democracy, which is based on the fundamental principles of sovereignty and a liberal democracy. Constitutional democracy underlies several other constitutional principles, which set the standard not only for the constitution but also laws. Constitutional democracy also implies legislative restraint and the direction of policy-making, which government agencies and citizens shall respect.

Strengthening the Constitution through revision or repeal should receive utmost protection, as it is a fundamental right of the people. A core political right, as protected by the Constitution, is to express opposition against a policy, morality or legitimacy of the government.

The spread of political ideas through legal assembly or demonstration and gathering of people who share the same ideas through a signature-seeking campaign would not constitute a threat to the national security. Instead, the public remarks underlie the core of a 'liberal democracy', which is a fundamental principle of the Constitution. Any government action or law that prohibits citizens from criticising the government should not be justified. The reason is that it does not correspond to the fundamental principles of liberal democracy.

Even if the statements opposed the Constitution or called for its reform, they do not give rise to a national emergency that required or justified invoking the emergency decrees.

Decree nos. 1 and 2 presumed that any act calling for the revision of the Constitution was a crime threatening national security. In light of the fundamental principles of sovereignty and liberal democracy underlying the Constitution, the legislative purpose of the decrees is not justified and the method to restrict the fundamental principles is not legitimate.

The national emergency right including martial law or emergency decree can be exercised only under national crisis, such as war-like incident, and natural disaster. It is not managed by ordinary constitutional measures of the rule of law and should not be determined solely by the head of state. The right should be exercised to protect national security and basic orders of a liberal democracy. It should be temporary and provisional because of its exceptional nature to manage the temporary emergency.

Decree no. 1 and 2 controlled opposition against the Constitution and severely infringed on the right to express political opinions. The legislative purposes of the decrees are not justified and their methods were improper, as they exceeded the limit of the national emergency right.

People shall possess the right to express their political ideas, including proposals to reform the Constitution. The right is a fundamental value of a liberal democratic constitution, as it is the essence of democratic politics.

Decree no.1 was excessively broad in that it prohibited any negative expression of the Constitution and any violation was punished by criminal sanction. The measure was a last resort to address danger if other means including time, place or method of individual expression could not be restricted.

Nevertheless, Decree nos. 1 and 2 punished any act of expression that opposed or was negative towards the Constitution, regardless if the national emergency right was invoked. Therefore, Decrees no. 1 and 2 are unconstitutional. The state's extensive authority had exceeded the legitimate restriction on the freedom of expression; violated the principle of clarity under the principle of *nulla poena*; and infringed upon the political rights regarding the revision of the Constitution, the right to national referendum, the doctrine of warrants, freedom of body, and right to trial.

Constitutionality of Decree no. 9

The concern that North Korea may provoke a war by miscalculation is an ordinary peril in light of the hostility between the South and the North. Nevertheless, the 'increase of possibility for North Korea to provoke a war', arguably an abstract and subjective awareness, does not give rise to a national crisis that justifies the emergency measures. These measures are authorised under the social consensus that the usual exercise of government powers stipulated by the Constitution would not handle the emergent national crisis.

Decree no.9 subsisted for 4 years and 7 months, from its promulgation on 13 May 1975 to its repeal on 8 December 1979. It suggested that the increased possibility of North Korea provoking a war is a national crisis and that the situation is an ordinary dilemma that should be constantly encountered until unification, or at least when peace is established peace in the Peninsula.

Citizens and government bodies entrusted with power to change the Constitution possess the inherent right to raise issues and influence its revision. Nonetheless, Decree no. 9 presumed that criticisms against the Constitution constitute a crime threatening national security by impeding the 'all-out national security posture grounded on the national consensus against the 'national crisis for North Korea to provoke a war by miscalculation.' Therefore, the purpose of Decree no. 9 is not legitimate under the principle of sovereignty, which is a fundamental principle of the Constitution.

A unified public opinion is presupposed by totalitarianism, which suppressed people's freedoms. Therefore, the means taken by Decree no. 9 is not appropriate because free discussion protected under the freedom of expression is an ideal means to communicate to citizens in a democratic society.

A rebellion or revolt to express political opinions opposing the Constitution should not be justified because of its nature to destroy the basic orders of the Constitution. Nevertheless, they could be regulated by applying criminal laws and other related laws without invoking the national emergency right, as it would be prohibited under the usual constitutional order. Therefore, Decree no. 9 does not satisfy the reasonableness of the means to restrict fundamental rights.

That Decree no. 9 imposed a complete ban on any claim to revise or repeal the Constitution violated the principle of clarity, the political right to revise the Constitution, freedom of expression, freedom of assembly, doctrine of warrants, freedom of body, and academic freedom as Decree nos. 1 and 2.

Decree no. 9, furthermore, prohibited any assembly, protest, and political activity of students as well as authorised the relevant minister to take measures to expel a student from school, and to close temporarily or permanently the school where the student was affiliated. Such authorities infringed on the freedom of assembly of students, freedom of learning, autonomy of universities, and principle of personal responsibility by punishing the school or organisation where the said person was affiliated.

Therefore, Decree no. 9 violated the Constitution.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2014-1-002

a) Korea / **b)** Constitutional Court / **c)** / **d)** 23.08.2013 / **e)** 2010Hun-Ma47, 252 / **f)** On the conformity of the Constitution of Identity Verification System on Internet / **g)** 24-2 (A), *Korean Constitutional Court Report* (Official Digest), 590/... / **h)**.

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:

Identity, verification / Rule against excessive restriction / Self-determination.

Headnotes:

The identity verification system imposed duties to adopt means to confirm the identity of internet message board users and maintain those users' identity information. The duties are imposed on the service providers installing and operating those boards of the website under which a message user can upload information on message boards only after he or she goes through identity verification process. The system violates the rule against excessive restriction and infringes on the complainants' basic rights, including the freedom of expression, freedom of self-determination on private information and freedom of the press.

Summary:

The Constitutional Court reviewed the statutory provisions at issue, Article 44-5.1.2 of the Act on Promotion of Information and Communications Network Utilisation and Information Protection (revised by Act no. 9119 on 13 June 2008, hereinafter, the "Information Communications Network Act") and Articles 29 and 30.1 of the Enforcement Ordinance of the same Act (revised by Presidential Decree no. 21278 on 28 January 2009) (hereinafter, collectively referred to as the "Instant Provisions").

In this case, the Court decided that the Instant Provisions, which regulate the identity verification scheme, violate the rule against excessive restriction and infringe on the complainants' basic rights. Such rights include freedom of expression, right of self-determination on private information and freedom of press.

To promote a sound and healthy internet culture, the identity verification scheme restrained illegal acts such as defamation by means of uploading information on internet-site message boards and securing basic data. The scheme identified persons that caused harm and damage by illegal postings and acts. Thus, the purpose of the Instant Provisions is legitimate and the means adopted are proper to achieve the purpose.

The Court found, however, that the identity verification scheme sought by the Instant Provisions amounts to such an excessive restraint that it shall not be regarded as the least restrictive means.

If a person suffers damages by illegal information posted on an internet message board, the identity of the perpetrator uploading that illegal information can be substantially verified by tracing or confirming internet addresses. In addition, the remedy for victims can also be fully obtained by blocking the distribution or dissemination of the illegal information. This includes deleting the information or taking temporary measures to stop the illegal information by the service provider (Article 44-2.1 and 44-2.2 of the Information Communications Network Act). Other alternatives include the denial, suspension or temporarily restricting the handling of illegal information against the message board manager or operator (Article 44-7.2 and 44-7.3 of the Information Communications Network Act); restitution; and criminal punishment.

'Message board users' subject to identity verification include not only 'the person uploading information' but also 'the viewers of uploaded information,' who are not likely to commit illegal acts. The scope of service provider of information and communications subject to identity verification scheme is determined by the number of users, which is calculated using a vague and inaccurate criteria. Thus, by broadly expanding the scope of its application without taking into account the nature of the internet communication, the scheme at issue leaves too much room for law enforcement authorities to arbitrarily enforce relevant laws.

Moreover, because freedom of expression is one of the fundamental values in the Constitution, limitation on that freedom is allowed only when there is a public interest for the restriction. However, in the instant case, it is difficult to determine that the public interest was actually served because various problems have occurred in the course of implementation, such as locating domestic internet users because they have been fleeing overseas. Other challenges include disputes of the discriminatory enforcement of those laws favouring foreign business entities over domestic ones and arbitrary enforcement of the provisions.

For the foregoing reasons, the Court concluded that the Instant Provisions regulating the identity verification scheme are unconstitutional because they have a chilling effect on people's freedom of expression. The restriction infringed on the complainants' basic rights, namely the freedom of expression, right of self-determination of private information and freedom of the press.

Languages:

Korean, English (translation by the Court).



Kyrgyz Republic Constitutional Chamber

Important decisions

Identification: KGZ-2014-1-001

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 29.10.2013 / **e)** 6-p / **f)** Abdrazakova N.A., Kempirbaeva Ch.S. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

4.6.9.1 Institutions – Executive bodies – The civil service – **Conditions of access.**

4.6.9.4 Institutions – Executive bodies – The civil service – **Personal liability.**

4.10.5 Institutions – Public finances – **Central bank.**

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

Keywords of the alphabetical index:

Bank officials, sanctions.

Headnotes:

The National Bank may impose certain preventive measures and sanctions upon banks and bank officials in order to safeguard the banking system from those who violate banking legislation.

Summary:

I. The applicants had been involved in banking practices classified as unsound and unsafe, and had accordingly been subject to sanctions imposed by the National Bank. The applicants argued that their constitutional rights and freedoms to work and to manage their abilities to work had been constrained by the normative legal acts of the National Bank, rather than by the Constitution. This was, in their view, unconstitutional. Under the Constitution, everyone is guaranteed the freedom to work and is entitled to freely manage their ability to work and to choose a profession and occupation.

II. The National Bank carries out activities such as the licensing of banks and the regulation of banks and their officials, in pursuance of its supervisory function over the banking system. It has the right to require all banks to be engaged in permitted activities and bank officials to have an impeccable reputation and specialist knowledge within the banking sphere.

The legislator therefore made it the National Bank's duty to determine the minimum requirements for officials to which those taking up positions within a bank will have to conform. If they violate these laws, they will involve the bank in unsound and unsafe banking practices. The legislator can amend these requirements in accordance with law where necessary. It was in order to protect national security and financial security that increased requirements were introduced for candidates for certain positions in commercial banks. The norm in question is not therefore unconstitutional.

III. Dissenting opinions were attached to the decision. One of the judges pointed out that the regulations of the National Bank govern the implementation of the functional and legitimate authority of the National Bank but do not affect the constitutional rights and freedoms of human and citizen. For that reason, they could not be considered as contrary to the Constitution.

Languages:

Russian.



Identification: KGZ-2014-1-002

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 31.10.2013 / **e)** 7-p / **f)** Rahimova A.K. and others / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Electoral rights, eligibility, criminal record.

Headnotes:

Rules precluding persons convicted of an offence from being elected as mayor or head of local administration (even if the criminal record is later cancelled or removed) place an unjustified restriction on the constitutional right to be elected.

Summary:

I. Certain norms stipulated that citizens who have been convicted of an offence cannot be elected as mayor or head of local administration. The applicants in these proceedings argued that these norms were unjustified and disproportionate; they limited their constitutional right to be elected and no account was taken of circumstances such as the removal of the criminal record.

II. The Constitutional Chamber noted that, in line with international standards, the right to elect and to be elected is an integral part of the constitutional and legal status of citizens within a democratic society. These particular restrictions did not take into account the nature, degree of social risk and seriousness of the offence for which the person was convicted.

The Constitutional Chamber unanimously decided that the law contradicted the Constitution.

Languages:

Russian.

*Identification: KGZ-2014-1-003*

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 16.11.2013 / **e)** 9-p / **f)** T. Baltabaeva and others / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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:

Pension, payment, termination.

Headnotes:

Norms which resulted in the termination of payment of enhanced pension sums to certain categories of pensioner in return for services to the Kyrgyz Republic were in breach of the right of individual pensioners to receive full pensions and the right not to suffer discrimination for a particular social quality.

Summary:

I. The applicants took issue with legislation governing special services to the Kyrgyz Republic which had resulted in the termination of payment of enhanced pension sums to certain categories of pensioner in return for services to the Kyrgyz Republic.

II. The Constitutional Chamber found these norms to be contrary to the Constitution and in breach of the constitutional rights of individual pensioners to receive full pensions. The norms also placed working and non-working pensioners in unequal positions. The principle of equality is enshrined within the Constitution; discrimination is not permitted on the grounds of a person's social qualities. The Constitutional Chamber pronounced the regulations unconstitutional.

III. Dissenting opinions were attached to this decision. Two of the nine judges took the view that support is provided under the Constitution for socially vulnerable groups. The main criterion to the diversity of social assistance is neediness; state social assistance should be targeted. As a result, the Government is both entitled and under an obligation to act to ensure that social assistance is directed at the categories of people who need it.

Languages:

Russian.



Identification: KGZ-2014-1-004

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 22.11.2013 / **e)** 11-p / **f)** Shigaeva D. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.4.3.2 Constitutional Justice – Procedure – Time-limits for instituting proceedings – **Special time-limits.**

1.4.6.1 Constitutional Justice – Procedure – Grounds – **Time-limits.**

1.4.7.1 Constitutional Justice – Procedure – Documents lodged by the parties – **Time-limits.**

1.4.8.3 Constitutional Justice – Procedure – Preparation of the case for trial – **Time-limits.**

Keywords of the alphabetical index:

Time limits, appeal.

Headnotes:

The right to a retrial in cassation, including the right to reinstatement of a term, must be balanced with the nature and purpose of cassation proceedings as a form of legal protection.

Summary:

I. Questions had arisen over cassation complaints and procedural missed deadlines. Under the current legislation, the court may restore a term of appeal in cassation within a maximum period of one year from the entry into force of the judicial act.

II. The legislation sets out the legal status of an enforceable judgment and contains provisions for review within a reasonable time. Failure to comply with these principles would lead to instability within the legal relationship.

The legislature and judiciary are under a duty to prevent abuse in cases of procedural missed terms. The Constitutional Chamber, by a unanimous decision, found the legislation to be constitutionally compliant.

Languages:

Russian.



Identification: KGZ-2014-1-005

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 23.12.2013 / **e)** 16-p / **f)** Osinzev E.V. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Execution of debt, property, seizure.

Headnotes:

Changes to the method and order of execution of enforcement proceedings have been made in order to facilitate the effective execution of judicial acts and to protect the rights and legitimate interests of parties in the implementation of the constitutional right to judicial protection. The seizure of property through the levying of execution is to be regarded as statutory termination of ownership, not as arbitrary deprivation.

Summary:

I. Under Article 282 of the Civil Code, the seizure of property through levying of execution against property due to the obligations of the owner is based on the court's decision, unless another levying of execution is stipulated by law or contract.

Under Article 209 of the Civil Procedural Code, the court which considered the case may, upon the appeal of the parties to the proceedings, delay its decision-making and alter the method and order of

execution depending on the financial status of the parties or other circumstances.

The applicant contended that these provisions meant that property owners could be deprived of the only dwelling suitable for them through repossession, without alternative accommodation being provided.

II. Under the principle of inadmissibility of deprivation of housing, a person's housing or right to housing can only be lost pursuant to a court decision or in cases determined by the Constitution and legislation (Article 12.2 of the Constitution). A court order for the compulsory seizure of property should be considered as the principal means of terminating the right to property ownership; other methods are only permissible if they are specified by law to protect national security, public order, public health or morals and the rights and freedoms of others.

These principles on the arbitrary deprivation of property are enshrined in Article 28 of the Civil Code.

The universally recognised constitutional principles of inviolability of property and freedom of contract, as well as equality, autonomy of will and property independence of members of civil-legal relations and the inadmissibility of arbitrary interference in private affairs, all have a bearing on the freedom of ownership, use and disposal of property. Owners have the discretion to take any action concerning their properties, providing they do not violate the law or impinge upon the rights and lawful interests of other persons.

Owners are responsible for all consequences that may arise from the meaning and content of agreements concluded on the basis of equality and autonomy of the parties. Seizure of property, including a dwelling, through enforcement proceedings stemming from the obligations of the owner is a case of statutory termination of the right to property. It cannot be regarded as arbitrary deprivation of property.

The legislature, for its part, has the right to delineate the degree of responsibility of the property owner, depending on the nature of the obligation and the legal consequences of the agreement concluded. A property owner who clearly demonstrated his or her will on the security obligations and civil-legal liabilities that arose from a mortgage may be fully responsible for the property mortgaged under the agreement. In other "civil/legal situations", where the owner clearly did not assume the risk of their property being seized, the legislator might envisage an opportunity for the purpose of protection of public health and morals to place restrictions on the rights of the creditor to seize

the property, especially if it is only suitable for an owner dwelling.

Under Article 59 of the Civil Code, citizens are liable for all obligations in terms of their property, apart from property which cannot be subject to levy or which features on the list set out in civil procedural law. The civil procedural law does not actually contain such a list; it is listed in the annex to the Law on Enforcement Proceedings and the status of bailiffs in the Kyrgyz Republic.

This approach has been adopted by the legislature in order to allow property-owning citizen debtors a level of immunity and to make sure they (and those dependent on them) enjoy the conditions necessary for a dignified existence. A dwelling will not be included on the list if it is the only suitable dwelling for the debtor and his family.

These changes to the method and order of execution have been brought about in order to facilitate the effective enforcement of judicial acts issued to protect the rights and legitimate interests of parties in the implementation of the constitutional right to judicial protection. The courts' competences are limited to the types of property featuring on the list of property which cannot be levied.

For the reasons outlined above, the Constitutional Chamber decided to recognise Article 282.1 of the Civil Code and Article 209.1 of the Civil Procedure Code constitutional.

Languages:

Russian.



Identification: KGZ-2014-1-006

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 13.01.2014 / **e)** / **f)** Abdykalykov / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**

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

4.7.15.1.2 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Powers of ruling bodies.**

Keywords of the alphabetical index:

Prosecutors, powers.

Headnotes:

Legislation allowing the General Prosecutor, in exceptional cases, to transfer a matter to another law enforcement agency for criminal prosecution, was contrary to the Constitution.

Summary:

I. Questions had arisen over legislation which allowed the General Prosecutor, in exceptional cases, to transfer a matter to another law enforcement agency for criminal investigation. Under the Constitution, the General Prosecutor cannot transfer cases for criminal investigation where public officials, particularly judges, are involved. The applicant suggested that the wording of the provision “in exceptional cases – regardless of jurisdiction” should be pronounced unconstitutional and contrary to the Constitution.

II. The absence of regulation gives the General Prosecutor a free rein to determine the nature of these cases; definition is needed of the criterion of “exceptional cases” within the legislation where a transfer might be permissible.

The Constitutional Chamber found the provision in question to be contrary to the Constitution, which prevents the prosecutor to transfer criminal cases involving offences committed by a separate category of public officials.

III. Dissenting opinions were attached to this judgment. One judge was of the view that the Constitutional Chamber had only considered criminal proceedings against a judge by the General Prosecutor in its decision. Criminal proceedings form an independent stage of prosecution, during which legal assessment of the presence or absence of grounds for a criminal case against a judge allows the Constitutional Chamber to reduce the impact the case would have on the judge. This has been identified in the decision as being within the exclusive competence of the General Prosecutor. Yet conducting a criminal investigation against a judge would be regarded as affecting the judge.

The decision was taken unanimously.

Languages:

Russian.



Identification: KGZ-2014-1-007

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 15.01.2014 / **e)** 2-p / **f)** Etekbaev R.I. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**
5.3.13.1.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings.**

Keywords of the alphabetical index:

Repealed act, appeal, status.

Headnotes:

Questions had arisen over the constitutional compliance of legislation which meant that the Constitutional Chamber could reject an appeal lodged by a citizen because of the repeal or loss of force of the act the constitutionality of which was being contested.

Summary:

I. The Constitutional Chamber had, in accordance with the Law on the Constitutional Chamber of the Supreme Court, resolved to refuse to accept an appeal lodged by a citizen due to the repeal or loss of force of the act the constitutionality of which was being contested.

II. Under the Constitution, the Constitutional Chamber may declare unconstitutional laws and other regulatory legal acts in the event that they contradict the Constitution. It can also rule on the constitutionality of international treaties not entered into force and to which the Kyrgyz Republic is a party and upon draft legislation on changes to the

current Constitution. These powers of the Constitutional Chamber are exhaustive; they cannot be expanded by other laws. It is open to everyone, under the Constitution, to contest the constitutionality of legislation and other normative legal acts which may have violated the rights and freedoms recognised by the Constitution. The Constitution, in giving the right to appeal to the Constitutional Chamber, does not connect it to the direct violation of the rights and liberties of the subject of appeal.

The Constitutional Chamber's power to implement normative inspection does not involve consideration of regulations which have been repealed or are no longer valid.

The provision of the Constitutional Law on the Constitutional Chamber of the Supreme Court does not contradict the Constitution.

III. Dissenting opinions were attached to this decision. Concern was expressed that if the Constitutional Chamber refuses to accept an appeal against a normative act which has already lost its power, individuals will be deprived of the opportunity to seek a review of certain actions that were taken on the basis of what may have been an unconstitutional act.

Languages:

Russian.



Identification: KGZ-2014-1-008

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 24.01.2014 / **e)** 4-p / **f)** Saatov T.Dj. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

Keywords of the alphabetical index:

Criminal proceedings, refusal, appeal / Practice, judicial, contradictory.

Headnotes:

Legislation may allow appeals against a refusal to institute criminal proceedings (or to dismiss them), and against other decisions and acts with the potential to jeopardise the rights and freedoms of parties to criminal proceedings or to impede access to justice.

Summary:

I. The question had arisen of the potential for contradictory judicial practice in the application of the Criminal Procedure Code, where complaints against the decision of the investigator or prosecutor to initiate criminal proceedings were under consideration. Some courts have taken the view that no appeal lies against these decisions and proceedings on the complaint have been halted; in so doing, they have considered Article 131 of the Criminal Procedure Code in conjunction with Article 132, which sets out a limited list of procedural acts which can be the subject of complaint by physical and legal entities.

The legislator included within the article legal regulations not related to the subject of its regulation.

II. Article 1 of the Criminal Procedure Code clearly states that appeals can be made not only against a refusal to institute criminal proceedings or to dismiss a criminal case, but also against other decisions and actions (or inactivity) with the potential to jeopardise the constitutional rights and freedoms of parties to criminal proceedings or to hamper citizens' access to justice.

Unfounded criminal proceedings, along with unjustified refusal to institute criminal proceedings, contradict the objectives of criminal justice and are against the law.

The Constitutional Chamber held that the provision of the Criminal Procedure Code under consideration did not contradict the Constitution.

Languages:

Russian.



Identification: KGZ-2014-1-009

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 31.01.2014 / **e)** 8-p / **f)** North PMC / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Evidence, new.

Headnotes:

The Civil Procedure Code should set out strict boundaries regarding newly discovered facts which form the basis for judicial review. This should not be perceived as a restriction on access to justice.

Summary:

Suspension of execution of a judgment pending resolution of an appeal, supervisory complaint or presentation does not detract from the role, significance and consequences of a judicial act. This option must remain open to a debtor during this period. It cannot become a restriction of the right to judicial protection; rather, it is one of the mechanisms for the implementation of law.

The provisions of the Civil Procedure Code adopted by the legislator in the implementation of the constitutional guarantees of judicial protection of human rights and freedoms, and the universal right to a retrial by a higher court are not subject to any restriction. Under the rules of civil procedure law, newly discovered facts are circumstances that were not and could not have been known at the time of the proceedings. Thus, “newly discovered facts” are by

their legal nature new circumstances, combined in one step in civil proceedings, as a basis for review of judicial acts. The hallmark of “new circumstances” is their appearance after proceedings and adjudication. Their legal effect is judicial review.

New circumstances (as newly discovered facts), as a basis for review of judicial decisions should have strictly defined boundaries and contain no abstract definitions. Otherwise, legal stability and the certainty of legal acts (and consequences of violation) could be put at risk. The Constitutional Chamber does not therefore perceive an exhaustive list of newly discovered circumstances as a restriction on access to justice. The confusion which the legislator has brought about between “newly discovered fact” and “new fact” could be dealt with by making changes and additions to the Code of Civil Procedure. The Chamber decided unanimously that the contested provisions were not contrary to the Constitution.

III. Oskonbaev E.J attached a dissenting opinion on the reasoning section of the Constitutional Chamber’s decision; diverging positions emerged on the evaluation of the substance and content of the articles of the Civil Procedure Code. No doubts should be allowed to develop over the irrefutability and exclusivity of a judicial act that has entered into force. This is its highest value. Without these properties, justice acquires a formal nature and loses its real value to society. The Constitutional Chamber has incorrectly viewed the appeal courts and supervisory mechanisms as the immediate realisation of the universal constitutional right to retrial by a higher court. “Re-examination of the case” (a full trial of the case in accordance with civil procedural law) is possible only in the appellate court and concerns judicial acts which have not entered into force. In cassation and supervisory instances, the relevance of the case, the Court’s findings and the correct application will be evaluated; this cannot be regarded as “a retrial by a higher court.” The Cassation and supervisory authorities, in line with their intended purpose, allow judicial review of an act which has entered into force, before an actual miscarriage of justice has been detected, but cannot overturn a judicial act which has come into force. The Constitution favours legal certainty and the stability of judicial acts which have come into force. This legal concept should be followed when procedures are applied for the suspension of the execution of a judgment which has entered into force. The legislation should accordingly contain provisions with clearly defined terms and strictly regulated procedure.

Languages:

Russian.



Identification: KGZ-2014-1-010

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 07.02.2014 / **e)** 10-p / **f)** Osinzev E.V. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**
 4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts.**
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**

Keywords of the alphabetical index:

Evidence, new.

Headnotes:

Rules governing the right to initiate a review in criminal proceedings of a decision already in force, due to newly-discovered evidence, are in line with the principles of fair trial and legal certainty and stability.

Summary:

The Criminal Procedure Law regulates procedure in criminal cases before courts and provides for the review of judicial acts that have come into force, in the light of newly discovered circumstances.

The rules relating to cases of newly discovered circumstances only apply to decisions which have already come into force. The legislator has established comprehensive and specific rules corresponding to the principles of fair trial, legal certainty and stability. Their constitutionality is not questioned.

The right to initiate a review, based on newly discovered circumstances, covers both the prosecutor and the court. A distinction needs to be drawn between the grounds on which prosecutors

and courts may initiate reviews in such cases, due to the nature of their powers.

The role of a prosecutor in these cases relates to the implementation of supervision over the legality of actions of officials of the relevant bodies.

Courts can revise judicial acts where fresh evidence has arisen, and eliminate or mitigate punishment. It is not part of their inherent function to investigate and obtain evidence. On this basis, the legislator has ruled out the possibility of citizens appealing directly to the court. This would lead to unnecessary difficulties in law enforcement, as the courts are only empowered once research has actually corroborated evidence.

The Constitutional Chamber saw no necessity for a comprehensive list of instances where cases might be resumed due to newly discovered evidence.

A dissenting opinion was attached to the decision. The justice in question was of the view that the legislator should set out procedural rules, to regulate fully the production of newly-discovered evidence, as part of the protection of human rights and freedoms in terms of judicial errors.

Languages:

Russian.



Identification: KGZ-2014-1-011

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 12.02.2014 / **e)** 11-p / **f)** Aliev J. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.2 Institutions – Judicial bodies – **Procedure.**
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

Keywords of the alphabetical index:

Judicial protection, procedure.

Headnotes:

The right to judicial protection is not subject to limitation; the opportunity for a higher court to review a case is an important part of this right. A normative legal act can only be declared unconstitutional by the Constitutional Chamber.

Summary:

The opportunity for a higher court to review a case is an important safeguard for the right to judicial protection. Constitutional guidelines ensure the right to retrial, where human rights and freedoms may have been breached, and outline the procedure for appealing to higher courts against judicial decisions by the lower courts.

The norm under dispute allows a court to annul or modify a decision at trial, appeal or cassation instance and make a fresh decision without submitting the case for a new trial, where a mistake has been made in the application of the substantive law. The basis of the law was to ensure the efficiency of production, and avoid unjustified conduct of the trial. Under the Constitution, courts cannot apply a normative legal act that is contrary to the Constitution. Courts cannot apply a normative legal act that is contrary to the Constitution.

The meaning of this constitutional provision is that a normative legal act will only be determined as unconstitutional by decision of the Constitutional Chamber. If questions have arisen over the constitutionality of a law or other act which affects the resolution of a case, the court must refer the matter to the Constitutional Chamber. From now on it is prohibited to use a normative legal act that is contrary to the Constitution. The contested rules were not ruled unconstitutional by the Constitutional Chamber.

Languages:

Russian.

*Identification:* KGZ-2014-1-012

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 19.02.2014 / **e)** 14-p / **f)** T. Djenalieva I. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Minimum wage / Subsistence.

Headnotes:

New provisions within legislation which remove the link between the minimum wage and benefit payments and other payments not related to wages are constitutionally compliant.

Summary:

I. The Kyrgyz Republic is a social state, which provides support to socially vulnerable groups in accordance with the Constitution.

The legislature had enacted regulations setting out a mechanism determining amounts of compensation to be awarded for harm caused to human life or health under the Labour Code and Civil Code.

The Labour and Civil Code provide for increasing amounts of compensation for damages paid for the maintenance of the citizen.

Amendments were made to the Civil and Labour Code and the words “minimum rate of remuneration of labour” and “minimum wage” replaced by “rate of the estimate indicator”

II. The Constitutional Chamber considered that the introduction by the legislator of the new concept of “estimated indicator”, which removes the link between the minimum wage and benefit payments and other payments not related to wages, would allow the level of the minimum wage to be reached and provide minimum requirements for a citizen’s standard of living.

Under the Constitution, the constitutional-legal nature of the institute of the minimum wage involves the establishment of a minimum level of funds, which should be guaranteed to an employee as his or her reward for the performance of duties.

The norm under dispute does not contradict the Constitution.

III. A dissenting opinion was attached. The justice in question noted that the only permissible criterion in calculating increases in social benefits is subsistence level, rather than any other indicator. The state, irrespective of the economic situation, must make a start on this index, and, in future, seek to reach this level.

Languages:

Russian.



Identification: KGZ-2014-1-013

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 21.02.2014 / **e)** 15-p / **f)** Ostrikov V. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice.**

Keywords of the alphabetical index:

Trial *in absentia*.

Headnotes:

Legislation may allow criminal cases to be tried in the defendant's absence.

Summary:

I. Legislation was introduced which permitted criminal cases to be tried in the defendant's absence where the defendant is outside the Kyrgyz Republic and has refused to appear in court, and where he or she, following a recall, has not appeared at the hearing or informed the court of their absence. Under the rules of the Criminal Procedure Code, the defendant is entitled to participate in the proceedings of the case,

can enjoy all the rights of a party, has the "last word" and may appeal against the court's decision. However, in the same provision, a defendant must also appear in court when summoned, to a "hearing in the trial court held with the participation of the defendant, whose presence is required." Participation in the trial is both the right and duty of the defendant.

To ensure the defendant's participation, the court may oblige the prosecutor to ensure his or her appearance. The court may subject a defendant who has not appeared to preventive or more rigorous measures, in cases of real necessity, when it has been established that the defendant is refusing to appear in court. In this way, the criminal procedural law is prescribing all the measures that need to be taken to ensure the proper conduct of the defendant and the conditions necessary for a full trial, and upholding the duty of the state to protect and defend the rights and interests of persons and victims of crimes and to ensure access to justice and compensation for criminal damage. Trial *in absentia* is a way of implementing the principle of inevitability of criminal liability for somebody who is hiding from the court or deliberately avoiding the obligation to participate in a criminal trial.

II. The Constitutional Chamber decided unanimously that the contested provisions were not contrary to the Constitution. The decision was taken unanimously.

III. A dissenting opinion was attached, by Oskonbaeva EJ, who observed that criminal proceedings are about protection against illegal and unjustified accusation and condemnation, as well as the protection of the rights and lawful interests of individuals and organisations and victims of crimes. In allowing trial *in absentia*, the public interest must be weighed up against the legitimate interests of the persons involved in criminal process (especially the defendants and victims). The absence of the defendant in litigation creates significant obstacles to the realisation of fundamental principles of criminal justice. The principle of immediacy is difficult to achieve, as the court cannot hear evidence and arguments from the defendant. It is also not possible to secure full "equality of arms" or the right of defendants to choose their own methods of protection. A systematic approach to this issue is needed, along with changes to the Code of Criminal Procedure, to ensure proper regulation in criminal cases, both at trial and pre-trial stage, when the defendant is absent.

Languages:

Russian.



Liechtenstein

State Council

Important decisions

Identification: LIE-2014-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 29.10.2012 / **e)** StGH 2012/130 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

Keywords of the alphabetical index:

Child, best interests / Religion, dress, restrictions / Religion, sensibility, protection / Religion, state.

Headnotes:

Obliging the children of the applicants, members of the Palmarian Church, to take part in swimming lessons is disproportionate and constitutes unlawful interference in the freedom of belief, conscience and religion in accordance with Article 37 of the Constitution (LV) and Article 9 ECHR.

The civic duty to take part in school swimming lessons does not constitute an absolute priority over the fundamental right of freedom of religion. The aim sought by this limitation of fundamental rights – namely the socialisation and integration of the applicants' children through taking part in swimming lessons – is not such that it can justify the forced mental stress and emotional dilemma of the children if obliged to take part in the swimming lessons. In the instant case, the child's interest should be placed above the state's public interest in the socialisation and integration of children.

Summary:

I. The applicants filed a constitutional appeal against the refusal to grant dispensation from obligatory swimming lessons on religious grounds, in particular

because attending such lessons would mean exposure to the uncovered bodies of others, making it impossible for them to comply with their religious precepts. The lower court had ruled that this interference in the freedom of belief and conscience was proportionate in view of the public interest in obligatory swimming lessons and the arrangements made, such as separate changing rooms, a separate showering area and showering times, and the possibility of wearing a full swimsuit.

II. The State Court took a different view and upheld the appeal on the grounds of a violation of the freedom belief, conscience and worship. In so doing, and based on the existence of particular circumstances, the State Court highlighted the fact that this decision was in keeping with the leading judgment of the Swiss Federal Court in these matters (BGE 135 I 79 (SUI-2009-1-002)).

The Court noted that the catechism of the Palmarian Christian Church comprises, according to the established facts, strict dress codes which do not authorise attending school swimming lessons with other pupils. As the obligation to learn how to swim at school also applies to children of this belief, it is in conflict with the freedom of belief and conscience and constitutes interference in this freedom. There are substantial public interests in making learning to swim obligatory: in particular, protection against drowning and the educational function of socialisation and integration, to which swimming lessons, as part of physical education instruction, make a fundamental contribution. On the basis of the information gathered and the fact that the state, which is neutral as regards religious affairs, cannot assess the theological conformity of religious rules, it was argued that the obligation placed on children to attend school swimming lessons brought significant pressure to bear on the applicants on account of the beliefs of their religious community and that, at worst, they risked excommunication.

In the context of the merits of the interference in the freedom of belief and conscience, it is also necessary to look at the conflict situation in which the children in this case find themselves. The best interests of the child are a prime consideration in all legal actions concerning children (Article 3 CCR – Convention on the Rights of the Child). On the one hand, attending school swimming lessons is in the interest of the child, covered here by the public interest in making learning to swim obligatory. On the other hand, belonging to a family community and involvement in the family's religious practices are also very important for a child. This means that sparing children an insoluble conflict of conscience and loyalty is also a central aspect of their physical and moral well-being.

The refusal to grant dispensation from swimming lessons places the family of the applicants in the difficult position of having to fail to comply with either a state requirement or a religious requirement. This tension may have a serious effect on the applicants' children and be contrary to their physical and moral well-being. This is also true even where accompanying arrangements are attached to the obligation to attend swimming lessons. This tension is made no easier by the fact that the applicants' children are in daily contact with children dressed less modestly than themselves. According to what was adduced, the obligation to attend swimming lessons causes significant psychological distress.

The state's educational role as a public interest is such that, in principle, a priority is given to obligatory swimming lessons over the application of religious rules.

As this case concerns a family of Liechtenstein nationals, there is no question here of the socio-political concern over the integration of foreign children. There was no fear of a serious disruption of the regular and effective functioning of the school. Also to be taken into account is the possibility that was mentioned of excommunication from the Palmarian Christian Church. In the circumstances, the merits of the interference in the freedom of conscience and belief must be rejected in particular in view of the fact that religious precepts are of greater importance for the individuals concerned than the public interest that is affected thereby. Considered as a whole, there are specific features in this case which justify an exemption from swimming lessons. However, the school authorities are entitled to demand proof from the applicants that their children are taking private swimming lessons.

Languages:

German.



Lithuania Constitutional Court

Important decisions

Identification: LTU-2014-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 18.03.2014 / **e)** 31/2011-40/2011-42/2011-46/2011-9/2012-25/2012 / **f)** On criminal liability for genocide / **g)** *Valstybės Žinios* (Official Gazette), 103-5079, 01.10.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

2.1.1.4.17 Sources – Categories – Written rules – International instruments – **Statute of the International Criminal Court of 1998.**

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies.**

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

2.3.6 Sources – Techniques of review – **Historical interpretation.**

3.14 General Principles – **Nullum crimen, nulla poena sine lege.**

Keywords of the alphabetical index:

Genocide, liability / Protected groups / Social, political groups / Retroactive effect / No statute of limitations / International law / Convention against genocide / Significant part of group / Soviet occupation, resistance / Destruction, nation.

Headnotes:

Actions may be recognised as genocide if they are deliberate actions aimed at destroying certain social or political groups that constitute a significant part of any national, ethnical, racial, or religious group and the destruction of which would impact the respective national, ethnical, racial, or religious group as a whole.

Under the Constitution as well as universally recognised norms of international law, the exception to the principle of *nullum crimen, nulla poena sine lege*, which permits the retroactivity of the criminal laws establishing criminal liability for crimes

recognised under international law or the general principles of law, is also applicable to crimes against humanity and war crimes, which may be directed, *inter alia*, against certain social or political groups of people.

Summary:

I. In this case, subsequent to the application of a group of members of the *Seimas* and some general jurisdiction courts, the Constitutional Court considered whether the provisions of the Criminal Code (hereinafter, the "CC") regulating criminal liability for the crime of genocide were unconstitutional. The applicants argued that Article 99 CC consolidates a broader *corpus delicti* of genocide if compared to the norms of international law providing for liability for this crime. That is, under the norms of international law, genocide means only actions committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, while under national regulation, genocide also means the aforesaid deeds committed against any social or political group. Also it is provided that the legal norms establishing liability for genocide have retroactive effect, and no statute of limitations applies to the crime of genocide. Thus, criminal law has retroactive effect and statutes of limitation neither apply to the actions qualified under international law as genocide against all or part of the persons belonging to a national, ethnic, racial, or religious group, nor to the actions qualified under national law as genocide against a social or political group. From the point of view of international law, this has not been regarded as genocide.

II. The Constitutional Court emphasised that the Constitution creates obligations to adhere to universally recognised principles and norms of international law. Lithuania is obliged to fulfil, in good faith, its international obligations arising under the universally recognised norms of international law (general international law), *inter alia*, *jus cogens* norms, that prohibit international crimes and are consolidated, *inter alia*, in the international treaties that are a constituent part of the national legal system. The constitutional principle of respect for international law, i.e. the principle of *pacta sunt servanda*, means the imperative of fulfilling in good faith the obligations assumed by Lithuania under international law, *inter alia*, international treaties.

After analysing international legal provisions, the Court noted that under the universally recognised norms of international law, the list of protected groups against genocide is exhaustive and does not include any social and political groups. The Court stipulated further that no statutory limitation may be applied to the crime of genocide as defined under the

Convention against Genocide and other international legal acts (i.e. the crime of genocide aimed exclusively at national, ethnical, racial, or religious groups).

On the other hand, the universally recognised norms of international law do not preclude from establishing, in national law, other crimes that would not be subject to any statute of limitations, *inter alia*, any statute of limitations for delivering a judgment of conviction. The universally recognised norms of international law permit an exception to the principle of *nullum crimen, nulla poena sine lege*. That is, they provide for the retroactivity of the national laws establishing criminal liability for the crimes recognised under international law or the general principles of law. This exception does not apply to the other crimes specified under national law. Thus, the aforesaid exception is applicable to, *inter alia*, the crime of genocide as defined under the universally recognised norms of international law (i.e., the crime of genocide directed exclusively against national, ethnical, racial, or religious, but not social or political, groups).

Moreover, the Court stated that actions may also be recognised as genocide if they are deliberate actions aimed at destroying certain social or political groups that constitute a significant part of any national, ethnical, racial, or religious group and the destruction of which would impact the respective national, ethnical, racial, or religious group as a whole. Thus, under the universally recognised norms of international law, the exception to the principle of *nullum crimen, nulla poena sine lege* is also applicable to the deliberate actions considered to constitute genocide. Specifically, they are the deliberate actions aimed at destroying a significant part of any national, ethnical, racial, or religious group that would have an impact on the survival of the whole respective group, comprising, *inter alia*, certain social or political groups.

The Court considered the international and historical context. It noted that, in the course of qualifying the actions of the participants of the resistance against Soviet occupation as a political group, one should take into account the significance of this group in light of the entire respective national group (Lithuanian nation) that is covered by the definition of genocide according to the universally recognised norms of international law. The actions carried out during a certain period against certain political and social groups of residents in Lithuania might be considered to constitute genocide if such actions – provided this has been proven – were aimed at destroying the groups that represented a significant part of the nation and whose destruction impact the survival of the entire nation. In the absence of any proof of such

an aim, it should not mean that, for their actions against the residents (e.g., killing, torturing, deportation, forced recruitment to the armed forces of an occupying state, persecution for political, national, or religious reasons), respective persons should not be punished according to universally recognised norms of international law and national laws. In view of concrete circumstances, one should assess whether those actions also entail crimes against humanity or war crimes.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2014-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.01.2014 / **e)** 22/2013 / **f)** On the Law Amending Article 125 of the Constitution / **g)** *Valstybės Žinios* (Official Gazette), 103-5079, 01.10.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

1.1.1.1.1 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Constitution.**

1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation.**

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.**

3.3 General Principles – **Democracy.**

Keywords of the alphabetical index:

Fundamental values / Amendment, constitutional / Material and procedural limitations / Geopolitical orientation / Commitments, membership, European Union / Constitution, motion to amend / Amendments, substantial, scope.

Headnotes:

The Constitution prohibits any substantive change, during the consideration in Parliament, of the content of a proposed draft law amending the Constitution,

submitted by special subjects enjoying the right to amend the Constitution. The change includes, *inter alia*, a way that would distort the objective of the proposed constitutional legal regulation, alter the scope of the proposed constitutional legal regulation, introduce essentially different means to achieve the objective sought by the proposed constitutional legal regulation, or propose that a different provision of the Constitution be altered. A substantially amended draft law that changes the Constitution must be regarded as a new draft law. That means a new motion to amend or supplement the Constitution that can be submitted, by a group of no less than 1/4 of all the members of the *Seimas* or no less than 300,000 voters, but not of the Committee of *Seimas*, giving some remarks on the draft law.

Summary:

I. The *Seimas* requested an investigation into whether the Law Amending Article 125 of the Constitution, in view of the manner of its adoption, was constitutional. It doubted as to whether, in the course of adopting the said Law, the legislature had observed the requirement that a motion to alter or supplement the Constitution may be submitted to the *Seimas* by a group of not less than 1/4 of all the members of the *Seimas* (36 parliamentarians). The reason is that, in the course of the consideration of the said Law, the Committee on Legal Affairs of the *Seimas* had in substance changed the content of the Draft Law Amending Article 125 of the Constitution, which had been submitted by a group of 45 members of the *Seimas*.

II. The Constitutional Court stated that the concept, nature, and purpose of the Constitution, the stability of the Constitution as a constitutional value, and the imperative of the harmony among the provisions of the Constitution imply certain material and procedural limitations on amendments. The material limitations relevant in this case are the limitations consolidated in the Constitution regarding the adoption of amendments of certain content. The procedural limitations on the alteration of the Constitution are related to the special procedure for the alteration of the Constitution that is consolidated therein.

The material limitations on altering the Constitution stem from the overall constitutional regulation. They are designed to defend universal values, upon which the Constitution as the supreme law and as a social contract and the state as the common good of the entire society are based. They are also designed to protect the harmony of these values and the harmony of the provisions of the Constitution. The Constitution does not permit any such amendments thereto that would deny at least one of the constitutional values

lying at the foundation of Lithuania as the common good of the entire society consolidated in the Constitution. Such values include the independence of the state, democracy, the republic, and the innate character of human rights and freedoms. The fundamental constitutional values are closely interrelated with the geopolitical orientation, which is established in the Constitution and implies European and transatlantic integration pursued by Lithuania.

Thus, under the Constitution, as long as the constitutional grounds for membership of Lithuania in the European Union have not been annulled by referendum, any amendments to the Constitution that would deny its commitments arising from its membership in the European Union are not permitted. The Constitution neither permits any such amendments to the Constitution that would deny the international obligations of Lithuania (*inter alia*, the obligations arising from its membership in NATO are preconditioned by the geopolitical orientation) nor permits the constitutional principle of *pacta sunt servanda*. This is under the condition that the said international obligations have not been renounced in accordance with the norms of international law.

The procedural limitations on the alteration of the Constitution are related to the special procedure to amend the Constitution that is consolidated therein. The special procedure includes special requirements, such as, special subjects who enjoy the right to submit a motion to alter or supplement the Constitution to the *Seimas*. That is, a group of not less than 1/4 of all the members of the *Seimas* or not less than 300,000 voters. This requirement, according to the applicant, was not respected while the Constitution was amended. The exclusive right to make a motion to amend or supplement the Constitution that is enjoyed by special subjects leads to the statement that the *Seimas*, while considering the submitted motion, is not allowed, in general, essentially to amend the text of a draft law amending the Constitution.

Under the Constitution, when the *Seimas* considers certain draft laws amending the Constitution, which have been submitted by the special subjects, it may introduce only such modifications to the proposed draft laws that do not affect the content of these draft laws in substance. That is, they are modifications aimed at editing the proposed draft amendments to the Constitution in order to improve the texts of these draft laws in terms of the Lithuanian language and legal technique or that make the proposed draft formulations more accurate or concrete without changing the scope of the proposed constitutional legal regulation.

Therefore, under the Constitution, structural sub-units of the *Seimas*, *inter alia*, its committees, as well as individual members of the *Seimas*, do not have the right to submit a draft law amending the Constitution that would differ in substance from the draft law amending the Constitution that was submitted by a group of not less than 1/4 of all the members of the *Seimas*. This includes, *inter alia*, where the difference constitutes a different scope of the proposed constitutional legal regulation, or virtually different means of the constitutional legal regulation in order to achieve the objective sought, or a proposal for an amendment of a different provision of the Constitution. When, at the *Seimas*, a draft law amending the Constitution is being considered, structural sub-units of the *Seimas*, *inter alia*, its committees, as well as individual members of the *Seimas*, have the right to propose non-substantial amendments to the draft law considered by the *Seimas*. It also possesses the right to propose that the draft law be rejected, and to propose that the group of not less than 1/4 of all the members of the *Seimas* that has submitted the draft law under consideration submit a new and substantially changed draft law amending the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Mexico

Supreme Court of Justice of the Nation

Important decisions

Identification: MEX-2014-1-001

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 03.09.2013 / **e)** Contradiction of Prior Judgment 293/2011 / **f)** SCJN determines that the rules on human rights contained in International Treaties have constitutional rank / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies.**

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

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

2.3.11 Sources – Techniques of review – **Pro homine/most favourable interpretation to the individual.**

Keywords of the alphabetical index:

Human right, application, scope / Inter-American Court of Human Rights, rulings / International law, national law, relationship / Treaty, international, application / Treaty, international, fundamental rights / Treaty, international, validity.

Headnotes:

Regarding the normative hierarchy of international treaties on human rights in relation to the Constitution, since the constitutional reform of 6 and 10 June 2011, which recognises a set of human rights stemming from the Constitution and the international treaties to which the Mexican State is party, human rights, regardless of their source, constitute the control parameter of constitutional regularity, by which the validity of government rules and acts that form part of the Mexican legal system must be weighted. Consequently, the rules governing

human rights, regardless of their source, are not related in hierarchical terms. However, where the Constitution expressly establishes a restriction on the exercise of human rights, the constitutional provision must be observed. The determination of the criteria applicable in each case shall have to be defined by the trial court based on the *pro persona* principle. Regarding the imperative nature of the case-law issued by the Inter-American Court of Human Rights (hereinafter, “IACHR”), such international case-law is binding on Mexican courts, provided that the precedent is largely favourable to individuals. Thus, the case-law criteria of the IACHR are binding on the Mexican authorities, irrespective of whether the Mexican State has been party to the litigation before the Court because they constitute an extension of the treaties it interprets, given that these criteria are used to determine the content of the human rights contemplated in them.

Summary:

I. On 24 June 2011 a matter was brought before the Supreme Court of Justice of the Nation (hereinafter, “SCJN”) regarding a possible contradiction of criteria upheld by two Collegiate Courts (akin to federal courts of appeal; one on civil matters, the other on administrative and labour matters). The differences of opinion which had to be resolved by the First Chamber of the SCJN concerned two fundamental questions: first, the hierarchical position of international treaties on human rights with respect to the Constitution; and second, the binding nature of case-law concerning human rights issued by the Inter-American Court of Human Rights (hereinafter, “IACHR”).

II. After studying the criteria listed below, the Court *en banc* found that the contradiction of prior judgments did exist, and resolved its two fundamental aspects.

Concerning the first question, regarding the possible hierarchical application of the rules of human rights, the Seventh Collegiate Court on Civil Matters of the First Circuit had determined that international treaties on human rights were ranked hierarchically below the Constitution. The Collegiate Court based its decision on a precedent delivered by the SCJN *en banc*, in which it had stated: “International treaties, are located hierarchically above federal laws and in second place with respect to the Federal Constitution.” By contrast, the First Collegiate Court on Administrative and Labour Matters of the Eleventh Circuit decided that “in the case of a dispute concerning human rights, the international treaties and conventions to which the Mexican State is a party must properly be ranked at the level of the Constitution.” This new criterion generated another precedent, recorded in the prior

judgment: “International treaties. When conflicts arise in relation to human rights, (...) must be ranked at the level of the Constitution.”

Regarding the normative hierarchy of international treaties on human rights in relation to the Constitution, the SCJN determined that after the constitutional reform of 6 and 10 June 2011, Article 1.1 of the reformulated Constitution recognises a set of human rights stemming from the Constitution and the international treaties to which the Mexican State is party.

The Court, by a majority of ten votes, held that, in this sense, human rights, regardless of their source, constitute the control parameter of constitutional regularity, by which the validity of government rules and acts that form part of the Mexican legal system must be weighted. Consequently, the rules governing human rights, regardless of their source, are not related in hierarchical terms. However, where the Constitution expressly establishes a restriction on the exercise of human rights (perhaps recognised in international treaties, such as for example, the restraining order prohibiting movement out of the court’s jurisdiction, as an exceptional measure in criminal proceedings), the constitutional provision shall be observed. The determination of the criteria applicable in each case shall have to be defined by the trial court based on the *pro persona* principle.

Concerning the second question, regarding the binding nature of judgments of the Inter-American Court of Human Rights, the Seventh Collegiate Court on Civil Matters of the First Circuit had argued, based on the judgment of the SCJN in case number Miscellaneous 912/2011, that it is possible to invoke the IACHR’s case-law as a guiding criterion when it comes to the construction and fulfilment of provisions on the protection of human rights. That criterion had been recorded in the following prior judgment: “International case-law. Its usefulness in guidance regarding human rights.” Meanwhile, the First Collegiate Court on Administrative and Labour Matters of the Eleventh Circuit determined that international case-law on human rights is binding (and not just for guidance).

Regarding the imperative nature of the case-law issued by the IACHR, the SCJN held, by a majority of six votes, that such case-law is binding on Mexican courts, provided that the precedent is largely favourable to individuals.

Thus, the case-law of the IACHR is binding on the Mexican authorities, irrespective of whether the Mexican State has been party to the litigation before the Inter-American Court, because they constitute an

extension of the treaties it interprets, given that these criteria set out in the Inter-American Court’s judgments are used to determine the content of the human rights contemplated in them.

The SCJN further decided that, in compliance with this order, judges must act in accordance with the following:

1. Where the criterion for the IACHR has been issued in a case to which the Mexican State has been party, the applicability of the precedent to the specific case must be determined based on a verification of the existence of the same reasons that led to the pronouncement;
2. In all cases where it is possible, the Inter-American case-law must be harmonised with national case-law; and
3. If harmonisation is possible, the criterion that most favours the protection of human rights of persons shall be applied.

Languages:

Spanish.



Moldova

Constitutional Court

Important decisions

Identification: MDA-2014-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 11.02.2014 / **e)** 5 / **f)** Constitutional review of provisions of Article 4.e of the Administrative Litigation Law no. 793-XIV of 10 February 2000 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.18 Institutions – **State of emergency and emergency powers.**

5.1.5 Fundamental Rights – General questions – **Emergency situations.**

5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings.**

Keywords of the alphabetical index:

Judicial review, administrative act / National security.

Headnotes:

Public authorities sometimes need to take steps which may result in violation of the law, in order to safeguard national security. Administrative acts issued in emergency situations should correspond to minimum legal requirements in order to serve the protection of the public interest. The lawfulness of these administrative acts will be assessed by courts of law in terms of their purpose, which should be the protection of the public interest; any abuse of power by public authorities will be sanctioned. The legislator may establish certain procedural rules for such assessments.

Summary:

1. On 11 February 2014 the Constitutional Court delivered a judgment on the constitutionality of Article 4.e of the Administrative Litigation Law no. 793-XIV of 10 February 2000 (Complaint no. 38a/2013).

The ombudsman, Ms Aurelia Grigriu, had asked the Constitutional Court, by an application dated 13 August 2013, to rule on the constitutionality of certain provisions of Article 4.e which, in her opinion, represented an unjustified limitation of free access to justice.

The President of the Republic of Moldova was of the view that administrative acts concerning national security and those related to the exercise of the state of emergency regime cannot be subject to judicial examination. This limitation does not run counter to the free access of justice as enshrined in Article 20 of the Constitution, since it is motivated by the need to safeguard national security. These acts do not have a civil character and so Article 6 ECHR does not apply to them.

Parliament took the view that, in enacting these provisions, the legislature set out conditions for and limitations upon the exercise of rights by those who had suffered damage, including the exclusion of administrative acts concerning national security from the judicial control of the administrative courts. These limits and conditions are in accordance with the provisions of the Constitution and the provisions of international acts on human rights and fundamental freedoms.

According to the Government, the issue of administrative acts concerning national security is determined by states of emergency. Challenges to them might endanger the national security and public order and so their exemption from judicial control is justified by the general interest.

II. The Constitutional Court held that within the limits allowed by Article 4 of the Constitution regarding the interpretation and enforcement of the constitutional provisions on human rights and freedoms in accordance with international acts to which the Republic of Moldova is a party, and in terms of Article 6.1 ECHR, and having regard to the case-law of the European Court of Human Rights, the right of access to justice cannot be absolute. Limitations may be placed on it (including procedural ones), providing they are reasonable and proportionate to the aim pursued.

However, in its case-law, the European Court of Human Rights has indicated that the limitations must not restrict the right of access to such an extent that they strike at its core.

The Court held that, as stipulated in Article 4.e of the Administrative Litigation Law, administrative acts issued in emergency situations are completely exempt from judicial control; courts do not have the power to adjudicate on their lawfulness.

It noted at the same time that under Article 7.1 and 7.2 of the State Security Law, respect and protection for the human rights and freedoms represents one of the main duties of the state. The activity of ensuring the security of the state cannot violate legitimate human rights and freedoms.

Under paragraph 6 of the Article cited above, a person who considers that their legitimate rights and freedoms have been violated or the exercise of these rights was unreasonably restricted or the process of their exercise was violated by an official body which was exercising measures to safeguard the security of the state has the right to appeal to the superior authority of the state security, to the prosecutor or to the court as provided by law.

The Court noted certain unusual aspects to the legality of administrative acts issued in emergency situations, including what is known as “crisis legality”. It accepted that in emergency situations which threaten the very existence of the state, public authorities can take the necessary measures to cope with such circumstances. This may even result in violation of the law. Safeguarding the public interest is the supreme law (*salus rei publicae suprema lex*).

However, the Court emphasised that acts issued in emergency situations should correspond to minimum legal requirements (principle of legality), in order to serve the protection of the public interest. The legality of such acts will be assessed by courts of law in terms of their purpose, which should be the protection of the public interest, penalising abuse of power by public authorities. The legislator may establish certain procedural rules for such assessments.

The Constitutional Court held that courts must examine whether several conditions have been met cumulatively, namely the existence of the emergency situation; the existence of the emergency situation at the date on which the act was issued; the competence of the authority to issue the act; the effective impossibility on the part of the public administration to issue the act in ordinary conditions; the act is being issued in order to protect the general interest.

For these reasons, the Constitutional Court found that the total exemption from judicial control, provided for in Article 4.e of the Administrative Litigation Law, of administrative acts concerning the national security of the Republic of Moldova, the exercise of the state of emergency regime, the emergency measures taken by public authorities in order to fight natural calamities, fires, epidemics, epizooties and other similar phenomena, represents an unjustified limitation imposed by the legislator, which

undermines the principle of free access to justice, enshrined in Article 20 of the Constitution.

Languages:

Romanian, Russian.



Identification: MDA-2014-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 13.02.2014 / **e)** 6 / **f)** Constitutional review of Law no. 199 of 12 July 2013 on exemption from payment of taxes, contributions, premiums and deductions, together with the cancellation of the increasing penalties and fines related to them / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.25 General Principles – **Market economy**.
4.5.2 Institutions – Legislative bodies – **Powers**.
4.10.2 Institutions – Public finances – **Budget**.

Keywords of the alphabetical index:

Budget, adoption, control.

Headnotes:

Under the Constitution, legislative initiatives or amendments which entail an increase or decrease in budgetary revenues or loans, and increases or curtailing of budgetary expenditure are only permissible with prior government approval.

Summary:

On 13 February 2014 the Constitutional Court delivered a judgment on the constitutionality of Law no. 199 of 12 July 2013 on the exemption from payment of taxes, contributions, premiums and deductions, as well as the cancellation of the increasing penalties and fines related to them (Complaint no. 3a/2014), following an application made to the Court on 20 January 2014 by Members of Parliament Messrs Mihai Ghimpu, Valeriu Munteanu and Gheorghe Brega.

Under Law no. 199, “*Glorinal*” LLC (a limited liability company) was exempted from payment of certain taxes and contributions to the state budget in the amount of 12 million MDL, on account of debts incurred in the process of rebuilding and restoring the “*Curchi*” Monastery Complex. Under Article 2 of this Law, certain penalties and fees were also cancelled for *Glorinal*, regarding payment of contributions to the respective budgets.

The government had previously issued Decision no. 506 of 10 July 2013. The observation was made that the exemption from payment of taxes for “*Glorinal*” LLC only violates the principle of financial equality.

Subsequently, by Law no. 324 of 23 December 2013, which amended and supplemented certain legal acts and established a new financial policy, Parliament made changes to Law no. 199 and the amount of the exemption was increased from 12 to 25 million MDL.

Under Article 131.4 of the Constitution, government approval was not needed for the proposed amendments, which were aimed directly at the financial policy of the state. The requirement of government approval was only brought in after the adoption of the legislative initiative.

Therefore, at the request of the President of the Parliament (sent by letter no. DDP/C-6/243 of 24 December 2013), the Government adopted *post factum* Decision no. 1051 of 24 December 2013, whereby the amendments proposed by Parliament were accepted.

II. The Constitutional Court noted that the amendments challenged by the authors of the application were adopted by Parliament without Government approval.

It also observed that these amendments, which increased the amount of taxes that were exempted for this economic entity, and which resulted in an increase of the amount of exemptions, had direct repercussions on the level of budget revenue.

The Court held that the provisions of Article 131.4 of the Constitution establish the requirement for prior approval by the Government of amendments or legislative proposals which involve increases or decreases in expenditure, revenues or loans. This is an imperative condition, from which the legislator cannot deviate in the process of approving the public budget. Failure to respect it represents an infringement of the procedure established by the Constitution, in terms of implementation within the

budgetary field. This constitutional principle is inherent to the budgetary procedure.

The provisions of Article 131.4 of the Constitution are aimed at ensuring that the state budget and the state social insurance budget are implemented. The requirement that legislative proposals or amendments regarding increases or reductions in budget revenues or expenditure can only be adopted following government approval is aimed at maintaining budgetary balance. Any legislative initiative or amendment with a budgetary impact shall accordingly only be submitted once the source of funding has been identified (and with prior government approval).

The Court reiterated that the limitation of the exercise of legislative initiative and the restrictive conditioning of the legislative procedure in the budgetary field is based on the ground of the executive competences of Government, which, under Article 96 of the Constitution, ensures the implementation of state internal and external policy and exercises general management of the public administration.

The Court held that Government cannot disclaim its rights and constitutional liabilities, including express consent or rejection of legislative initiatives or amendments with a budgetary impact.

It also held that the prior approval of Government shall be express and univocal.

The Executive cannot, therefore, leave at Parliament’s discretion the adoption of draft laws with a direct impact on the national public budget. The government should either decide explicitly in favour of the draft law, by identifying the necessary budgetary means, or against it.

The Court also underlined the importance of safeguarding the principle of transparency of budgetary procedures, by full publication in the Official Gazette of Government opinions on legislative initiatives and amendments with a budgetary impact.

It held that Parliament, by adopting Law no. 199 of 12 July 2013 and deviating from the provisions of the Tax Code, has deflected, implicitly, from the principle of social equity.

By allowing a tax amnesty for a trader, Parliament established a difference in treatment for a company by comparison to other legal persons carrying out the same type of activity.

The exemption of an economic agent from payment of taxes, in contrast to other economic agents which

are required to fulfil their tax obligations, inevitably leads to favouring one legal person over another, from the same field of activity.

Exempting an economic agent from payment of taxes, and granting other financial facilities, undermines the constitutional principles of free competition as well as the principles of market economy.

Languages:

Romanian, Russian.



Identification: MDA-2014-1-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 14.02.2014 / **e)** 9 / **f)** Interpretation of Article 135 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.**

4.4.3.4 Institutions – Head of State – Powers – **Promulgation of laws.**

Keywords of the alphabetical index:

Legislation, enactment, timing / Official Gazette.

Headnotes:

Within the meaning of Article 135.1.a of the Constitution, the review of constitutionality of laws includes laws passed by Parliament, both before and after publication in the Official Gazette of the Republic of Moldova, upon the appeal of the President and other subjects with the right to appeal.

Summary:

On 14 February 2014 the Constitutional Court handed down a judgment on the interpretation of Article 135.1.a of the Constitution (Complaint no. 52b/2013), following an application which had been submitted to it on 26 November 2013 by Members of Parliament Messrs Valeriu Munteanu and Gheorghe Brega.

Article 135.1.a states that:

“1. [The Constitutional Court] exercises, upon appeal, the review of constitutionality over laws and decisions of the Parliament, decrees of the President, decisions and ordinances of the Government, as well as over international treaties to which the Republic of Moldova is a party”

As well as an interpretation of Article 135.1.a, the applicants also sought an explanation as to whether the President of Moldova could request a constitutional review of laws, submitted by Parliament, before they had been promulgated by presidential decree and published in the Official Gazette of the Republic of Moldova.

They also asked the Court to explain whether other subjects, aside from the President of Moldova, who are entitled to address to the Constitutional Court can challenge a law that has not been published in the Official Gazette.

The President was of the view that a law that has not been enacted or published (and does not therefore exist) cannot be subject to constitutional review.

Parliament was of the opinion that the review of laws before it is enacted could be institutionalised, in the first stage, for a limited number of subjects (those involved in the legislative process), which are bound to respect adopted, but not yet published laws. These could include the Government, Parliament and the President.

According to the Government, acts liable to constitutional review are subject to this imperative control after their entry into force.

II. The Court held that the supremacy of the Constitution falls under the essence of the rule of law requirements, representing a legal reality implying consequences and guarantees.

It also observed that, stemming from the content of Article 135.1.a of the Constitution, the Constitutional Court “exercises, upon appeal, the review of constitutionality over laws [...]”, without expressly limiting the exercise of this competence to the laws “in force”.

It noted too that Article 76 of the Constitution sets out the process for the entry into force of a law. This provision stipulates that the law is to be published in the Official Gazette and shall come into effect either on the date of its publication or on the date specified in its text. Also, Article 76 (according to which a law, unless published, is deemed non-existent), refers to the fact that the unpublished law is not required for enforcement and, respectively, does not take effect. Therefore, this constitutional provision refers to the enforceability of laws; it cannot be perceived as an obstacle to examining the constitutionality of laws before they are enacted.

Since the constitutional norm in question has a general nature and does not specify at what stage laws can be subject to constitutional review, prior to or after their entry into force, it should also be examined in the light of other constitutional provisions, which use the same terminology.

The Court held that, under Article 74.4 of the Constitution, laws are submitted to the President of the Republic of Moldova for enactment. It is therefore clear from the content of constitutional norms that, at the time of submission for enactment to the President, an act adopted by Parliament already has the status of “law”, even if it has yet to enter into force.

Moreover, Article 93 of the Constitution, which establishes the phase of enactment by the President, uses the term “law”, in contrast with the term “draft law” used in Articles 63.4, 74.3, 106¹ and 106² of the Constitution.

The Regulation of the Parliament operates with the term “draft law” in relation to acts that are within the legislative process until their adoption in the final reading (Articles 47-71) and with the term “law” in relation to acts adopted in the final reading.

The Court held that the progressive interpretation of the Constitutional Court’s competences allows for increases and extensions to its mechanisms. The restrictive interpretation of the fundamental rule outlined above, in the sense of limiting, eliminating or reducing the powers of the Constitutional Court, would result in its deviation from the purpose of improving constitutional democracy, which was followed by the constituent legislator himself.

The Court noted that the constitutional review of laws before enactment is inseparably integrated with a legal mechanism which contributes to the effective preventive protection of human rights and fundamental freedoms. Namely, such an interpretation of the constitutional provisions, by avoiding the entry into force of a law which is contrary to the Constitution, represents the expression of diversification and consolidation of the Constitutional Court’s power, the sole authority of constitutional jurisdiction in the Republic of Moldova, and an accomplishment in efforts towards achieving a rule of law state and a constitutional democracy.

The Court held that under the constitutional provisions, the President may only once request re-examination by Parliament of the law. He or she would be obliged to enact it, if it is readopted, even if there are certain doubts on the constitutionality of the law.

This situation is likely to cause a constitutional impasse, because, on the one hand, the President would be forced to enact a law contrary to the Constitution, therefore violating the Constitution, and on the other hand, the President would infringe the Constitution if he or she did not enact the law, thus encroaching on the exercise of the legislative power.

The Court accordingly held that where the President of the Republic of Moldova is about to send a law to Parliament for reconsideration on grounds of unconstitutionality, he or she can simultaneously submit an application to the Constitutional Court, as the sole authority of constitutional jurisdiction, to review the constitutionality of the law.

However, in view of the compulsory norm of Article 93 of the Constitution, the Court held that an application for the constitutional review of the law before its publication does not directly affect the enactment procedures, so that, if the challenged law is enacted before the Court hands down its judgment, the *a priori* constitutional review of the law will be carried out within the *a posteriori* review.

Concurrently, the Court held that, in cases of challenges to a law which has been submitted by the President to Parliament for reconsideration on grounds of unconstitutionality, heed should be taken of the essence of the principle of constitutional loyalty and Parliament should only re-adopt the law following delivery of the Constitutional Court’s judgment upholding the constitutionality of the law.

In conclusion, the Court held that, within the meaning of Article 135.1.a of the Constitution, the review of constitutionality of laws includes laws passed by Parliament, both before and after publication in the Official Gazette of the Republic of Moldova, upon the appeal of the President and other subjects with the right to appeal.

Languages:

Romanian, Russian.



Montenegro Constitutional Court

Important decisions

Identification: MNE-2014-1-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 17.04.2014 / **e)** U-I no. 6/14, 9/14 / **f)** / **g)** *Službeni list Crne Gore* (Official Gazette), no. 20/14 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.10 General Principles – **Certainty of the law.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.3.13.1.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings.**

Keywords of the alphabetical index:

Bankruptcy, proceedings / Mining and metallurgy.

Headnotes:

Any restrictive measures brought in by the state will only be considered “legal” in the spirit of the European Convention on Human Rights if they comply with the principles of a basis in domestic law, quality of law, accessibility of domestic law, predictability of domestic law and legal protection in domestic law against arbitrary interferences.

The legislator is authorised under the Constitution to regulate issues that are in the interests of Montenegro and those of the mining and metallurgy sector. The legislator must do this in line with the Constitution by enacting laws that determine rights and obligations regarding legal issues of interest to Montenegro.

Parties affected by a legal norm can only comprehend their concrete rights and duties and the effects of their behaviour if the norm is sufficiently precise and clear. However, this does not mean that the legislator, on the basis of its margin of appreciation, has a totally free rein to pass laws which deviate from the principles determined by the Constitution and systemic laws.

Summary:

I. The rationale behind the Law on the Protection of the Interest of the State in the Mining and Metallurgical Sector (hereinafter, the “Law”) was to preserve the national interest in the mining-metallurgy sector by regulating the process of selling companies going through bankruptcy proceedings. The legislator also regulated the conditions of sale of these companies; under the law, companies in this sector must perform activities of significance for Montenegro and its citizens.

The Supreme Court of Montenegro and the Government of Montenegro asked the Constitutional Court to review the constitutionality of certain provisions of Articles 1, 2.1 and 3.2 of the Law.

The Supreme Court contended in its petition that Article 3.4 of the Law was out of line with the Constitution, as it made decisions of the court acting in its sole jurisdiction conditional on the prior approval of Parliament. It also argued that bankruptcy proceedings are solely a matter of court procedure because under Article 6 of the Bankruptcy Law, once bankruptcy is filed, the competent court conducts the procedure *ex officio*. Bankruptcy procedure is defined by law as imperative (Article 7.1).

The Government of Montenegro argued that the provisions of Articles 1, 2, 3 and 4 of the Law ran counter to Articles 11, 17, 19, 20, 58, 118 and 139 of the Constitution and that they deviated altogether from the general principles of the Bankruptcy Law. These provide safeguards for bankruptcy creditors, their equal treatment and equality, economy of operation, the exclusively judicial process of administering bankruptcy, its regulation by law, the preclusive effect of judgment, swiftness of proceedings, two instance proceedings and transparency.

II. The Constitutional Court considered the constitutional principle of the integrity of the legal order as set out in the provisions of Article 145 of the Constitution, given that the legal regime governing bankruptcy proceedings is regulated by the Bankruptcy Law and other laws (Article 7.2 of the Bankruptcy Law). It noted the importance of an assessment as to whether the contested provisions impinged upon the principle of the separation of powers between legislative, executive and judicial and upon the principle of the rule of law as one of the highest values of the legal order.

It found that Parliament had exceeded its competence and violated the provisions of Articles 11.3 and 32 of the Constitution and Article 6.1 ECHR on the division of

power and right to fair trial before an independent and impartial tribunal established on the basis of law. The legislator had also infringed the principle from Article 10.2 of the Constitution, that everyone must observe the Constitution and law, as well as the basic presumption of legal security and legality which, under Article 25.3 of the Constitution, cannot be limited, whether in war or due to out of the ordinary states of affairs.

The Constitutional Court observed that the legislator had effectively made the administration of justice (in terms of selling a company to a strategic investor and concluding sales agreements in bankruptcy cases) conditional on obtaining the prior approval of Parliament. It had also imposed the condition on the state that it could only take over a company with prior approval from Parliament and if the contract was concluded in a manner prescribed by Article 3 of the Law. By granting this power to itself, under Articles 3.4 and 4 of the Law, Parliament had acted in a way that ran counter to the Constitution, as a new bankruptcy authority with unacceptable arbitrariness in the ensuing proceedings. Moreover, by enacting Articles 2.2 and 3.1 of the Law, the legislator deprived the authorities in charge of bankruptcy proceedings of the right to select the most appropriate model of sale as set out in Article 134.2 of the Bankruptcy Law. It also narrowed the field of competence of the bankruptcy authorities. Measures will only be deemed to comply with the principle of proportionality if they are necessary in the sense that no alternatives or better options can be found.

The Constitutional Court therefore found that the contested provisions of Articles 2.2, 3.1 and 3.3 of the Law did not meet the standard of “in accordance with the law” in line with the positions of the European Court of Human Rights. It also found that, due to the potential for ambiguity in the application of the provisions, the legislation could not be considered to be based on the rule of law or to establish legal certainty or predictability. Articles 2.2, 3.1 and 3.3 of the Law accordingly contravened the principle of the rule of law as the supreme principle of the constitutional order (Articles 10.2 and 145 of the Constitution).

As regards the legal solutions set out within Articles 1, 2.1 and 3.2 of the Law, the Constitutional Court found that these fell within the “constitutionally-legally accepted” limits and remits of the legislator to regulate issues of interest for Montenegro. The proposal to review their constitutionality was refused. The Court did not weigh the claims that were listed in the motion on breach of the right to legal remedy and the right to property from Articles 20 and 58 of the

Constitution since these, as already found by the Constitutional Court, could not be relevant for deciding otherwise in this case.

Cross-references:

European Court of Human Rights:

- *Stran Greek Refineries and Stratis Andreadis v. Greece*, no. 13427/87, 09.12.1994;
- *Sunday Times (no. 1) v. United Kingdom*, no. 6538/74, 26.04.1979, Series A, no. 30; *Special Bulletin Leading Cases ECHR* [ECH-1979-S-001];
- *Huvig v. France*, no. 11105/84, 24.04.1990.

Languages:

Montenegrin, English.



Netherlands

Council of State

Important decisions

Identification: NED-2014-1-001

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 23.10.2013 / **e)** 201301126/1/A3 / **f)** Central Office for Motor Vehicle Driver Testing (CBR) v. X (a citizen) / **g)** ECLI:NL:RVS:2013:1643, *Jurisprudentie Bestuursrecht 2013/247* / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 4.5.2 Institutions – Legislative bodies – **Powers**.
 4.15 Institutions – **Exercise of public functions by private bodies**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

Keywords of the alphabetical index:

Driving licence / Alcolock programme.

Headnotes:

Decision to suspend a trucker's driving licence and make him enrol in an alcolock programme was within the ambit of Article 6 ECHR and proportionate.

Summary:

I. X (a citizen) claimed that the decision of the Central Office for Motor Vehicle Driver Testing (hereinafter, the "CBR") to suspend his driving licence and make him enrol in a breath alcohol ignition interlock device programme (Alcolock programme) violated his right to a fair trial under Article 6 ECHR. The District Court found for X. The CBR then lodged an appeal to the Administrative Jurisdiction Division of the Council of State.

II. The Council of State found that suspending the applicant's driving licence, an administrative sanction, because of the severity of this measure in general could be within the scope of Article 6 ECHR. According to the Council of State, this is in line with

the European Court of Human Rights' case-law, determining that the severity of a sanction may amount to a criminal charge despite its administrative law qualification under national law.

X depended on his truck driving licence in order to earn his living. In the present case, his truck driving licence had been suspended for 24 months. In the light of the European Court of Human Rights' case-law, the Council of State ruled that the District Court had rightly held that this measure amounted to a criminal charge. However, the CBR's appeal succeeded, as the Council of State decided that the legislation on which the measure had been based was proportionate to the aims pursued (road and traffic safety) and necessary in a democratic society. The balance was first for the legislature to strike, and not for the court. Therefore, it did not violate Article 6 ECHR.

Cross-references:

European Court of Human Rights:

- *Nilsson v. Sweden*, no. 73661/01, 13.12.2005, *Reports of Judgments and Decisions* 2005-XIII;
- *Malige v. France*, no. 27812/95, 23.09.1998, *Reports* 1998-VII ;
- *Maszni v. Romania*, no. 59892/00, 21.09.2006;
- *Mihai Toma v. Romania*, no. 1051/06, 24.01.2012.

Languages:

Dutch.



Identification: NED-2014-1-002

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 20.11.2013 / **e)** 201207897/1/A3 / **f)** Shooting Society 'De Bunker' v. State Secretary for Security and Justice / **g)** ECLI:NL:RBARN:2012:BX2311, *Jurisprudentie Bestuursrecht* 2014, 11 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

1.3.5.7 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-legislative regulations.**

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

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

Keywords of the alphabetical index:

Shooting society, firearms and ammunitions permit / Statute interpreting guideline.

Headnotes:

A Circular stipulating that a firearms and ammunitions permit could only be obtained by membership in the Royal Netherlands Shooting Association qualified neither as a 'statute interpreting guideline' nor as an infringement prescribed by law in the sense of Article 11.2 ECHR.

Summary:

I. The State Secretary for Security and Justice turned down objections against the revocation of the Shooting Society's 'De Bunker' permission to have at its disposal firearms and ammunitions. The District Court found for the State Secretary. The Shooting Society 'De Bunker' then lodged an appeal to the Administrative Jurisdiction Division of the Council of State.

II. The Council of State held that the 'reasonable interest' criterion for the disposal of firearms and ammunitions under the Weapons and Ammunition Act relates to a specific aim. In case of Shooting Society 'De Bunker', their interest is for a (shooting) sport. A Circular reading that the reasonable interest criterion could only be met by membership of the Royal Netherlands Shooting Association (hereinafter, the "KNSA") went beyond the text and history of the applicable provision in the Weapons and Ammunition Act. The reason is that the KNSA rather than the chief constable (the competent authority) would *de facto* supervise shooting associations without a legal basis. Therefore, the Circular cannot be upheld by reasonable interpretation of the Act and does not constitute a 'statute interpreting guideline'. Non-membership of the KNSA does not mean that it failed to meet the 'reasonable interest' criterion. Consequently, there is no sufficient reason to revoke the Shooting Society's 'De Bunker' permission to have at its disposal firearms and ammunitions.

For the same reason, the Shooting Society 'De Bunker' could rely on the freedom of assembly and association in Article 11 ECHR. The Council of State upheld the District Court's judgment that Article 11 ECHR included the right not to be forced to

join an association, which had been infringed in the present case. However, the Council of State held that the interference was not justified under Article 11.2 ECHR. The infringement was not prescribed by law, as the Circular did not qualify as a 'statute interpreting guideline'.

Cross-references:

Council of State:

- no. 200703524, 09.01.2008, *Bulletin* 2008/1 [NED-2008-1-002].

European Court of Human Rights:

- *Vörður Ólafsson v. Iceland*, no. 20161/06, 27.04.2010, *Reports of Judgments and Decisions* 2010.

Languages:

Dutch.



Poland

Constitutional Tribunal

Statistical data

1 January 2014 – 30 April 2014

Number of decisions taken:

Judgments (decisions on the merits): 26

- Rulings:

- in 9 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
- in 17 judgments the Tribunal did not find any challenged provisions to be contrary to the Constitution (or other act of higher rank)

- Initiators of proceedings:

- 1 judgment was issued upon the requests of 2 groups of MPs
- 3 judgments were issued upon the request of the Prosecutor General
- 4 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
- 1 judgment was issued upon a request of a Regional Parliament
- 1 judgment was issued upon the request of the Supreme Medical Council
- 1 judgment was issued upon the requests of 2 Trade Unions (jointly with a request of a group of MPs)
- 5 judgments were issued upon the request of courts – the question of law procedure
- 7 judgments were issued upon the request of a physical person – the constitutional complaint procedure
- 2 judgments were issued upon the request of a legal person – the constitutional complaint procedure
- 1 judgment was issued upon the request of a partnership – the constitutional complaint procedure

- Other:

- 3 judgments were issued by the Tribunal in plenary session
- 9 judgments were issued with at least one dissenting opinion

Important decisions

Identification: POL-2014-1-001

a) Poland / b) Constitutional Tribunal / c) / d) 07.05.2013 / e) SK 11/11 / f) / g) *Dziennik Ustaw* (Journal of Laws), 2013, no. 585; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2013, no. 4A, item 40 / h) CODICES (English, Polish).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**
 4.7.8 Institutions – Judicial bodies – **Ordinary courts.**
 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**
 5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Working hours, judge / Working time, judge / Work, length, legal, judge / Work, overtime, bonus, judge / Remuneration, judge / Judge, salary, judicial independence.

Headnotes:

Determining the work hours for judges by their workload falls within the scope of the legislator's regulatory freedom.

The constitutional obligation to ensure an appropriate amount of free time, which constitutes an element of the right to rest, does not concern compensation for overtime, as the norms included in Article 66.2 of the Constitution protect the conditions of work, and not remuneration that is granted for that reason.

Summary:

I. The applicant, an Ordinary Court Judge, challenged the constitutionality of Article 83 of the Act of 27 July 2001, the Law on the Organisational Structure of Common Courts, insofar as this provision does not determine the maximum permissible hours of work for common court judges and does not precisely specify situations where the said maximum number of hours may be exceeded. Also, it rules out the right to compensation in the form of additional remuneration or an equivalent period of time off work for the work performed outside the said maximum number of hours.

II. According to the applicant, it follows from the end part of the second sentence of Article 66.2 of the Constitution that every person that performs work has the right to expect the legislator to effectively determine the maximum permissible hours of work. The applicant indicated that, in Article 66.2 of the Constitution, the ordinary legislator has been granted powers within the scope of determining the maximum permissible hours, but he does not have full discretion in that respect. When specifying the maximum permissible hours, the legislator is also bound by a requirement to provide employees with safe and hygienic conditions of work (paragraph 1). The complainant has underlined that the hygienic conditions of work entail that factors detrimental to human health are eliminated from the work environment. In his opinion, such factors should undoubtedly include the lack of specified maximum permissible hours, which may “even ruin a person's health”.

In the applicant's view, the protection of performance of work under Article 24 of the Constitution must comprise, on one hand, clear provisions regulating issues related to the permissible hours of work; and, on the other hand, the introduction of different types of penalties for the breach of the said provisions that would vary in their degree of stringency. According to the applicant, the said penalties include employees' right to additional remuneration or an equivalent period of time off work for the work performed outside the maximum permissible hours of work, as well as penalties under criminal law. In his opinion, the challenged regulation infringes on Article 24 of the Constitution in both these aspects.

The challenged regulation constitutes a kind of compromise between the tasks of the judiciary related to citizens' right to a fair trial and the protection of work and the hours of work. This, however, does not mean approval for assigning judges with excessive caseload and additional duties related thereto.

It is possible to declare the non-conformity of the challenged Act to Article 66.2 of the Constitution, which to a large extent has a referral character, if arguments are presented for the infringement of the “essence” of that right by the challenged regulation. The special legal position of judges, and in particular the special character of work performed by them, as well as the necessity to ensure their independence within the scope of adjudication, make it difficult to match judges’ tasks by a fixed work schedule. At the same time, the constitutional regulations that guarantee the right to rest permit a pro-constitutional interpretation of a norm that specifies the hours of work assigned to judges.

The granting of possible compensation in the form of additional remuneration or an equivalent period of time off work for the work performed outside the maximum permissible hours of work would not resolve the problem of excessive workload assigned to judges. The reason is that granting time off work to judges will only cause judges to lag behind with their work, which they will have to make up for any way. Also, the payment of remuneration for work outside the maximum permissible hours would mean that judges burdened with excessive caseload would constantly work more than the maximum permissible hours of work, which could affect their effectiveness and quality of their work, as well as have a negative impact on their health.

As there is no relation between the challenged provision and Articles 30 and 47 as well as Article 71.1 of the Constitution, proceedings in this respect have been discontinued.

Cross-references:

Constitutional Tribunal:

- Judgment U 6/97, 25.11.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 5-6, item 65;
- Judgment K 3/98, 24.06.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 4, item 52; *Bulletin* 1998/2 [POL-1998-2-014];
- Judgment P 6/98, 17.05.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 4, item 76; *Bulletin* 1999/2 [POL-1999-2-015];
- Judgment P 8/00, 04.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 189; *Bulletin* 2000/3 [POL-2000-3-021];
- Judgment K 12/00, 24.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 7, item 255; *Bulletin* 2000/3 [POL-2000-3-024];
- Decision SK 10/01, 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 225;
- Judgment SK 20/00, 07.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 29;
- Judgment U 7/01, 02.07.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 48;
- Judgment SK 42/01, 14.07.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 63;
- Judgment K 54/02, 24.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 10;
- Judgment P 20/04, 07.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 10A, item 111;
- Judgment K 40/07, 16.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 44;
- Judgment P 48/07, 02.12.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 10A, item 173;
- Judgment SK 10/09, 09.02.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 2A, item 10;
- Judgment K 1/12, 12.12.2012, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2012, no. 11A, item 134.

Court of Justice of the European Union:

- Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others v. Deutsches Rotes Kreuz*, 05.10.2004, [2004] ECR I-0000.

Languages:

Polish, English (translation by the Tribunal).



Identification: POL-2014-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.12.2013 / **e)** Ts 13/12 / **f)** / **g)** www.trybunal.gov.pl / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

1.2.1 Constitutional Justice – Types of claim – **Claim by a public body.**

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

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

Keywords of the alphabetical index:

Constitutional Court, company, public, *locus standi* / Constitutional complaint, by state, admissibility / *Locus standi*, constitutional / Constitutional Court, appeal, *locus standi* / Complaint, constitutional, admissibility / Constitutional action.

Headnotes:

Public business entities may exercise constitutional rights and freedoms and the respective means of their protection only when they are in the same situation as natural persons and other legal persons and the challenged normative act concerns them on the same terms, on which it could concern natural persons and other legal persons.

It is not the type and legal character of a public business entity or the origin of capital on the basis of which this entity functions which should determine whether it may file a constitutional complaint. Rather, it should be based on the fact whether the public business entity enjoys a given constitutional right or freedom.

Public business entities may not be treated as beneficiaries of constitutional rights and freedoms, and consequently, are not entitled to file a constitutional complaint, if they are acting as entities with the attributes of state power and if the challenged normative act concerns them exactly due to their character of entities subordinated organisationally to their owner – the State.

Summary:

I. The constitutional complaint was filed by a public business entity, a limited liability company. Its shares are held by the City of Szczecin, the Town of

Goleniów, the *Zachodniopomorskie Voivodeship* and the “Polish Airports” State Enterprise.

II. By its decision Ts 13/12 of 29 March 2012, the Constitutional Tribunal refused to proceed with the complaint due to the lack of *locus standi* of the said company. The present decision granted the request to reconsider the previous decision, under Article 49 in conjunction with Article 36.4 of the Constitutional Tribunal Act. A ruling on the merits of the case has not yet been issued.

Article 79.1 of the Constitution gives no grounds for an *a priori* exclusion of legitimacy to file a constitutional complaint by a public business entity, as it grants the right to file a constitutional complaint to everyone, whose constitutional rights or freedoms have been infringed. When assessing eligibility to file a constitutional complaint, the goal is not to specify the term “a public business entity” in greater detail. Instead, the aim is to determine whether such entities may be entitled to certain constitutional rights or freedoms, and consequently – may have active legitimacy to file a constitutional complaint. Indeed, in light of Article 79.1 of the Constitution, the assumption that a given entity is entitled to a constitutional right or freedom implies that the entity has active legitimacy to file a constitutional complaint. According to the wording of that provision, there are no grounds to automatically exclude legitimacy that a given entity may have only due to the fact that its activity relies on public property (the property of the State Treasury or of a unit of local self-government). Nevertheless, public business entities are not entitled to file a constitutional complaint to the extent that they may imperatively influence the legal situation of other entities.

As the initiator of the proceedings does not exercise public authority because it may not imperatively influence the legal situation of other natural or legal persons, and as the challenged norm concern all entities entitled to legal protection before administrative courts on equal terms, the origin of the capital of the said company may not deprive it *a priori* of the legitimacy to file a constitutional complaint, especially when it relies on its constitutional right of access to a court.

III. The Tribunal issued this judgment *en banc*. Three dissenting opinions were raised.

Cross-references:

Constitutional Tribunal:

- Judgment SK 4/98, 24.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 24; [POL-1999-X-003];

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- Judgment SK 12/98, 08.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 96; [POL-1997-X-007];
 - Decision SK 6/99, 21.03.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 66;
 - Judgment K 19/00, 07.05.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 4, item 82; *Bulletin* 2002/1 [POL-2002-1-001]; *Special Bulletin – Limitation of Human Rights* [POL-2001-H-001];
 - Decision Ts 72/01, 26.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 8, item 298;
 - Judgment SK 37/01, 28.01.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 1A, item 3;
 - Decision Ts 116/02, 17.03.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 2B, item 105;
 - Decision Ts 163/04, 02.11.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4B, item 164;
 - Decision Ts 35/04, 23.02.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 1B, item 26;
 - Decision Ts 204/04, 10.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6B, item 238;
 - Decision Ts 36/05, 31.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 1B, item 28;
 - Decision Ts 148/05, 03.10.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1B, item 70;
 - Decision Ts 204/04, 08.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6B, item 239;
 - Judgment SK 63/05, 20.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 108;
 - Judgment P 5/05, 09.01.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 1A, item 1;
 - Judgment SK 7/06, 24.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 108; *Bulletin* 2008/1 [POL-2008-1-004];
 - Decision SK 67/05, 20.12.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 11A, item 168;
 - Decision SK 80/06, 08.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 51;
 - Decision SK 11/10, 02.12.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 10A, item 131;
 - Decision SK 21/07, 06.04.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 3A, item 28;
 - Decision SK 19/10, 09.07.2012, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2012, no. 7A, item 87;
 - Judgment SK 17/12, 25.07.2013, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2013, no. 6A, item 86.

Languages:

Polish, English (translation by the Tribunal).



Portugal

Constitutional Court

Important decisions

Identification: POR-2014-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 19.12.2013 / **e)** 862/13 / **f)** / **g)** *Diário da República* (Official Gazette), 4 (Series I), 07.01.2014, 20 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

3.11 General Principles – **Vested and/or acquired rights.**

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

Keywords of the alphabetical index:

Pension, adjustment / Pension, reduction / Pension, system, harmonisation.

Headnotes:

Norms designed to address budgetary consolidation by reducing the pension entitlements of one class of public sector pensioners (i.e., pensions paid by *Caixa Geral de Aposentações*, hereinafter, “CGA”, the public sector pension fund) did not adequately pursue the public interests invoked by the State (the sustainability of the CGA system, intergenerational fairness, and the need for the country’s different social protection systems to converge). From the constitutional viewpoint, the pensioners in both systems are simply state pensioners, and it is up to the state to guarantee the system under which both types of pensioners have contributed as required to by law.

Summary:

I. The President of the Republic sought review by the Constitutional Court of number of norms contained in a Decree of the Assembly of the Republic. The norms were designed to deepen social-protection convergence mechanisms by bringing in measures regarding *Caixa Geral de*

Aposentações (hereinafter, “CGA”, the public sector pension fund) old-age, retirement, invalidity and survivor’s pensions with a gross monthly amount of more than 600 euros. It cut the value of pensions subject to the regime set out in the Statute governing the Retirement of Public Sector Staff by ten per cent and provided for the application of a new formula for calculating the pensions. It formed part of the general reform intended to ensure convergence between the general social security system and that protecting Public Administration staff – an idea that dates back almost to the creation of the CGA (which began operating in 1929) itself, albeit the intention was then abandoned more than once, before reappearing with the current Constitution.

II. The Constitutional Court took the view that the measures contained in the norms questioned would have resulted in an abrupt cut in the pensions concerned, and did not form part of a framework of structural cross-cutting measures designed to ensure across-the-board progress in fulfilling the interest of convergence on other levels.

The petitioner in this case (the President of the Republic) argued that these norms brought about a coercive, unilateral and definitive reduction in pensions by cutting them by a fixed percentage of their gross amount. He argued that this meant they should be seen as norms that created taxes. In this respect the Court was of the opinion that the norms affected social rights which are part of legal ‘institutes’ that inform the social security system. Classifying the norms as being covered by social security law would not in itself preclude them from possessing a fiscal nature, but some of the fundamental elements needed to categorise this cut in pensions as a tax were missing. There would be no direct payment to the state of the amount by which the pensions were reduced, inasmuch as within the legal relationship involved in public sector pensions, the entity with the duty to pay those pensions is the same as the one charged by the norms with cutting them. A cut in a pension is itself founded on a legal bond under which there is an obligation to pay that pension; whereas the legal precondition for the formation of the obligation to pay a tax is not linked to any relationship between the taxpayer and the Administration. A tax is a payment that is required of persons who possess the capacity to contribute, within the overall framework of the relationship between the fiscal state and citizens as a whole. This was not the case here, in addition to which the purpose of taxes is to provide general funding for public spending, and not to finance specific public expenses.

On the alleged violation of the principle of protection against reverses in fundamental social rights, the Court emphasised that purely forbidding any regression in social terms is impracticable, because it would presuppose the idea that the available resources are always going to grow. It may be necessary to lower levels of essential benefits in order to maintain the essential core of the social right in question. From this perspective, guaranteeing the minimum content of the right to a pension may itself mean reducing the amount of that pension.

The Court noted that although the norms before it were intended to have effect in the future – the legal effects of the pension cut would only apply from 1 January 2014 onwards – they addressed legal relations regarding public sector retirement that were formed under an earlier regime. This was a situation of inauthentic or retrospective retroactivity, in which the force of the norms is *ex nunc*, but they affect rights that were constituted in the past and whose effects are ongoing at the present time.

The Court stated that there are no constitutional rules that would preclude retrospective laws which reduce the *quantum* of pensions that have already been recognised, but one must gauge whether such laws do respect a number of constitutional principles – namely the principle of the protection of trust, which itself arises out of the principle of legal certainty, which is in turn a material element of the state based on the rule of law.

The Court had already held in the past that from the point of view of the principle of the protection of trust, it is not unconstitutional to decrease the amount of the pensions of CGA beneficiaries. However, it held that the reasons underlying its earlier findings did not apply in the present case.

The budgetary consolidation reflected in these norms only addressed one part of the public pension system (the CGA social protection regime), not the entire public pension system. This meant it was the protection of the trust of certain pensioners that had to be considered and weighed against the position of the rest of the country's public pensioners. At the same time, the new measure was not temporary, but indefinite, given that while reversing it at some time in the future was seen as a possibility, this would depend on a favourable evolution in macroeconomic variables directly linked to an increase in the capacity to fund the structural deficit of the CGA pension system by means of transfers from the State Budget.

The Court stated that it was necessary to evaluate whether the public interest in reducing the transfers from the State Budget used to finance the CGA's

structural deficit justified cutting the pensions of the CGA's beneficiaries. The outcome of that evaluation was negative.

Firstly, because the CGA pension system was closed to new beneficiaries as of 1 January 2006. The legislator accepted the burden of the system's financial unsustainability – to which the explanatory preamble to the Decree containing the norms in question specifically refers – as one of the costs of the convergence of the benefit regimes included in the overall public social security system. This is why the Decree said that public sector retirement and survivors' pensions payable under the CGA regime would be co-funded by "transfers from the State Budget". The Court noted that in the medium and long terms, a benefit system that no longer accepts new subscribers inevitably ceases to be self-financing and self-sustaining. The numerical ratio of subscribers to beneficiaries will gradually decrease as the former retire, until one eventually reaches the extreme situation in which there are no subscribers left. The continuous fall in this ratio will end up causing the CGA to be funded by transfers from the State Budget, and the contributory regime will turn into a non-contributory one. The future horizon for such a system can never be one of self-sustainability. The Court said that in a system that is closed to new subscribers, cutting pensions is not in itself a measure with the capability to safeguard the system's sustainability. By itself, a closed system is unsustainable in the medium and long terms. This characteristic means that such a system must necessarily resort to funding from taxation and/or forms of capitalisation, in that it will no longer be viable to resort solely to techniques for sharing out the money that is already in the system.

Secondly, one cannot sacrifice the rights of CGA pensioners exclusively for these budgetary consolidation reasons, inasmuch as it is legitimate for the pensioners in both regimes (the general social security system and the protection system applicable to Public Administration staff) to be considered holders of rights to a pension that possess equal legal consistency: from the constitutional viewpoint, the pensioners in both systems are simply state pensioners, and it is up to the state to guarantee the system under which both types of pensioner have contributed as required to by law. Any inequalities between them at the level of the legal rules governing the two public regimes that have come from the past and have financial consequences in the present cannot be corrected solely on the basis of difficulties experienced by one of the two regimes and by exclusively sacrificing the constituted rights of the beneficiaries of that regime.

The possible solutions to the problem of the system's lack of financial sustainability must be looked at in terms of the public system as a whole. The problem requires answers that safeguard the system's fairness on both the intergenerational and the intergenerational levels.

In the Court's view, sacrificial solutions motivated by reasons linked to financial unsustainability are asymmetric or one-off measures, and are intended to achieve goals (avoiding increases in transfers from the State Budget by sacrificing CGA pensioners and no one else) that have no place in the constitutional design of a unified public pension system. The criterion underlying such solutions – the convergence of the systems – objectively contradicts the legitimacy of, and the good reasons for, the trust that had previously been engendered among those beneficiaries in terms of the amount of the pensions that were awarded to them.

The existence at a given moment in time of legal regimes that differ in terms of the conditions required for retirement and the calculation of the ensuing pension undoubtedly resulted from recognition that there were sufficient material grounds to justify the difference between them. One cannot consider the Statute governing the Retirement of Public Sector Staff and the legal rules that complemented it to have been arbitrary pieces of legislation without a legitimate sense and lacking in serious and reasonable grounds. The staff and other agents of the Public Administration who retired under this regime could not but trust that these rules existed in order to protect them in old age and/or invalidity, and that the rules' ultimate objective was to make the fundamental right to retirement a concrete reality. The existence of a different regime for calculating pensions is entirely the responsibility of the state, which felt it necessary to ensure the protection of Public Administration workers in old age and invalidity in a different way. The principle of trust becomes particularly important in connection with the state's responsibility for its own actions, in that the increase in the expectation of trustworthiness can only be attributed to the legislator's own behaviour. The current beneficiaries of the CGA regime fulfilled all the legal obligations that were imposed on them in order to benefit from their pension; they could not have chosen otherwise, so now they cannot be the only ones to pay the price for the difference, on the pretext of the need to restore equality.

III. The Ruling was unanimous. However, while concurring, two Justices disagreed with the use of the principle of trust as the key control parameter without an autonomous analysis centred on the principle of proportionality. In their view only part of the norms was unconstitutional: the part in which they affected

pensions by cutting amounts which, from a normal point of view, are likely to have been allocated to paying expenses that are a mandatory and unavoidable element in providing for pensioners' needs and commitments, and in which, by so doing, they exceeded the reasonable extent of the sacrifice the citizens in question could be asked to make and excessively affected the most disadvantaged among them.

Cross-references:

- Rulings nos. 581/95, 31.10.1995; 369/97, 14.05.1997; 435/98, 16.06.1998; 99/99, 10.02.1999; 411/99, 29.06.1999; 72/02, 20.02.2002; 675/05, 06.12.2005; 302/06, 09.05.2006; 437/06, 12.07.2006; 432/07, 26.07.2007; 351/08, 01.07.2008; 128/09, 12.03.2009; 188/09, 22.04.2009; 3/10, 06.01.2010; 396/11, 21.09.2011; 353/12, 05.07.2012; 187/13, 05.04.2013 and 474/13, 29.08.2013.

Languages:

Portuguese.



Identification: POR-2014-1-002

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 09.01.2014 / **e)** 45/14 / **f)** / **g)** *Diário da República* (Official Gazette), 29 (Series II), 11.02.2014, 4173 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings.**

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

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

Keywords of the alphabetical index:

Offence, administrative / Sanction, administrative / Burden of proof, presumption affecting / Presumption, legal, rebuttable / Vicarious liability, employers.

Headnotes:

A norm that generically makes companies responsible for any infractions committed by drivers in their service, even outside Portuguese territory, is constitutional. First, it provides for the presumption of company responsibility to be rebutted where the company demonstrates that it organised the driver's work in such a way that the latter was able to comply with the applicable legal provisions. Second, the norm creates an administrative offence (as opposed to a crime), and given the difference between administrative and penal infractions the norm could not be considered to violate the penal principle of guilt, or indeed any other constitutional parameter.

Summary:

I. This concrete review case was obligatorily brought by the Public Prosecutors' Office because the court *quo* had refused to apply a norm contained in the Law that transposed a European Directive and regulates the regime for imposing sanctions for breaches of the provisions of the European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (hereinafter, "AETR"), on the grounds that the norm was unconstitutional. The sanctions imposed by this Law include those regarding breaches of the norms on driving times, breaks and rest times and on controlling the use of tachographs in the road transport business.

The objectives of the international regulations on this issue were to harmonise the conditions under which road transport enterprises compete with one another (they must all incorporate the expenses linked to working conditions and road safety into their business costs) and to improve both working conditions and road safety.

This subject had already been regulated in Portugal by a 1989 Executive Law, which was itself designed to comply with the AETR. However, this Executive Law did not include a precept that expressly attributed the responsibility for infractions linked to working and rest times to the employer or the worker. 1999 saw the approval of a new general regime governing labour-related administrative offences, which provided that employers were generically responsible for labour-related infractions. A Labour Code was passed in 2003, but the absence therein of

a norm of this nature led to the understanding that it was necessary to demonstrate that an employer was actually responsible for the material commission of an administrative offence in order for the employer to be held legally liable.

Against this background, Regulation (EC) no. 561/2006 of the European Parliament and the Council entered into force in 2007. It laid down a rebuttable presumption (*praesumptio iuris tantum*) that transport enterprises are responsible for any infraction committed by their drivers, even if the infraction takes place in the territory of another Member State or a third country.

The creation of this presumption dispenses with the need to allege and prove the material facts that could make the employer liable for the acts of a driver employed by it. However, employers are allowed to show that they have organised their road transport work in such a way that the driver in their service could have complied with the breached norm, whereupon the employer's liability is excluded.

II. The Constitutional Court observed that where administrative offences are concerned, the attribution of a fact to an agent must be based on an extensive concept of authorship under which the author of an administrative offence is considered to be any agent who contributed causally or co-causally to the occurrence of the fact. This extensive concept of authorship differs from the more restrictive penal law equivalent, and is especially obvious in cases like the situation before the Court in this case, where the facts that have been committed involve a company's organisational and functional structure. This construction is logically derived from the existence in the law governing mere administrative offences of norms that create duties, failure to comply with which is sanctioned by fines. The imposition of duties on a wide range of agents gives them the ability to either fulfil or breach those duties, and the responsibility for such breaches. The attribution rule derived from this extensive concept of authorship means that the entity in charge will always be held liable whenever the duty it is legally required to uphold, or whose breach it is required to avoid, is not fulfilled.

Inasmuch as an employer is under a legal duty to ensure compliance with the rules regarding driving times, breaks and rest times and the control of the use of tachographs in the road transport business, it can be held liable for an administrative offence under the terms of the Law before the Court in cases in which, as a consequence of its actions, it has directly given rise to the so-called 'anti-juridical result', or it has causally or co-causally contributed by omission to the commission of an infraction by a driver in its service.

The Court considered that the presumption that a driver's failure to comply with rules is caused by a defective organisation of the activity in question is not arbitrary.

Where the law governing mere administrative offences – when all that is at stake is the imposition of fines – is concerned, there can be no reservations in this respect, all the more so in the case of this particular norm, which allows the employer to demonstrate that it should avoid any responsibility for the administrative offence.

The Court held that, quite apart from any other distinctions that result from the difference between the natures of acts that are unlawful under the criminal law and those that are unlawful under the law governing administrative offences, this difference conditions the impact of the principles of guilt, proportionality and sociability. The natures of administrative offences and penal infractions are different, and this difference led the Court to find that the norm before it could not be considered to violate the penal principle of guilt, or indeed any other constitutional parameter.

Cross-references:

- Ruling no. 336/08, 19.06.2008.

Languages:

Portuguese.



Identification: POR-2014-1-003

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.02.2014 / **e)** 108/14 / **f)** / **g)** *Diário da República* (Official Gazette), 59 (Series II), 25.03.2014, 7966 / **h)** CODICES (Portuguese).

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.**

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

Keywords of the alphabetical index:

Criminal procedure / Minor.

Headnotes:

The interpretation of a provision of the Code of Criminal Procedure, which states that persons accused of the same or a related crime in separate proceedings can only testify as witnesses in the other case(s) if they expressly consent to do so, as not applying to any witness who was a minor on the date the crime was committed, who was not subjected to criminal proceedings, is constitutional. Youth custody, protection and re-education proceedings are not criminal in nature, nor can they be confused with criminal proceedings because their purpose is not punitive. The absence of the requirement that the witness must consent to testify is not unconstitutional in such instances, because the two separate proceedings were not both of a criminal nature.

Summary:

I. The appellant in this concrete review case was tried at first instance and convicted of the crime of theft – a conviction that was then confirmed by the Coimbra Court of Appeal.

The question of constitutionality involved a Code of Criminal Procedure (CPP) norm which states that persons accused of the same or related crimes in separate proceedings cannot testify as witnesses unless they expressly consent to do so, even if they have already been convicted and the sentence has transited in *rem judicatam*.

A subject who had initially been accused in the same criminal proceedings testified as a witness at the first-instance trial hearing of the other accused person (an adult). It was found that he had been below the age of 16 when the criminal facts occurred, and youth custody, protection and re-education proceedings had therefore been initiated in relation to him and the criminal inquiries were dropped in his case.

There are similarities between youth custody, protection and re-education proceedings and criminal proceedings, and that they share a number of guarantees. The essential content of the guarantee-based constitutional principles applies more forcefully to criminal proceedings, but the two models are quite close and this is especially clear in the case of the

principle of procedural legality, the right to a hearing, the adversarial principle, and the right to a lawyer. Although youth custody, protection and re-education interventions are not intended to punish, the limitations they place on the fundamental rights of the person who is the object of them require the ordinary legislator to guarantee the various rights to a defence, which include the right not to incriminate oneself. The procedural status of minors (defined for this purpose as below the age of 16 years) is also quite close to that of accused persons, and the range of procedural rights and guarantees available to minors includes the right to remain silent. The Code of Criminal Procedure applies subsidiarily to the procedural details of youth custody, protection and re-education proceedings.

The United Nations Convention on the Rights of the Child (1989) also lays down that: "Every child alleged as or accused of having infringed the penal law has at least the following guarantees... Not to be compelled to give testimony or to confess guilt...".

Inasmuch as it is necessary to ensure that in the case of a minor who is the object of youth custody, protection and re-education proceedings, any contribution that he or she makes and is unfavourable to his or her position must be made in a way that is informed, free and self-responsible, the simple obligation to testify as a witness in criminal proceedings regarding the same facts as those involved in the youth protection proceedings could constitute a breach of the principle *nemo tenetur se ipsum accusare* (no one is bound to incriminate himself).

However, once closed, the law does not allow youth custody, protection and re-education proceedings to be reopened on the grounds of testimony given by the minor in criminal proceedings, or because new evidence has been discovered as a result of that testimony. As such, the requirement that the minor must testify in those criminal proceedings does not violate the *nemo tenetur* principle.

The appellant to the Constitutional Court had moved for the minor's testimony to be disregarded on the grounds that it was inadmissible unless the minor had consented to give it, which was not the case. The court of first instance refused this request and the court of appeal confirmed the lower court's understanding.

The appellant argued that this was unconstitutional because it was in breach of the *nemo tenetur* principle. The testimony given by the witness, who had been less than 16 years old at the time of the facts in question, referred to facts for which the

witness had been jointly responsible with the accused in those proceedings (the appellant in the present case).

II. The Constitutional Court noted that the right to remain silent is recognised under the criminal procedural law of the majority of states based on the rule of law, and is expressly enshrined in a number of international legal instruments, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

The right to remain silent is intimately linked to the right of an accused person not to incriminate him or herself. It is only by recognising the accused's right to be silent that one can be certain he or she will not be forced to pronounce him or herself and reveal information that might contribute to his or her conviction. If the accused's right to self-determination is to be protected, he or she must be able to exercise his or her completely free will and decide what position to take in relation to the matter that is the object of the proceedings.

The Portuguese Constitution does not enshrine this principle *expressis verbis*, but both doctrine and case-law have argued that the principle *nemo tenetur se ipsum accusare* possesses a constitutional basis, and it is considered to be an unwritten constitutional right in criminal proceedings that is included among the guarantees of the defence which the Constitution requires that such proceedings ensure. These procedural rights offer protection to the dignity of the human person and other, related fundamental rights, such as the rights to personal integrity, the free development of personality, and privacy.

The *nemo tenetur* principle plays both a preventative part in criminal proceedings, precluding solutions that would oblige an accused person to provide evidence that could contribute to his or her conviction, and a repressive part, requiring evidence collected by taking advantage of a forced collaboration on the part of the accused to be disregarded.

On the infra-constitutional level, the right to remain silent aspect of the *nemo tenetur* principle is expressly enshrined in the Code of Criminal Procedure, and is accompanied by the imposition of other, related requirements, such as the prohibition on attaching significance to an accused's decision to remain silent, the duty to advise an accused of the rights derived from the principle and clarify any doubts about it, the prohibition on the use of evidence obtained in violation of the right, and the prohibition on attaching significance to earlier declarations made by an accused who chooses not to say anything at his or her trial hearing.

In cases in which someone is in both situations – that of witness in one set of proceedings, and that of person accused of the same or a related crime in other proceedings – this procedural subject can only testify as a witness in the former if he or she expressly consents to do so. In such cases, the witness benefits not only from the general protection afforded to witnesses, whereby they can refuse to answer questions when that answer might lead to them being held criminally liable, but also from the protection granted to accused persons under which they can refuse to say anything.

The norm that prevents accused and co-accused persons from testifying as witnesses precludes the possibility that, when he or she is relating facts concerning a co-accused, an accused person may be obliged to take a position in relation to facts for which he or she is alleged to be responsible in the same or related proceedings that are subject to the same form of judgement.

The purpose of the procedural requirements regarding the admissibility of testimonial evidence given by persons who are accused of the same or a related crime in separate proceedings is to protect the rights and the procedural position of an accused person who is called on to give such testimony, with the ultimate goal of guaranteeing his or her right not to incriminate him or herself. As a rule, this impediment only remains valid for as long as the potential witness is still an accused person in the proceedings in question.

The purpose of youth custody, protection and re-education interventions is to educate the minor in such a way as to ensure that he or she abides by the law in the future; it is not to punish him or her for the crime. These youth measures cannot be imposed unless the court concludes that the minor's personality needs to be corrected, as demonstrated by his or her responsibility for the crime committed. However, imposing such measures – above all a custodial sentence – implies restricting the minor's fundamental rights on the grounds that he or she was responsible for a fact which the criminal law qualifies as a crime. This fact places the minor in a position which, from this perspective, possesses similarities with the position of an accused person in criminal proceedings.

The Court observed that the present case raised questions regarding duties associated with the procedural status of witnesses, which are different from the prerogatives inherent in the status of accused persons. A witness is under both the duty to speak under oath when he or she is being heard by judicial authorities, with refusal to testify subject to sanctions, and the duty to truthfully answer questions

put to him or her; although he or she can refuse to answer if he or she alleges that answering may lead to his or her being held criminally liable.

Supplementary information:

It should be noted that the normative interpretation considered by the Constitutional Court in the present case is limited to the hypothesis that, at the moment when a minor testifies as a witness in criminal proceedings, the relevant youth custody, protection and re-education proceedings in relation to him or her have already ended in a decision to dismiss the charges, and his or her subsequent testimony is therefore not capable of contributing to the imposition of a measure that would violate his or her fundamental rights. In other words, under the rules applicable to concrete reviews, this Constitutional Court decision is limited to situations that exactly match this set of circumstances.

Cross-references:

- Rulings nos. 695/95, 05.12.1995; 304/04, 05.05.2004; 181/05, 05.04.2005; 155/07, 02.03.2007 and 461/11, 11.10.2011.

Languages:

Portuguese.



Identification: POR-2014-1-004

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 18.02.2014 / **e)** 174/14 / **f)** / **g)** *Diário da República* (Official Gazette), 51 (Series I), 13.03.2014, 1858 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case.**

Keywords of the alphabetical index:

Crime, gravity / Criminal procedure / Criminal proceedings, guarantees / Summary proceedings, constitutionality.

Headnotes:

A provision of the Code of Criminal Procedure that consigned the judgment of persons detained *in flagrante delicto* to summary proceedings heard by a single judge, regardless of the maximum possible penalty, including penalties beyond those applicable in single-judge summary proceedings, violates the guarantees the Constitution affords to accused persons. Summary procedure contains restrictions on the exercise of the right to a defence that are not compatible with the more demanding requirements which the trial of more serious crimes impose as regards the level of the guarantees available to the defence.

Summary:

I. The normative interpretation addressed in this Ruling had already been found materially unconstitutional in three earlier concrete review decisions. In such situations, any Constitutional Court Justice or the Public Prosecutors' Office (the petitioner in the present case) can request the Court to review the norm in question under the *ex post facto* abstract procedure, with the object of standardising the existing jurisprudence and securing a declaration of unconstitutionality with generally binding force.

The question before the Court was whether a norm that consigned the judgment of persons detained *in flagrante delicto* to summary proceedings heard by a single judge, regardless of the maximum possible penalty, respected the guarantees the Constitution affords to accused persons. The particular issue was the fact that the norm was applicable to the trial of crimes with a maximum abstract penalty of more than five years' imprisonment, which thus exceeded the maximum possible sentence that a single judge is competent to impose in common proceedings. The only exceptions under the provision were highly organised criminality, crimes against cultural identity and personal integrity, crimes against state security and those involving violations of International Humanitarian Law from this summary judgment rule for persons detained *in flagrante delicto*.

II. The Constitutional Court observed that, in principle, cases in which the maximum possible penalty in abstract terms is greater than five years in prison must be heard by a panel of judges, albeit this competence pertains to a single judge when the crime in question is subject to summary procedure.

In the criminal field this form of procedure is linked to small and medium-sized crimes, and is justified when the facts are immediately verified because the agent was caught "red-handed" – *in flagrante delicto* – which makes it possible to dispense with other formalities and the more in-depth investigation that would normally occur in the investigative and fact-finding phases of common criminal proceedings. It is commonly justified that this is logical from the dual point of view of the productivity and efficacy of the justice system and the idea of justice itself, in that the speedy justice permitted by submitting accused persons to immediate trial in *flagrante delicto* cases helps ensure social peace and a feeling of community justice.

The Constitution enshrines the principle that an accused person is presumed innocent, which it associates with the requirement that a trial must take place in the shortest possible period compatible with the guarantees which the Constitution also affords to the defence. The underlying perspective is that delays in penal proceedings prolong both the cloud of suspicion hanging above the accused and any security measures to which he or she is subject, and end up diminishing the useful content of the principle of the presumption of innocence.

The Court emphasised that the principle that proceedings should be as fast as possible must be made compatible with the guarantees applicable to the defence, and that it is not permissible to sacrifice the rights inherent in the procedural status of accused person.

The summary procedural form is a faster format in terms of the applicable time limits, and a simplified one where the requisite formalities are concerned.

As a general principle it involves: reducing the acts involved in trials and the terms under which they take place to the indispensable minimum required to come to a final decision; restrictions on the possibility of delaying the trial hearing itself, on the use of evidence and the time limits by which it can be produced, and on appeals; and on increasing the oral aspect of the proceedings.

The Constitutional Court recalled that it has recognised that trial by a court composed of a single judge offers accused persons fewer guarantees than

trial by a panel of judges, because it increases both the margin for error in the way in which the facts are assessed and the possibility of a less just decision. The intervention of a panel favours the process of weighing up and discussing aspects of the law and analysing evidence – elements that can enhance the quality of the court's decision. The legislative decision to opt for summary judgements must always be limited in terms of the judge's power to sentence, as defined by the quantitative criterion of the penalty the judge can impose.

The Court observed that the existence of direct proof of the crime provided by the *flagrante delicto* nature of the arrest may not preclude the factual complexity of aspects of the situation that are important to the determination and weight of the penalty on the one hand, or its attenuation on the other, above all with regard to the agent's personality, the motive for the crime and any circumstances before or after the facts that might reduce the latter's unlawfulness and/or the agent's guilt.

When what is at stake is a more serious form of criminality that can correspond to a graver penal format, a *flagrante delicto* situation should not imply a worsening of the accused's procedural status.

The Constitutional Court took the view that summary procedure contains restrictions on the exercise of the right to a defence that are not compatible with the more demanding requirements which the trial of more serious crimes impose as regards the level of the guarantees available to the defence.

The Court therefore found that the solution adopted in the provision of the Code of Criminal Procedure in question violated the guarantees of the defence of accused persons, as enshrined in the Constitution.

III. This Ruling was the object of one concurring and one dissenting opinion. In the former, the President of the Court disagreed with the grounds for the decision. Given the current configuration of summary proceedings and the safeguards applicable to them, he did not consider that their use to try crimes that can involve a maximum penalty of more than five years in prison conflicts in any constitutionally reprehensible way with the guarantees available to the accused's defence. He was, however, of the opinion that the possibility of trial by a court composed of a single judge was not in conformity with the Constitution when the possible penalties include imprisonment for over five years.

The dissenting Justice took the view that the current details of the summary procedure format ensure that accused persons are tried in a way that is as fast as it can be without being incompatible with the defence guarantees, and that it ensures harmony between the purposes of criminal procedure in a democratic state based on the rule of law: to discover the material truth and that justice be served, to protect citizens' rights, and to re-establish both the legal peace in the community and that of the accused, both of which are undermined when a crime has been committed.

This Justice contended that, particularly in the trial phase, the summary procedure provides for different solutions for more serious crimes on the one hand and for crimes that are punishable by imprisonment for no longer than five years on the other.

She also took the position that the fact that a trial is heard by a single judge does not necessarily mean the guarantees of the accused's defence will not be respected; the essential point is rather that, when taken as a whole, criminal proceedings must ensure all the guarantees available to the defence.

In her view the Constitution does not give rise to any criterion as to when competence should be attributed to a court with a single judge, a panel of judges, or a jury, and that the only thing it does state is that the law can only provide for jury trials in the case of serious crimes (except terrorism and highly organised crime). She argued that the Court's earlier jurisprudence does not mean that trial by a single judge is precluded by the fact that the crime can lead to this or that maximum abstract penalty – a question it instead leaves open.

Cross-references:

- Rulings nos. 393/89, 18.05.1989; 326/90, 13.12.1990; 428/13, 15.07.2013 and 496/13, 13.08.2013.

Languages:

Portuguese.



Identification: POR-2014-1-005

a) Portugal / b) Constitutional Court / c) Plenary / d) 19.02.2014 / e) 176/14 / f) / g) *Diário da República* (Official Gazette), 44 (Series I), 04.03.2014, 1701 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.2.5 Constitutional Justice – Types of claim – **Obligatory review.**

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

Keywords of the alphabetical index:

Adoption, homosexual couple / Adoption, homosexual partners, discrimination / Referendum, unity of substance / Referendum, wording.

Headnotes:

A draft referendum on the possibility of co-adoption by a same-sex spouse or cohabiting partner and adoption by married or cohabiting same-sex couples, which was approved by Resolution of the Assembly of the Republic, did not fulfil the requisites imposed by the Constitution and the Organic Law governing the Referendum Regime (LORR). Nor did it respect the right of participation pertaining to those citizens who are properly registered as voters and reside abroad, who must be invited to participate in referenda on matters that specifically concern them. The draft referendum proposed in Resolution of the Assembly of the Republic no. 6-A/2014 failed to comply with either the Constitution or the ordinary law.

Summary:

I. The Constitution requires the President of the Republic to request a prior review of the constitutionality and legality of draft referenda that are submitted to him or her. The Organic Law governing the Referendum Regime (LORR) in turn requires that the object of such requests must include a review of the requisites regarding the universe of voters to whom the referendum is to be submitted.

A Resolution of the Assembly of the Republic proposed holding a referendum in which citizens registered to vote in Portuguese territory would be called on to answer the following questions:

1. “Do you agree that a same-sex spouse or cohabiting partner should be able to adopt the child of his or her spouse or cohabiting partner?”
2. Do you agree with adoption by same-sex married or cohabiting couples?”

II. The Constitutional Court noted that that the legal ability to adopt of same-sex couples, be they married or cohabiting, had never been recognised in Portuguese law.

The legal regime governing adoption was itself only introduced as a systematised normative complex in the Portuguese legal system with the entry into force of the 1966 Civil Code.

The Court observed that the (social or individualist) function of the ‘institute’ of adoption has not been constant over time – a fact that reflects the difficulties of ensuring the necessary balance between minors’ rights and the right of potential parents to adopt. Initially seen as satisfying an interest pertaining to the latter, today adoption must be guided by the “superior interest of the child”. The need to uphold the superior interest of the adoptee child is considered as justifying the imposition of legal restrictions on rights, freedoms and guarantees pertaining to the adopting parents. Be that as it may, an adoptable minor’s physical, intellectual and moral development must be placed in the hands of someone who is willing and able to satisfy those needs, and above all someone who has the capacity to establish and maintain a deep affective relationship with him or her.

The Court noted that changes that have been made in the adoption regime over time have tended to facilitate the formation of an adoptive relationship by dispensing with requisites that had initially been imposed, or making them more flexible. These included the amount of time the adopting couple had been married, their minimum age, and that they could not have biological children of their own.

The legal notion of ‘family’ has itself also evolved, with legal effects now attributed to cohabitation. Where adoption is concerned, it is particularly now possible for cohabiting different-sex couples to adopt under conditions that are analogous to those required of married couples.

In 2003 a broad legal reform raised the principle of the superior interest of the child to the status of the ultimate goal of the 'institute' of adoption and reinforced the idea that every stage of the adoption process should be guided by this primary purpose.

2010 saw the passage of a Law that permitted same-sex civil marriage, but also made it legally inadmissible for such married couples to adopt and specifically said that no legal provision regarding adoption could be interpreted to the contrary.

Those who argue in favour of adoption by single-sex parents highlight the fact that this legal path differed from that taken in the majority of countries which have recognised homosexual marriage. In most cases outside Portugal, this form of adoption was either recognised at the same time as same-sex marriage, or even before it. They also emphasise that single-parent adoption is permitted regardless of the adopting person's sexual orientation, but adoption by a same-sex couple is not.

It is also argued that in cases in which one of the members of a same-sex married or cohabiting couple is already the child's parent, it is beneficial for the child to allow a court to permit co-adoption by the other member of the couple (on condition that the legal parent-child relationship with the second progenitor is not already established).

The Court noted that the objective constitutional and ordinary-law preconditions for the actual process of passing a Resolution to hold a referendum in this case were met.

It also took the view that the constitutional requirement that the subject of the referendum be of important national interest was also fulfilled, and that the other material constitutional limits were respected.

The Constitution enshrines the principle that a particular referendum can only address a single, homogeneous subject. This requirement that referenda be monothematic is designed to avoid confusion about both the object of the consultation and the voters' answers. This principle of the homogeneity and unicity of the subject matter refers to the object of the referendum and not the actual questions. However, when there is more than one of the latter – a possibility for which the Constitution and the ordinary law make express provision – this principle becomes important to the way in which they are formulated.

In the present case, co-adoption and joint adoption are different concepts. The former consists of the possibility for one member of a married or cohabiting

couple (currently they must be of different sexes) to adopt the other member's biological or adopted child (adoption by one person).

Joint adoption entails the establishment of parent-child relationships between a couple and a child, with the issue at stake being whether or not to make this possible for same-sex couples.

The Court took the view that the fact that the draft referendum addressed both co-adoption and joint adoption did not in itself mean that its object did not possess homogeneity and unicity.

There was a substantial nexus between the two questions: seen from the perspective of the adopting parent(s), both address issues regarding the capacity of members of same-sex married or cohabiting couples to adopt; from that of the adoptee child, both questions ask whether, from a filiation point of view, adopted children can have two mothers or two fathers.

However, the Court said that the draft referendum did simultaneously formulate two questions that were different because they addressed different situations and interests, both from the point of view of the adopting parents and from that of the adoptees, and that this could affect voters' ability to decide.

In the case before it the Court said the questions had to be drafted in such a way as to enable every citizen to understand that the sole purpose of the consultation was to determine whether it should be possible for members of same-sex couples to adopt, and the questions had to obey a dilemmatic principle – i.e. they must be written in such a way as to only permit a "yes" or "no" answer.

Both dimensions of this requisite were indeed fulfilled:

- i. both questions were formulated in a way that would allow citizens to be aware that they were making a choice based on clear pair of alternatives (dilemmatic principle);
- ii. and both formulations were binary and thus permitted a "yes" or "no" answer.

Compliance with the requirements of objectivity, clarity and precision must be gauged both for each referendum question individually, and for all the questions taken as a whole; their formulation must express the mutual coherence derived from the logical principle that contradiction between them is prohibited.

The Court pointed out that if the voters' answers to either of the questions were both affirmative ("yes") and binding (for this to be the case, the number of actual voters must exceed half the total number of registered voters), the existence of two fatherhoods and two motherhoods would be recognised in Portuguese law for the first time, thereby changing the current paradigm for 'parenthood'.

This proposed consultation in the form of a referendum was designed to get citizens to give their opinion on whether the law should admit or deny the possibility for minors to be adopted by same-sex family communities – in the case of one question, successively, and in that of the other, jointly. However, the Court said that the different value judgments it is possible to make in relation to each of these situations justified the existence of autonomous questions.

Turning to the interests of the potential adoptive parents, the Court said that both the issue of the prohibition on discrimination based on sexual orientation, and that of the right to form a family, could be at stake in this case; while where the interests of the potential adoptees were concerned, it was possible to invoke the right of children to be protected with a view to their full development, their personal identity and the development of their personality, the right to be integrated into a family, and each child's emotional and axiological balance.

However, the value judgment underlying each of the two questions differed depending on the parental and family situation of the potential adoptee at the moment of the adoption: the first question presupposes that the child already lives in a family with a homosexual parent; in the situation covered by the second question, this is not the case.

Despite the fact that the text of the questions primarily expressed the interest of same-sex couples, making the general question of whether or not there are material grounds for discriminating against them the object of public discussion, voters in the referendum would also be voting on the superior interest of potential adoptees – i.e. on the issue of whether it is justified from the child's point of view to recognise two fatherhoods or two motherhoods.

The Court considered that the simultaneous formulation of the two questions could lead to a lack of understanding on the part of voters of the values that are manifest in each of the questions. The first question involves the issue of the adoption by one spouse or cohabiting partner of the existing child of the other one, when both spouses/partners are of the same sex. This situation is about establishing legal

bonds between a child and a person with whom he or she already has a parental relationship; and it is about establishing a legal bond between two people (the child and the thus-far non-legal-parent member of the couple), each of whom already has a legal bond with a third person (the existing father/mother, the latter's same-sex spouse/partner).

In such cases the adoption serves to recognise that a relationship which was already being established *de facto* between the child and the aspiring adoptive parent has legal effects. The European Court of Human Rights has used the fact that an adoptee is already incorporated in practice into a family based around a same-sex couple as grounds for legitimating adoption by that couple. In doing so it has used the "criterion of the effective existence of interpersonal bonds" to gauge whether a "family life" exists.

Given that the superior interest of the child is an imperative that requires the adoptee to be ensured an appropriate family insertion, the first question means that voters would have to decide whether the adoption of children who are already members of a family with two fathers or two mothers damages that interest or not.

The second question asked voters about the adoption of a child by two persons of the same sex, neither of whom is already the child's legal parent.

This difference meant that it was possible to accept that the legal importance of the adoptee's interests was different in this case. Voters could attach a different value to the existence of a real, consummated situation in which the child is already incorporated into a same-sex family (be it conjugal or *de facto*), compared to situations in which such a life experience had never existed. Quite apart from anything else, the "right to form a family" takes on a different shape here, inasmuch as neither the Portuguese Constitution nor the European Convention on Human Rights recognise a "right to adopt" derived from the right to form a family.

At stake in the first of the two questions was the child's interest in establishing a legal relationship with one of his or her carers; while in the second, the primary issue was the interests of same-sex couples in being able to gain access to the possibility of adopting children.

The first question implies that a *de facto* family has already been formed, whereas the second addresses the formation of a new family from scratch. The second question is therefore not about the minor's interest in the recognition of a legal relationship with

a concrete family, but rather a couple's desire to adopt, *ex novo*, a child who to begin with probably has no relationship with them whatsoever, even though it may be in his or her interest to be adopted in general.

Given that the 'institute' of adoption seeks first and foremost to satisfy the interests of the child and not of the potential adoptive parents, voters might not consider that the value judgments they were being called on to make with regard to the two questions were different. If, as the European Court of Human Rights emphasises, the purpose of adoption is to "give a family to a child and not a child to a family", voters would not only face the question of equality for homosexual couples, but also necessarily whether it is in a child's interest to live in a family with same-sex parents.

These value judgments, which are inherent in the two questions, are different and could generate ambiguity. The answer to the second question could contaminate the answer to the first, and vice versa, in such a way that if the questions were to be posed separately, voters might give different answers to the ones they would give in a combined consultation, because in the separate referenda voters would be aware that the value judgments involved in each question were also different.

The Court thus held that combining these two questions in a single referendum was capable of undermining respect for the need for questions to be precise.

The Court also pointed out that doing so could leave the legislator itself in a dilemma. According to the Constitutional Court's own jurisprudence, when there is more than one question in a referendum, they must permit a univocal set of answers or a univocal overall answer that gives the legislator precise indications as to how it should act. This was not the case with these two questions. If voters were to say "no" to the first question and "yes" to the second, they would leave the legislator in a position in which it would be forced to permit the establishment of parental relations with regard to some same-sex couples and not others. This would be an inadmissible situation, given the need for normative unity. A result of this kind would be discriminatory, regardless of the value judgments voters might make in relation to adoption by same-sex couples.

The Court also found that the draft referendum failed to fulfil the constitutional requirement that citizens who reside abroad and are properly registered to vote must be invited to do so when the subject of the referendum specifically concerns them too. This was because the

formation of adoptive filiation is subject to the 'personal law' of the adopting parent; and the constitutional rights and principles that can be used as arguments for accepting or rejecting the possibility of co-adoption and/or joint adoption by same-sex married or cohabiting couples constitute a material domain that is of interest to Portuguese citizens living abroad.

As such, the Court held that the draft referendum set out in the Resolution of the Assembly of the Republic before it would be both unconstitutional and in breach of the ordinary law.

Supplementary information:

The Ruling was the object of four opinions, whose authors either dissented from it, or added to the grounds for concurring with it.

Cross-references:

- Rulings nos. 1172/96, 20.11.1996 and 29/13, 15.01.2013.

Languages:

Portuguese.



Identification: POR-2014-1-006

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 03.03.2014 / **e)** 202/14 / **f)** / **g)** *Diário da República* (Official Gazette), 68 (Series II), 07.04.2014, 9463 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 3.11 General Principles – **Vested and/or acquired rights.**

Keywords of the alphabetical index:

Contract, administrative / Contract, public law / Contract, state / Legitimate expectations, protection, principle / Public contract.

Headnotes:

Norms concerning possible causes for the invalidity of public contracts, contained in a Law which repealed norms in an earlier Executive Law with retroactive effect, violate both the principle of the protection of legitimate trust and expectations and the principle of legal certainty. The ordinary legislator is entitled to revise the law, but it is not constitutionally tolerable for it to do so in these terms, with effects that are limited to a concrete case – amending the regime governing unilateral terminations of administrative contracts for public-interest reasons – with a resulting breach of the unity and identity of the legal system. The law gives public-sector contracting parties powers that include the ability, when justified by duly substantiated public-interest reasons, to both unilaterally modify clauses regarding the content of the contractual undertakings made in a public contract and the way in which they are fulfilled, and to unilaterally terminate a contract altogether. However, when its actions are motivated by the public interest, the public sector contracting party can only terminate with future effect. This party (the Public Administration) does not possess powers of authority to invalidate contracts; only the courts have the competence to annul a contract or declare its nullity. Inasmuch as public sector contracting parties are precluded from retroactively terminating contracts for public-interest reasons, the same is true of the legislator itself, which cannot seek to achieve the same objective by retroactively repealing the specific legal act on which a contract was based.

Summary:

I. This case involved a mandatory appeal by the Public Prosecutors' Office against a decision in which an arbitration tribunal refused to apply norms contained in a 2010 Law that repealed earlier (2008) legislation on the contract governing the concession of the right to operate the Alcântara port terminal in Lisbon under a public service regime. The 2008 Executive Law had authorised the changes in the grounds for the initial operating concession needed to implement solutions designed to develop and renovate the terminal in the light of new circumstances in the port services market. The initial contract had itself been authorised by a 1984 legislative act, which had empowered the Lisbon Port Authority (hereinafter, "APL") to select a Portuguese private company by means of a competitive invitation to tender for the concession to operate this container terminal under a public service regime, and to enter into the applicable contract.

The arbitration tribunal found that norms in the 2010 Law violated the constitutional principles of legal certainty and the protection of trust and legitimate expectations, and therefore refused to apply them.

The constitutional-law framework on which the tribunal based itself is that the requirements imposed by the principles of legal certainty and the protection of trust and legitimate expectations mean that the legislator is not entirely free to change the law as it sees fit, regardless of how predictable the alterations may or may not be, the extent of the effects they have over time, and the intensity with which the changes affect the legal situation or the reasonable expectations of the entities at which they are directed. The freedom the legislator enjoys as a result of the principle that the law can be revised, which itself forms part of the democratic principle, must coexist with other legal principles in such a way that there is no breakdown in the unity and identity of the legal system.

II. The Constitutional Court recalled its own jurisprudence on the protection of the principle of trust and legitimate expectations, and noted that the requisites for the existence of that constitutional-law protection were met in the case before it.

The Court was of the view that the state had generated expectations on the part of the private entity (hereinafter, "LISCONT") which entered into a contract with it, that there would be continuity on both the legislative and the contractual levels, and that those expectations were legitimate, justified and substantiated by good reasons.

The Court said the fact that, in a Report issued prior to the passage of the 2010 Law that repealed the 2008 Executive Law, the Court of Auditors was particularly critical of the renegotiated concession contract signed by APL (a 2008 addendum to the original), saying it was neither a good deal nor a good example for the public sector in terms of good financial management and an adequate protection of public financial interests, did not detract from those expectations as to the continuity of the state's behaviour.

Those expectations determined the private party's plans for the future. After the addendum to the initial contract, LISCONT undertook the studies and planning needed to implement its investment plan, and once this had been approved by the competent entities, carried out the corresponding works projects and bought the planned equipment.

The Court considered that in order for it not to be possible to allege that the principle of protecting trust and legitimate expectations had been unconstitutionally violated by the retroactive repeal of the governmental legislative act underlying the “Addendum to the Contract”, almost two years after its signature and the beginning of its implementation, and following a significant involvement by the private party to the contract in the period prior to the passage of the 2010 Law, which amended the bases for the operating concession contract against the legal principles that govern administrative contracts, it would be necessary for there to be public-interest reasons which, when weighed against the other interests at stake, justified the non-continuity of the behaviour that generated the expectation situation. On this aspect the Court was of the opinion that the parliamentary discussions that preceded the 2010 Law and the exposé of motives for it showed that the Law was not based on public-interest reasons; instead, there was a reassessment of the public interest that differed from the prevailing understanding in 2008, and a disagreement with the government’s initial or original choice and decision.

After weighing this issue up from the perspective of the principle of proportionality, the Court concluded that it was not possible to attach as much proportionate value to this reassessment of the public interest as it would have been to a public-interest decision taken for supervening reasons; and that the reassessment did not justify the non-continuity of the behaviour that generated the situation in which LISCONT possessed legitimate expectations, inasmuch as the 2010 Law had too damaging and arbitrary an effect on the expectations created by the state’s own past behaviour.

The 2010 Law repealed legislation with effect prior to its own entry into force, thereby bringing about a retroactive termination of a contract at the initiative of the public party. In the Court’s view, administrative contracts must ensure a balance between the principle of the pursuit of the public interest, which justifies the precepts that determine the prevalence of the public contracting party on the one hand, and the guarantee of the interests of the other contracting party on the other, in such a way that the latter’s trust and legitimate expectations are protected and its interests are defended. The stability and balance of the undertakings the parties to a contract are required to fulfil must be guaranteed, apart from anything else as a *quid pro quo* for the prevalence of the public interest.

III. Two Justices dissented from this Ruling, one of whom was its original rapporteur (she was substituted in that role because she disagreed with the majority decision). Their view was that the

Assembly of the Republic’s competence to legislate on a given public policy which is to be pursued by the Public Administration is derived from a particular aspect of the principle of that Administration’s legality – that preference must be afforded to Laws, and thus a Law must prevail over an administrative act – which, like the principle of the separation of powers, is a material component of the principle of the state based on the rule of law. As such, in this case the Assembly of the Republic did not invade the sphere of action which the Constitution entrusts to the government, and did not violate the principle of the separation of powers. On the breach of the principle of the protection of trust and legitimate expectations, the dissenting Justices said that even if the reasons underlying the 2010 repeal Law had nothing to do with the need to adapt the law in the light of new developments or of any other exceptional public-interest issue, but its passage was instead essentially due to a political (or party-political) divergence from the governmental option that had led to approval of the 2008 Executive Law, those reasons were irrelevant from a constitutional-law point of view; and that it was not up to the judicial power to question them, except in situations in which subjective legal positions that fall within the scope of the normative protection afforded to a fundamental right, or legal positions that are in some other way encompassed by the constitutional protection of trust and legitimate expectations, are affected.

The dissenting Justices argued that this self-limitation of its control powers by the Constitutional Court was in harmony with the majority conclusion that there had been no breach of the principle of the separation of powers. From the moment at which the legislative act in question is a Law as defined in the Constitution, and that the state’s legislative function is characterised by the legislator’s ability to revise its own legislation – an ability which is in turn founded on the structural ‘majority rule’ component of the constitutional concept of democracy – it is incongruent to question the representation of the public interest as revealed by the political/legislative process. By enshrining the rule that decisions must be taken by a majority, the Constitution of the Portuguese Republic itself provides the “guarantee” that when the parliamentary legislator takes a decision, it does so in accordance with a certain representation of the public interest, within the framework created by that same Constitution. The Constitution does not do this for pragmatic reasons (i.e. because in a plural society there is no other instrument for securing consensus about just what is a “public interest”), or for scientific ones (because the agreement of the majority is a reliable sign of what the public interest is), but rather for reasons of value. Agreement on the part of the greatest number as to

what the content of a certain decision should be makes it possible, in value terms, to identify that content with the pursuit of the public interest. In the opinion of the two dissenting Justices, there is nothing in the Constitution that would permit the conclusion that a “party-political disagreement” about a certain important aspect of the pursuit of public port policies, when expressed in the form of a majority parliamentary decision, consubstantiates without a shadow of doubt a “lesser” or “weakened” form of representation of the public interest by the legislator.

Supplementary information:

The Court of Justice of the European Union has extensively addressed the question of the award and the renewal and extension of the term of public service concessions. See:

- C-347/06, 17.07.2008, *ASM Brescia v. Comune de Rodengo Siano*;
- C-260/04, 13.09.2007, *Commission of the European Communities v. Italian Republic*;
- C-324/98, 07.12.2000, *Telaustria and others*;
- C-337/98, 05.10.2000, *Commission of the European Communities v. French Republic*.

Cross-references:

- Rulings nos. 128/09, 12.03.2009 and 287/90, 30.10.1990.

Languages:

Portuguese.



Identification: POR-2014-1-007

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 01.04.2014 / **e)** 315/14 / **f)** / **g)** *Diário da República* (Official Gazette), 93 (Series I), 15.05.2014, 2841 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 4.5.2.3 Institutions – Legislative bodies – Powers – **Delegation to another legislative body.**
- 4.6.1 Institutions – Executive bodies – **Hierarchy.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

Keywords of the alphabetical index:

Competence, legislative, limits / Regional act / Region, autonomous, power / Region, constitutional rules / Resource, natural, exploitation / Sovereignty.

Headnotes:

Norms in a Regional Legislative Decree (Azores Autonomous Region) may not purport to confer exclusive powers on the region regarding the management and exploitation of geological resources insofar as they apply to marine mineral resources located in Portuguese maritime zones, on the basis that they contravene the integrity and sovereignty of the state given that the powers over the maritime zones under Portuguese jurisdiction adjacent to the Azores archipelago are exercised by the state and not the region. The norms were not in harmony with the idea that the powers to manage maritime zones must be exercised either jointly by the state and the region, or within a shared management framework, and in a manner that preserves the integrity of the country's sovereignty. Further, a national Executive Law which disciplines the general regime governing the discovery and exploitation of geological resources, which states that the Executive Law's provisions are applicable to the regions, without prejudice to the competences of the latter's own governmental organs, or to the provisions of appropriate regional legislative acts that make necessary amendments to the Executive Law, is not illegal as it does not empower the regional legislator to issue an unconstitutional Decree, and the national legislator did not entirely forego the competence to regulate the terms and conditions under which the maritime public domain can be used.

Summary:

I. This case involved an *ex post facto* review of the legality of norms contained in a Regional Legislative Decree establishing the legal regime governing the discovery and exploitation of natural assets existing in the earth's crust (generically known as geological resources), whether or not integrated into the public domain of the land and maritime territory of the Azores Autonomous Region (hereinafter, the “RAA”); and of norms included in a National Executive Law that disciplines the general regime governing the discovery and exploitation of geological resources in the country as a whole. The review petition was lodged before the Constitutional Court by the Representative of the Republic to the RAA.

The Constitution gives the Constitutional Court the competence to declare with generally binding force, when asked to do so by entities with the legitimacy to make the request, the illegality of any norm contained in a regional legislative act, on the grounds that it is in breach of the Statute of the Autonomous Region in question; and of any norm contained in a legislative act issued by an entity that exercises national sovereignty, on the grounds that it violates the rights of an autonomous region, as enshrined in the latter's Statute.

Because the parameter that ought to be used to normatively control the legality of the norms that were concretely challenged was not the one invoked by the petitioner – a Political and Administrative Statute of the Azores Autonomous Region (*Estatuto Político-Administrativo da Região Autónoma dos Açores*, hereinafter, the "EPARAA") norm that only addresses the administration of the state's maritime public domain – the Court restricted the object of the petition to the norms solely insofar as they applied to marine mineral resources.

The Constitution does not directly establish that the ownership of the state's public domain encompasses all the natural assets governed by the legal regime regulated by the national Executive Law that disciplines the general regime governing the discovery and exploitation of geological resources. It leaves it to the ordinary law to define the assets that form part of the public domain of each public territorial entity: the state, autonomous regions, and local authorities.

Mineral resources are part of the public domain *ex constitutione*, but title to them does not always have to belong to the state. The EPARAA includes mineral deposits, hydromineral resources (including natural mineral water springs and industrial-mineral waters) and geothermal resources in the regional public domain.

However, where the ownership of marine mineral resources is concerned, the EPARAA expressly excludes assets pertaining to the maritime public domain from the regional public domain; while the national Executive Law in question includes mineral deposits, hydromineral resources and geothermal resources in the state's public domain.

This means that marine natural resources, be they solid, liquid or gaseous, located on or under the seabed of the territorial waters and continental shelf contiguous with the Azores archipelago are geological resources that are incorporated into the state's public domain and not the regional public domain.

II. The Constitutional Court stated that it was comprehensible that these resources should be part of the state's and not the region's public domain. This type of geological resource is located (or can be found) on and under the seabed of Portugal's territorial waters and continental shelf, which are themselves natural assets over which the Portuguese State exercises rights that form part of its sovereign jurisdiction over its territory.

Even if they form part of an autonomous region's territory, maritime territorial areas are spaces that are connatural to the characterisation of the territory of the Portuguese State, seen as a place in which the latter exercises state sovereignty; and they are necessarily part of the public domain, given their unbreakable connection with national identity and sovereignty. Maritime domainal assets are property that is indissolubly linked to sovereignty and cannot belong to the regional public domain. In its jurisprudence the Constitutional Court has repeatedly held that it is not constitutionally possible to incorporate the maritime public domain into the public domain of an autonomous region, nor is it possible to transfer certain assets – namely those that form part of the maritime public domain – to regional governments.

Marine mineral resources are not the same thing as the maritime public domain, but the two are intrinsically linked. Only the entity with title to them – the state – has the power to order or authorise that they be prospected for or the object of further research.

From a constitutional point of view, the fact that the bed of territorial waters and the marine depths contiguous with the Azores archipelago and the natural resources they contain belong to the state's public domain does not make it impossible for some of the powers to manage that domain to be attributed to an autonomous region.

However, the fact that the maritime public domain belongs to the state means that the assets in it are by their nature incapable of being transferred to either private or other public entities. The Court noted that it had previously held that the legislator is constitutionally prohibited from transferring assets in the maritime public domain to the autonomous regions by the principle of the unity of the state – a prohibition that applies to the ownership of the natural resources in that domain for as long as they are not detached or separated from the seabed and the ground under it.

It is possible to transfer “secondary powers” that do not undermine the state’s authority and territorial integrity, just as it is possible to transfer certain managerial powers included in the state’s title – particularly some of those that do not concern national defence and the authority of the state – to other entities. The fact that the title to the maritime public domain in or around the territorial area of the autonomous regions cannot belong to those regions does not mean that certain powers contained in the domain absolutely cannot be transferred; and this is what the article in the EPARAA does when, subject to certain terms, it establishes managerial rights that pertain to the region but are shared with the state.

The Court noted that the Constitution does not explicitly establish a division between the executive competences of the Government of the Republic and those of each of the regional governments. The constitutional model for situations of this kind is that of cooperation between the state and the autonomous regions.

Besides respecting the necessary limit imposed by the integrity and sovereignty of the state, the EPARAA does not go into detail about the principle of shared management.

However, inasmuch as any division of such competences must fit within the framework of the “conditions governing the use and limits” of the state’s maritime public domain, only the national entities that exercise sovereignty can decide what can be shared and under what terms, by means of an intervention by the Assembly of the Republic or the national government.

III. The Ruling was the object of one concurring and two (one partially) dissenting opinions on the decision not to declare the unconstitutionality of the enabling norm contained in the Executive Law with a national scope.

Cross-references:

- Rulings nos. 280/90, 23.10.1990; 330/99, 02.06.1999; 131/03, 11.03.2003; 258/07, 17.04.2007; 402/08, 29.07.2008 and 304/11, 21.06.2011.

Languages:

Portuguese.



Romania Constitutional Court

Important decisions

Identification: ROM-2014-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 12.12.2013 / **e)** 530/2013 / **f)** Decision on the exception of unconstitutionality of Article 16.3 of the Political Parties Law no. 14/2003 / **g)** *Monitorul Oficial al României* (Official Gazette), 23, 13.01.2014 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Political party, freedom / Compliance, judicial review, statutes.

Headnotes:

The jurisdictional body of a political party’s exclusive jurisdiction to determine the party members’ compliance with statutes, and its actions to override judicial review of its compliance by enacting its own statute are deemed unconstitutional. Courts are vested with authority to review applications challenging the jurisdictional body’s penalty of a party member’s expulsion and can review whether the said body complies with statutory rules establishing and applying the penalty. The courts can look into whether the right to defence and opinion of the party was actually ensured. Judicial review, however, can only be carried out on the jurisdictional body’s compliance with statute and on the regularity of conduct of the statute procedure. Courts cannot review whether the penalty should have been imposed.

Summary:

I. The Constitutional Court has been referred, based on Article 146.d of the Constitution (first sentence thereof), to consider the exception of unconstitutionality of Article 16.3 of the Political Parties

Law no. 14/2003, republished in the Official Gazette of Romania, Part I, no. 550 of 6 August 2012. According to Article 16.3, "Acquisition or loss of membership of a political party is subject only to the internal jurisdiction of that party, according to the statute of the party."

As grounds for the exception, it was argued that the impugned legal provisions are contrary to Article 21 of the Constitution concerning free access to justice. The reason is that they prevent the courts from reviewing measures carried out by jurisdictional bodies of a political party regarding the loss of membership thereof.

II. Examining the exception of unconstitutionality, the Court first stated that it has ruled before on some exceptions of unconstitutionality concerning the same legal provisions. It emphasised that it has consistently rejected them as unfounded. The reason is that courts are not vested with the function to administrate justice on breaches of internal discipline within political parties. Liability in this matter is not governed by legal rules of general jurisdiction, but by the parties' own ethical rules.

Also, courts do not have the power to censor the decisions of the bodies of so-called "internal jurisdiction of parties", as their decisions are tantamount to political acts. Upon checking the conditions required for the legal establishment of political parties, the Court will determine whether the statute procedures on the application of penalties ensure the right of the petitioner dissatisfied by a decision of the party to effectively and efficiently sustain his case.

However, in light of the serious legal consequences of party expulsion (in this case, termination of the term of office of local elected representatives) and the significant number of such cases referred to the Constitutional Court, the Court considered it necessary to distinguish between the ethical rules of political parties and the standards which are definitely a legal nature. The Court emphasised that the rules and standards establish rights and obligations of party members and of the statute bodies, as well as penalties for violating statute provisions and procedures to be followed in these cases. These rules are binding and fall within the definition of "law" as it was outlined according to the case-law of the European Court of Human Rights, i.e. as an independent concept. Likewise, these rules form the basis of the adoption of legal acts, and not of some "decisions that are tantamount to political acts."

At the same time, the Court noted that courts intervene to verify whether political parties comply with the requirements for their legal establishment. This is a separate issue of verification of compliance, as such review pertains to the statute of the parties, the statute procedure and the establishing and application of penalties. The fact that such issues are governed by legal rules implies that there is a possibility to carry out a judicial review and to adopt legal decisions and not political acts.

In light of this approach, the Court considered it necessary to reconsider the relevant case-law and to uphold the exception of unconstitutionality raised in the present case.

The Court noted that the regulation subject to constitutional review infringes on Article 21 of the Constitution under which no law may restrict the exercise of the right of every person to access the court to protect his/her rights, freedoms and legitimate interests. The reason is that, according to Article 16.3 of Law no. 14/2003, the application of the former member who was expelled from the party can never be effectively assessed by an independent and impartial judge. Thus, in receiving an application challenging the legality of expulsion from the party, the Court, even if it notices that statute procedures were violated, can only reject the application as inadmissible as it does not have jurisdiction to rule on it. Therefore, in this matter, free access to justice is not only limited but also completely annihilated. Hence, the impugned statutory text undermines the very essence of the right of access to courts and is contrary to the provisions of Article 6 ECHR and with the case-law of the European Court of Human Rights on the right to a fair trial.

The same conclusion results also from the fact that the jurisdictional bodies operate on the basis of statute provisions that must ensure the right to an opinion, the right to defence and the right to a fair hearing of parties. However, they do not constitute an independent and impartial tribunal within the meaning of Article 6 ECHR.

In light of these considerations, the Court held that the impugned text violates also the full jurisdiction of the courts, as it is governed by Article 126.1 of the Constitution. The provisions of Article 126.2 of the Constitution provide the legal basis for the jurisdiction of the courts; they do not provide that no court shall have jurisdiction to rule on a certain dispute. Even if the special law assigns to other bodies (for example, those having jurisdictional powers) the jurisdiction to solve a certain dispute, their decisions can be challenged in court, thus respecting the right of access to justice.

In accordance with the provisions of Article 15.1 and 15.3 of the Law no. 14/2003, members of a political party, in the case of disputes arising from the exclusion of the party, must undergo the procedure before the internal jurisdictional bodies of the party. They must request the effective application of statute provisions and only if they consider that these bodies have violated the statute, they have then the possibility of referral to court.

The Court also held that, in this matter, judicial review can only be carried out on the statute and on the regularity of conduct of the statute procedure before the jurisdictional bodies of the party – not on whether the penalty should have been imposed. Thus, the Court vested with the settlement of an application challenging the penalty consisting of exclusion from the party would assess the compliance with statute rules on establishing and applying the penalty and would check whether the right to defence and opinion of the party was actually insured.

III. The president and one of the judges of the Constitutional Court formulated a separate opinion.

Cross-references:

- Decision no. 952, 25.06.2009, *Monitorul Oficial al României*, Part I, no. 571, 17.08.2009;
- Decision no. 1.255, 06.10.2009, *Monitorul Oficial al României*, Part I, no. 783, 17.11.2009;
- Decision no. 649, 19.06.2012, *Monitorul Oficial al României*, Part I, no. 560, 08.08.2012;
- Decision no. 65, 21.02.2013, *Monitorul Oficial al României*, Part I, no. 176, 01.04.2013.

European Court of Human Rights:

- *Albert and Le Compte v. Belgium*, nos. 7299/75, 7496/76, 10.02.1983, paragraph 29, Series A, no. 58, *Special Bulletin Leading cases ECHR* [ECH-1983-S-001];
- *Buzescu v. Romania*, no. 61302/00, 24.05.2005, paragraph 60.

Languages:

Romanian.



Identification: ROM-2014-1-002

a) Romania / b) Constitutional Court / c) / d) 10.01.2014 / e) 1/2014 / f) Decision on the objection of unconstitutionality of the Law establishing some measures of decentralisation of the powers exercised by some ministries and specialised bodies of the central public administration, as well as some public administration reform measures / g) *Monitorul Oficial al României* (Official Gazette), 123, 19.02.2014 / h) CODICES (Romanian).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.10 General Principles – **Certainty of the law.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.13 General Principles – **Legality.**
- 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Law, precision, need / Local self-government, right.

Headnotes:

Establishing without clarity and precision a mechanism of exemptions from the law generally applicable in a matter represents a violation of the principle of legality. Although, in principle, the legislator may establish at any time exemptions from the effective normative framework, under the principle of law according to which *specialia generalibus derogant*, the normative act establishing such exemptions must not deprive the constitutional provisions from their efficiency. Such conduct of public authorities infringes the certainty of legal relationships since it is tantamount to the possibility to circumvent the legal framework at any time and in any circumstances while citizens are required to comply with the same.

Summary:

I. The Constitutional Court has been referred, on the grounds of Article 146.a of the Constitution, with the objection of unconstitutionality of the provisions of the Law establishing some measures of decentralisation of the powers exercised by some ministries and specialised bodies of the central public administration, as well as some public administration reform measures. The impugned Law comprises ten titles.

Eight of these titles regulate measures of decentralisation in the field of agriculture and rural development, culture, tourism, pre-university education, environment and climate change, health, youth and sport, transports, while two titles concern amendments to Law no. 273/2006 on local public finances, published in the Official Gazette of Romania, Part I, no. 618 of 18 July 2006, as amended and completed, and completions to Law no. 213/1998 on publicly owned property, published in the Official Gazette of Romania, Part I, no. 448 of 24 November 1998, as amended and completed, as well as transitional and final provisions.

As grounds for the objection of unconstitutionality, the authors formulated challenges of both extrinsic and intrinsic unconstitutionality.

In terms of extrinsic unconstitutionality, it was argued that the Government's assumption of responsibility on this law infringes the provisions of Article 1.4 on the principle of separation and balance of powers, Article 61.1 on the role of Parliament, as well as Article 114 of the Constitution, concerning assumption of responsibility by the Government, as interpreted by the Constitutional Court. From this perspective, it was also invoked the violation of the provisions of Article 147.4 of the Constitution on the generally binding nature of the decisions of the Constitutional Court.

In terms of the intrinsic unconstitutionality, it violated provisions of Article 1.1, 1.3, 1.5 of the Constitution (The Romanian State), Article 102.1 of the Constitution (on the role of Government), Articles 120, 121, 122 of the Constitution (Local public administration), Article 123 of the Constitution (The Prefect) and Article 136 of the Constitution (Property).

II. Examining the objection of unconstitutionality, the Court held the following:

1. The challenges of extrinsic unconstitutionality

Examination of the Government Programme 2013-2016, integral part of Resolution no. 45/2012 of Parliament of Romania granting confidence in the Government, published in the Official Gazette of Romania, Part I, no. 877 of 21 December 2012, as well as of the other documents submitted to the case file, reveals the importance of this Law's regulatory field, inclusively in view of the Government objectives. The explanatory memorandum and the viewpoint submitted by the Government to the case file give arguments on the urgency of the measure, celerity of the procedure, immediate application of the respective Law, corresponding to the other criteria established by the

Constitutional Court in relation to assumption of responsibility on a bill. Therefore, the subject matter of the impugned regulation is circumscribed in the main objectives contained in the Government Programme, whose achievement requires adoption of measures characterised by a certain degree of celerity, namely by immediate applicability, given the overall complexity of the issues pertaining to the administrative decentralisation process.

For these reasons, by majority vote, the Court dismissed the challenges of extrinsic unconstitutionality raised.

2. The challenges of intrinsic unconstitutionality

Analysing the regulation at issue, the Court held that its enactment failed to comply with the Framework Law no. 195/2006, which represents an infringement of the provisions of Article 1.5 of the Constitution regarding the obligation to respect the laws. Thus, as concerns of the decentralised domains, neither cost standards have been developed for funding the decentralised public services and public utility services nor quality standards to ensure supply thereof by the local public administration authorities. Likewise, the transfer of powers established by the law subject to constitutional review does not comply with the Framework-Law no. 195/2006 in terms of clarity, precision and foreseeability of the norm. The analysis of the provisions of the law shows the legislator's deviation from a set of rules imposed by the legal texts on legislative technique. This pertained to the need to organically integrate the normative act into the legislation system, to establish rules that are necessary, sufficient and possible and that would create a higher legislative stability and efficiency, to draft rules in a legal language and style, concise, sober, clear and precise, that would exclude any doubt, to express the same concepts using the same words.

Likewise, the Court analysed the Law subject to constitutional review in relation to Articles 1.5, 120, 136.2 and 136.4 of the Constitution. It held that the Law establishes a mechanism that departs from the framework-laws in the matter of property (Law no. 287/2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, no. 505 of 15 July 2011, as subsequently amended, Law no. 213/1998, as subsequently amended and completed, Law no. 7/1996, republished, as subsequently amended and completed). By doing so, it achieved a massive transfer of property from the public/private domain of the State into the public/private domain of administrative-territorial units. Although, in principle, the legislator may establish at any time exemptions from the effective normative framework, under

the principle of law according to which *specialia generalibus derogant*, the normative act establishing such exemptions must not deprive the constitutional provisions of their efficiency. This would be tantamount to failing to comply with the requirements of clarity of the law.

In this regard, the Court considered the absence of a clear distinction of assets that constitute the object of the transfer in between domains, in terms of their affiliation to the public or private domain of the State at the time of transfer. It held that in light of the imprecise nature of the legal regime of certain immovable property or in absence of a clear regulation of the measure itself as established by law on some of the assets, the derogatory mechanism of the impugned law is likely to contravene the principle of certainty of legal relationships, in terms of its component on the clarity and foreseeability of the law. This would lead to the violation of the legal regime of public property. On the other hand, some terminological inconsistencies, omissions or contradictions in the text of the Law itself, likely to create uncertainty in terms of legal transactions and situation of the assets covered, generates a lack of consistency, clarity and foreseeability of the legal norm. This is likely to infringe on the principle of legal certainty in terms of its component on clarity and foreseeability of the law.

Thus, having analysed the assets inserted in the annexes to the impugned Law, it results that the transfer refers to immovable property (buildings, land), fixed assets, and inventories. By their nature, they are not likely to constitute the exclusive object of public property, according to the listing under Article 136.3 of the Constitution. On the contrary, according to their destination, respectively their use or the national, county or local interest, they may belong either to the public domain of the State or to the public domain of the administrative-territorial unit. If so, the provisions of Article 869.3 last sentence of the Civil Code are deemed applicable, i.e. transfer from the public domain of the State into the public domain of the administrative-territorial unit can take place only on compliance with Article 9 of Law no. 213/1998, as subsequently amended and completed.

In this context, the Court held that the Law subject to constitutional review establishes an exemption from the statutory provisions cited above. It substituted individual acts (resolutions of the Government) of transfer of certain assets from the State's public domain into the public domain of the administrative-territorial unit, without establishing the legal regime of the transferred assets in terms of their affiliation to the national, county or local domain, according to their use, or according to the national, county or local interest. Thus, it circumvented judicial review on

administrative acts, exercised under the terms of the Administrative Contentious Law no. 554/2004, published in the Official Gazette of Romania, Part I, no. 1.154 of 7 December 2004, as subsequently amended and completed, review guaranteed by Article 126.2 of the Constitution. The derogatory mechanism of transmission of property, established by the impugned Law, without complying with the legal procedure in force and without a proper individualisation of the assets, represents, in fact, a violation of the legal framework of public property.

Furthermore, the mechanism of transmission of property, covered by the impugned Law, from the private domain of the State into the private domain of administrative-territorial units, by operation of law and without having obtained the consent of administrative-territorial units, violates the constitutional principle of local self-government. This is governed by Article 120.1 of the Constitution, concerning both the organisation and functioning of local public administration and the management, under its own responsibility, of the interests of the communities represented by those public authorities.

The Court also held that the way in which a management right was established over public property, subject to transfer in between domains, under the terms of the impugned Law, is incompatible with the concept and legal features of the real right of management. This corresponded to the right to public property and, consequently, comes against the provisions of Article 136.4 of the Basic Law, which enshrine at constitutional level the ways in which the right to public property may be exercised.

Analysing the lists contained in Annexes 1 to 8 to the Law, the Court found that the assets subject to transfer in between domains are not precisely identified, in terms of their affiliation to the State public or private domain (Annexes 1 and 2 merely refer to assets in the public property; Annex 3 does not specify, from this viewpoint, the legal regime of the listed assets), the holder of the management right is not indicated (Annex 3) or specified, and in case of transfer of immovable property, the legislator failed to indicate State's title to property in case of assets in the private domain, respectively the modality of acquisition of the property belonging to the public domain. Likewise, in case of transfer of immovable property, the legislator failed to indicate the framework elements of technical description, namely areas, land book number, cadastre data. The Court also found that, in the vast majority of cases, some of the inventory values had not been updated. The incomplete and vague regulation is likely to lead to the violation of Article 1.5 of the Constitution on the clarity of the law.

Apart from the issues regarding the relevance of Articles 1.5 and 136 of the Constitution, the Court ascertained the violation of the principle of local self-government lack the local public administration acceptance of the transfer into the private domain of administrative-territorial units of certain assets that were previously in the private domain of the State.

For these reasons, by unanimous vote, the Court upheld the objection of unconstitutionality in terms of the challenges of intrinsic unconstitutionality. It also found that the Law establishing some measures of decentralisation of the powers exercised by some ministries and specialised bodies of the central public administration, as well as some public administration reform measures, is unconstitutional as a whole.

III. Three judges formulated concurring opinion in relation to the decision to dismiss the extrinsic challenges of unconstitutionality.

Languages:

Romanian.



Russia Constitutional Court

Important decisions

Identification: RUS-2014-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 08.04.2014 / **e)** 10 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 89, 08.04.2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**

Keywords of the alphabetical index:

Foreign agent / Non-governmental organisation / Penalty, administrative / Sovereignty.

Headnotes:

The application of a special legal regime to non-governmental organisations engaging in political activities and funded from abroad is compatible with the Constitution.

Summary:

I. The Duma (lower house of the Russian parliament) passed the law conferring “foreign agent” status on Russian non-governmental organisations (hereinafter “NGOs”) funded from abroad. Under the terms of this law, NGOs engaging in political activities and funded from abroad will be subject to a special legal regime prescribing, in the event of an offence, a fine of up to RUB 1 million (EUR 24,500) or a criminal sanction of up to four years’ imprisonment for their managers.

The applicants, private individuals and the human rights ombudsman of the Russian Federation, asked the Constitutional Court to examine the special legal regime applicable to this category of “foreign agents”.

In July 2012, amendments were made to the law on associations and NGOs. The legislator conferred the status of “foreign agent” on Russian NGOs funded from abroad. Under the terms of this law, NGOs engaging in political activities and funded from abroad have since then been subject to a special legal regime and must therefore register with the Ministry of Justice or incur administrative sanctions for the organisations and their managers.

The applicants in their submission argued that the impugned provisions do not meet the requirements of legal certainty and coherence. They discriminate against NGOs, violate the presumption of their managers’ innocence, offend against their dignity and compel them to testify against themselves. Furthermore, the applicants submitted that the same provisions interfered with their freedom of expression, organisation and participation in public life.

They therefore argued that the law is contrary to Articles 13 (paras. 1-4), 19 (paras. 1 and 2), 21 (para. 1), 29 (paras. 1 and 2), 30 (para. 1), 32 (para. 1), 45, 46 (paras. 1 and 2), 49, 51 and 55 (para. 3) of the Constitution of the Russian Federation.

II. The Court held that the impugned law did not violate the Constitution.

It held that the recognition of a specific category of NGOs, which could be classed as “foreign agents”, did not mean that these organisations threatened state security or public safety.

The Court noted that the expression “foreign agent” might have negative connotations, with the legacy of stereotypes dating from the Soviet era, but expressed the view that such connotations were devoid of constitutional and legal foundations. Therefore the impugned provisions ought not to be construed as equating this category of NGOs with a malicious organisation, and were not intended to discredit their work.

For an NGO’s political activities to be recognised, their impact on public life or opinion-forming must be assessed. In the absence of such impact, even if the NGO in question was critical of the authorities or conveyed the opposition’s criticism, it could not be deemed to fulfil the function of a “foreign agent”. Besides, this designation as a “foreign agent” should concern the organisation as a whole and not each of its members acting personally and on their own initiative.

In another sense, NGOs in receipt of funds and assets from foreign sources were likely to use them in the interests of their sponsors. Thus the special legal regime applicable to these NGOs was compatible with the Constitution for the purposes of safeguarding the public interest and state sovereignty.

The Court therefore held that the impugned provisions of the law on NGOs were not contrary to the Constitution of the Russian Federation, considering that:

- a. they did not require the state to intervene in determining the NGOs’ priorities in order to verify the appropriateness of their aims, procedures and methods of political activity;
- b. establishing a notification procedure for the formation of NGOs acting as “foreign agents” did not impede their funding from Russian and foreign sources;
- c. presumption of the legitimacy and integrity of NGOs’ activities did not deny them their right to judicial protection.

The impugned provisions of the Administrative Code were not contrary to the Constitution of the Russian Federation. They were non-retroactive and entailed prosecution only where the NGO had not sent a declaration ensuring entry in the register of “foreign agents”.

However, the Court held that the provisions concerning fines imposed on individuals and corporate bodies were contrary to the Constitution as they did not set any lower thresholds. The Constitutional Court directed the legislator to amend the Administrative Code to that effect and referred to the competent courts the responsibility of reviewing the cases of the convicted applicants.

Languages:

Russian.



Identification: RUS-2014-1-002

a) Russia / b) Constitutional Court / c) / d) 15.04.2014 / e) 11 / f) / g) *Rossiyskaya Gazeta* (Official Gazette), no. 92, 23.04.2014 / h) CODICES (Russian).

Keywords of the systematic thesaurus:

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

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

Keywords of the alphabetical index:

Election, electoral barrier / Election, voting right / Election, law, electoral / Election, universal suffrage.

Headnotes:

Prohibition of early voting for citizens unable to vote on the day of the ballot is contrary to the Constitution.

Summary:

I. According to the law in force, early voting is only possible in inaccessible or remote areas, on ships at sea or in polar stations, as well as in other significantly remote places for which channels of communication and transport are inaccessible or difficult. Early voting may also be organised for constituents living abroad and for a regional or local referendum. Amendments were made to the electoral legislation over a period extending from 2002 to 2010.

The legislative assembly of a region referred the question of prohibition of early voting to the Court. According to the applicant's submission, the provisions in force denied a large proportion of citizens the possibility of exercising their right to vote. The applicant considered that the law did not secure this right to persons travelling on business or in hospital. Thus, the applicant argued that it violated constitutional rights and was contrary to Articles 3, 17, 18, 19 (para. 2), 27, 32 (paras. 1 and 2) and 55 (para. 3) of the Constitution.

II. The Court began by observing that free elections presuppose establishing equal conditions for all citizens' realisation of rights. The state must provide adequate guarantees to ensure respect for rights, transparency and combating of abuses.

Election conditions and arrangements must not impose unreasonable restrictions on citizens and preclude them from participating in the poll.

Institutionalisation of early voting presents itself as one of the mechanisms guaranteeing participation in the poll for citizens unable to vote on the day of the ballot. However, the amendments to the electoral legislation in recent years show a tendency to limit the possibility for citizens to participate in early voting.

It is important that in case of amendment the legislator should not act arbitrarily and should not infringe constitutional principles concerning free elections. The objective of rationalising the activities of the electoral commissions cannot in itself provide a basis for restriction of early voting.

The Court noted that the legislator has not discarded early voting and thus contemplates the possibility of using it on condition that it is well organised so as to ensure reliability, effectiveness and transparency.

At the same time, the legislator may limit the application of early voting where the use of other mechanisms, more suitable in certain circumstances, compensates for the absence of early voting. However, these changes should meet the criteria of expediency and proportionality.

The Constitutional Court held that the impugned provisions restricted the electoral rights of those citizens unable to go to the polling station on the day of the ballot for a good reason (holidays, business trip, public duties or state of health).

The existing regulations lead to inequality of electors in failing to allow an early voting procedure to be implemented. The provisions in question are therefore not in accordance with the Constitution.

The federal legislator should amend the electoral legislation. Citizens absent from their place of residence for a valid reason on the day of the ballot and unable to go to the polling station should be allowed the opportunity to vote early.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2014-1-001

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 10.07.2013 / **e)** UŽ-4100/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 90/2013 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Custody, pre-trial, treatment.

Headnotes:

Physical and psychological integrity is inviolable. Nobody may be subjected to torture, inhuman or degrading treatment or punishment.

Persons deprived of liberty must be treated humanely and with respect to dignity of their person.

Everyone shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Summary:

The appellant was deprived of liberty on 18 July 2005, tried, found guilty of first degree murder and sentenced to 40 years imprisonment. The appellant is serving his prison sentence at present.

The appellant filed a constitutional appeal against the Ministry of Internal Affairs, the Ministry of Justice and State Administration, specifically its Penal Sanctions Enforcement Administration, the Basic Court and the Basic Public Prosecution Office, claiming that they had violated the prohibition of torture and inhuman or degrading treatment or punishment enshrined in

Articles 25 and 28 of the Constitution and Article 3 ECHR, the right to judicial protection guaranteed by Article 22 of the Constitution and the right to an effective legal remedy enshrined in Article 36.2 of the Constitution and Article 13 ECHR.

In view of the allegations in and reasons for the submission of the constitutional appeal, as well as the alleged violations of the appellant's rights, the Constitutional Court (hereinafter, the "Court") assessed the existence of the procedural requirements for reviewing the appeal and the merits of the allegations of violations of the rights with respect to three periods, notably:

- a. the period the appellant spent in police custody,
- b. the period the appellant spent in pre-trial custody and
- c. the period the appellant has spent in prison, serving his sentence.

As per the allegation of the breach of the right enshrined in Articles 25 and 28 of the Constitution and Article 3 ECHR, the Court referred to European Court of Human Rights' case-law (its judgments in the cases of *Stanimirović v. Serbia*, no. 26088/06, 18.10.2011, paragraphs 39 and 40, *Labita v. Italy (GC)*, no. 26772/95, 06.04.2000, paragraph 131, *V.D. v. Croatia*, no. 15526/10, 08.02.2012, paragraphs 63 and 64 and *Mađer v. Croatia*, no. 56185/07, 21.09.2011, paragraphs 111 and 112), and concluded that these rights contained guarantees of the respect of the substantive and procedural aspects of the prohibition of torture and inhuman or degrading treatment.

During its consideration of the existence of the procedural requirements for its review of the appeal, the Court took into account the European Court of Human Rights' case-law, notably:

1. the admissibility of the constitutional appeal *ratione temporis* (judgments in the cases of *Stanimirović v. Serbia*, paragraphs 27 and 29 and *Tuna v. Turkey*, no. 22339/03, 19.01.2010, paragraphs 58-63) and
2. the rule on the exhaustion of regular legal remedies before going to the Court (judgments in the cases of *Akdivar and Others v. Turkey*, no. 21893/93, 16.09.1996, paragraph 69, *Vernillo v. France*, no. 11889/85, 20.02.1991, paragraphs 27 and 68, *Selmouni v. France*, no. 25803/94, 28.07.1999, paragraphs 75 and 77, *Chahal v. United Kingdom*, no. 22414/93, 15.11.1996, paragraph 145, *Airey v. Ireland*, no. 6289/73, 09.10.1979, paragraph 23, *Cardot v. France*, no. 11069/84, 19.03.1991, paragraph 34 and *Mađer v. Croatia*, no. 56185/07, 21.09.2011, paragraph 87).

During its assessment of the merits of the allegations about the violations of the substantive aspect of the prohibition of torture and inhuman or degrading treatment or punishment, the Court bore in mind the European Court of Human Rights' views and jurisprudence, notably with respect to excessive use of force, minimum level of severity of ill-treatment, the standard of proof "beyond reasonable doubt" and the rules on the burden of proof regarding ill-treatment allegations. In its consideration of the forms of ill-treatment, the Court also took into account European Court of Human Rights' case-law.

During its assessments of the merits of the allegations of violations of the procedural aspect of the prohibition of torture and inhuman or degrading treatment or punishment, the Court took into account the European Court of Human Rights' views and case-law, particularly with respect to the state authorities' obligations to conduct effective official investigations in the event a person in detention or serving a prison sentence made credible assertions, that the investigations have to be thorough, prompt and conducted by independent competent authorities that had not been implicated in the alleged ill-treatment, and that the investigations must afford a sufficient element of public scrutiny to secure accountability.

Bearing in mind the above-mentioned provisions of the Constitution and the European Convention on Human Rights, as well as the European Court of Human Rights' case-law, the Court established that both the substantive and procedural aspects of the appellant's right to the inviolability of his physical and psychological integrity enshrined in Article 25 of the Constitution had been violated during his pre-trial custody and the time he spent in prison serving his sentence.

Cross-references:

European Court of Human Rights:

- *Gömi and Others v. Turkey*, no. 35962/97, 21.12.2006, paragraph 77;
- *Berliński v. Poland*, nos. 27715/95 and 30209/96, 20.06.2002, paragraphs 57-65;
- *Gladović v. Croatia*, no. 28847/08, 10.05.2011, paragraphs 34, 37;
- *Ivan Vasilev v. Bulgaria*, no. 48130/99, 12.04.2007, paragraph 63;
- *Labita v. Italy*, no. 26772/95, 06.04.2000, paragraph 120, 121, 131;
- *Mađer v. Croatia*, no. 56185/07, 21.06.2011, paragraph 106;
- *Ireland v. United Kingdom*, no. 5310/71, 18.01.1978, paragraph 161;

- *Salman v. Turkey*, no. 21986/93, 27.06.2000, paragraph 100, *Reports of Judgments and Decisions* 2000-VII;
- *Sunal v. Turkey*, no. 43918/98, 25.01.2005, paragraph 41;
- *Ireland v. United Kingdom*, no. 5310/71, 18.01.1978, paragraphs 167 and 168;
- *Aksoy v. Turkey*, no. 21987/93, 18.12.1996, paragraphs 63 and 64;
- *Ilhan v. Turkey*, no. 22277/93, 27.06.2000, paragraph 85, *Reports of Judgments and Decisions* 2000-VII;
- *Gäfgen v. Germany*, no. 22978/05, 01.06.2010, paragraphs 88 and 89, *Reports of Judgments and Decisions* 2010;
- *Jalloh v. Germany*, no. 54810/00, 11.07.2006, paragraph 68, *Reports of Judgments and Decisions* 2006-IX;
- *Hajnal v. Serbia*, no. 36937/06, 19.06.2012, paragraph 79;
- *Stanimirović v. Serbia*, no. 26088/06, 18.10.2011, paragraphs 39 and 40;
- *Labita v. Italy (GC)*, no. 26772/95, 06.04.2000, paragraph 131, *Reports of Judgments and Decisions* 2000-IV;
- *V.D. v. Croatia*, no. 15526/10, 08.11.2011, paragraphs 63 and 64;
- *Mađer v. Croatia*, no. 56185/07, 21.06.2011, paragraphs 111 and 112;
- *Otašević v. Serbia*, no. 32198/07, 05.02.2013, paragraph 31;
- *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, 03.06.2004, paragraph 137.

Languages:

English, Serbian.



Slovakia

Constitutional Court

Important decisions

Identification: SVK-2014-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 19.06.2013 / **e)** PL. ÚS 13/2012 / **f)** Nurses' wages / **g)** / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law.**

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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

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

Keywords of the alphabetical index:

Nurses / Health-care / Remuneration.

Headnotes:

A law that raises wages of nurses too much and too quickly may be contrary to the right to property of private health care providers.

Summary:

I. In Slovakia, nurses are traditionally low-paid. In 2010, the nurse union asked the government to resolve this problem; otherwise, it would go out on strike. Then, shortly before the general elections, not only the coalition majority, but also virtually all the MPs voted to adopt the Law on Minimum Wages for Nurses (hereinafter, the "Law"). This applied to all nurses irrespective of public or private sector. The Law raised the wages for all nurses based on the principle of seniority in service.

The Prosecutor General, on the request of the Chamber of Physicians, challenged the whole Law before the Constitutional Court. He argued that the Law was contrary to the right of employees to remuneration which would allow for a decent standard of living. The reason was that the purpose of the Law, namely to

prevent nurses from going abroad, was not a real threat. He then argued that the Law was contrary to the rule of law (impossible to fulfil it economically in practice), contrary to the right to protection of property of health-care providers, and contrary to the principle of equality because it discriminated against the other employees in the health sector.

II. The Court decided on the case, first, alluding to the development of western constitutionalism after the Lochner era. It also pointed to the decision of the Polish Constitutional Tribunal in a similar case K 43/01. As far as judicial self-restraint is concerned, it noted Lon Fuller's theory of polycentric questions in constitutional adjudication and the necessity to support procedural democracy.

The Court stated that raising the wages (of nurses) naturally cannot be in breach of the (subjective) right of employees (nurses) to a remuneration that would provide them a decent standard of living. On the other hand, this right does not guarantee an optimum wage, but a minimum wage. Because this right is not directly applicable, the Court tested it as a public good in an abstract review. The economic issue could not be unconstitutional as the Prosecutor General argued, because this impossibility is relative in comparison with physical or legal impossibility. Also, it is not the task of the Court to decide on economic matters (Cases like *Airey v. Ireland* mean something different). Moreover the Court divided health care providers into state and non-state, and concluded that it could only protect non-state ones, because the State may impose upon itself any financial duty. From this point of view, considering the state as a payer, it is constitutionally irrelevant whether the raising of wages is economically realistic.

However, although espousing the self-restraint approach, the Court found that the Law did not pass the third step in the proportionality test (proportionality *stricto sensu*). The reason is that the financial burden on private health care providers would be too heavy and immediate in the health sector with its sophisticated regulations and fixed prices. Hence, the right to property outbalanced the public interest in raising the wages for nurses. This financial burden was particularly heavy for small providers (one physician and one older nurse for example), and it could lead to the end of their business. So the unconstitutional issue was not the very idea of the Law but its quantitative parameters related to time and finances.

In any case, the legislative and executive branches are, according to the Court, in much better position to consider the economic situation in the health sector, and they bear political and constitutional responsibility for it.

The Law was not unconstitutional in relation to the rest of the referenced constitutional norms. It was not discriminatory because there was no conjunction with the right of employees to remuneration which would provide them a decent standard of living. The reason was that it guaranteed a general minimum wage and a person's occupation was not a strictly prohibited ground for discrimination. The Law also passed the test of a general right to equality because the particular characteristics of nurses justified their particular wage.

Finally, the Court did not divide the operative part into state and non-state providers because this division is not practical, as many providers have mixed character.

III. Four judges dissented. Some of them wanted to stress the importance of equality among health employees, legal certainty and judicial self-restraint. Two dissenters argued that there was a possibility of derogating the Law just in favour of non-state providers.

Cross-references:

Polish Constitutional Tribunal:

- Decision no. K 43/01 of 09.09.2002, *Bulletin* 2003/1 [POL-2003-1-001].

Languages:

Slovak.



Slovenia Constitutional Court

Statistical data

1 January 2014 – 30 April 2014

In this period, the Constitutional Court held 23 sessions – 14 plenary and 9 in panels: 2 in the civil panel, 2 in the criminal panel and 5 in the administrative panel. It received 97 new requests and petitions for the review of constitutionality/legality (U-I cases) and 341 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 110 cases in the field of the protection of constitutionality and legality, and 289 cases in the field of the protection of human rights and fundamental freedoms.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovene full text versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts of decisions issued in the field of the protection of constitutionality and legality, with full-text version of the dissenting/concurring opinions);
- On the website of the Constitutional Court (full text in Slovene, English abstracts and a selection of full texts): <http://www.us-rs.si>;
- In the IUS-INFO legal information system on the Internet, full text in Slovene, available through <http://www.ius-software.si>;
- In the CODICES database of the Venice Commission (a selection of cases in Slovene and English).

Important decisions

Identification: SLO-2014-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 07.02.2013 / **e)** U-I-42/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 17/2013 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
4.7.4.3.6 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Status**.

Keywords of the alphabetical index:

State prosecutor, independence.

Headnotes:

Under the Constitution, within the executive branch of power the system of state prosecution must be organised as a system of independent authorities of the state, and state prosecutors must be ensured independence in the exercise of the prosecution function. Provided there is no interference with the constitutional guarantee of the independence of state prosecutors' offices or state prosecutors, decisions as to the ministry responsible for the organisation and functioning of state prosecutors' offices and the supervision of their operations falls within the discretion of the legislature.

Summary:

I. The Constitutional Court was asked by a group of deputies of the National Assembly to review the constitutionality of the statutory regulation that transferred competence over the system of state prosecution from the ministry in charge of the judiciary to the ministry in charge of internal affairs.

II. The Court began by observing that the fact that the state prosecution system is part of the justice system in the broader sense does not mean that it forms part of some "system-of-justice" branch; the justice system is not a special branch of power. Under the Constitution, state power in the Republic of Slovenia is exercised under the principle of the separation of powers into the legislative, executive, and judicial branches. An understanding of the system of state prosecution as part of the system of justice in the broader sense does not mean that the system of

state prosecution is a part of the judicial branch of power. The essence of the judicial power is in the performance of the judicial function, while the essence of the function of the system of state prosecution is the prosecution of criminal offences, as determined in Article 135 of the Constitution.

In terms of the constitutional content of the function of the system of state prosecution: it forms part of the executive branch of power. Nonetheless, the Court highlighted that under Article 135.1, the Constitution determines the principle of the functional independence of state prosecutors in the exercise of the function of the system of state prosecution, which also requires the independence of state prosecutors' offices as authorities of the state. State prosecutors must be ensured independence when carrying out their duties in specific cases. A statutory regulation according to which a state prosecutor is bound by orders, prohibitions, or other instructions when filing or presenting criminal charges would be inconsistent with the Constitution. A regulation that allows state prosecutors to be influenced or for pressure to be exerted upon them so that they proceed in a particular manner in a concrete case would also be inconsistent with the Constitution. Even though it is a part of the executive branch of power, the system of state prosecution cannot be viewed as an authority that could be subordinated to the Government or a specific ministry. State prosecutors decide only on the basis of the Constitution and laws.

The Constitution thus requires that within the executive branch of power the system of state prosecution is organised as a system of independent authorities of the state, while state prosecutors are ensured independence in the exercise of the prosecution function. The mere transfer of the competences concerning the system of state prosecution from the Ministry of Justice to the Ministry of the Interior in itself does not interfere with the principles of the independence of state prosecutor offices or state prosecutors. As long as there is no interference with the constitutional guarantee of the independence of state prosecutor offices or state prosecutors, the decision with regard to which ministry is to perform the administrative tasks related to the organisation and functioning of state prosecutor offices and supervision over their operations is a matter of the legislature's discretion. This would entail a question of the appropriateness of a statutory regulation, which the Court is not competent to assess.

Laws that regulate the office of state prosecutor and the performance of state prosecution (e.g. those regulating the system of state prosecution, criminal proceedings and the police) must ensure the

independence of state prosecutors in carrying out the function of prosecution. Ensuring the constitutional principles of the independence of state prosecutor offices and state prosecutors depends on concrete statutory competences and the authorisations of individual authorities or holders of individual positions of authority that they exercise in concrete cases in connection with the function of prosecution. Authorisations with the potential to reduce the constitutionally required independence of state prosecutors in concrete cases would be constitutionally disputable regardless of which ministry or minister was competent for their implementation. The Court found that the challenged regulation, under which the system of state prosecution was transferred from the Ministry of Justice to the Ministry of the Interior, was not inconsistent with the Constitution, as it does not alter the concrete legal relations between the State Prosecutor's Office, state prosecutors, and the competent ministry. The transfer of competences between ministries does not itself have direct legal significance in terms of the constitutionally guaranteed position of state prosecutors in specific instances of criminal prosecution.

The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2014-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 25.04.2013 / **e)** U-I-311/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 44/2013 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Enterprise, company, management board, member.

Headnotes:

The provision of the Companies Act which prevents members of the management or supervisory bodies of companies against which insolvency or compulsory dissolution proceedings have been initiated from setting up new companies or being involved with their management interferes with the right to free enterprise. When such prohibitions are a consequence of statutory presumption rather than judicial proceedings, in which a court would have established whether an individual acted in a socially unacceptable manner, the interference is excessive. Similar measures pronounced in judicial proceedings may also constitute an interference but one which is in pursuit of a public interest (protection of the integrity of the business environment) and not disproportionate.

Summary:

I. One of the provisions of the Companies Act imposed certain restrictions on members of the management or supervisory bodies of companies against which insolvency or compulsory dissolution proceedings had been initiated. This provision also applied to anyone who had held such office in the two year period before the commencement of insolvency or dissolution proceedings and it meant that the persons described above could not be a founder, partner or member of a management or supervisory body in another company. The Constitutional Court was asked to assess the constitutional compliance of this provision.

II. The Court found the provision to be an invasive interference with the right to free economic initiative (Article 74.1 of the Constitution), as it prevents certain persons from pursuing economic initiatives for a determined period of time. The measure does pursue a public interest (protection of the integrity of the business environment), in that it prevents those who participated in the management or supervision of companies which are insolvent or about to become so from establishing, managing, or supervising new companies. However, the measure is excessive and disproportionate, because the prohibition on pursuing business activities is based on the legal presumption that such persons did not act with the necessary diligence and arose on the basis of the law alone (*ex lege*). As the prohibition was a consequence of a statutory presumption, and not of judicial proceedings, during which, in line with constitutional procedural safeguards a court would have established whether an individual acted in a reprehensible and socially unacceptable manner, the Court repealed the provision concerned.

The above measure is linked to the Court's review of the measure whereby the court deciding on insolvency or compulsory dissolution proceedings *ex officio* annuls the power or authority of the legal entity or natural person who was a member of the management or supervisory body of the company against which insolvency or compulsory dissolution proceedings were initiated to manage the business or prevents their membership in the supervisory bodies of all the companies in which that person or entity currently holds office. The Court found that this regulation interfered with the right to free economic initiative. However, the restriction which it entails pursues a public interest (the protection of the integrity of the business environment) and is not disproportionate. While the measure of annulment of powers or authority to conduct business is also based on a legal presumption, its consequences do not arise by the force of law alone (*ex lege*), but only after the relevant judicial decision has become final. In judicial proceedings, the individual affected has the opportunity to put forward a case that he or she had acted with the necessary diligence in the company now the subject of insolvency or compulsory dissolution proceedings. They may file an appeal against the court decision, and will then be guaranteed all the constitutional procedural guarantees of a fair trial. The Court therefore decided that the measure was not inconsistent with the Constitution. It did, however, identify unconstitutionality in that the duration of the measure (ten years) was not defined with sufficient precision within the Act, as it depended on the duration of the insolvency or compulsory dissolution proceedings.

Other restrictions in the legislation may prevent somebody setting up or holding office in a company if a prison sentence has been imposed on them by a final judgment due to a criminal offence against the economy, an employment relationship, or social security; if he or she has been found personally liable by a final judgment due to the piercing of the corporate veil; if he or she was involved as a partner with a share of over 25% in the capital or was a member of the management or supervisory bodies of a company which was found to be void on the basis of the act regulating the register of companies, because the purpose of the functioning or the activity of the company was inconsistent with the Constitution, compulsory regulations, or moral principles.

The Court decided that this restriction is not unconstitutional from the perspective of the right to private property or from that of the right to free economic initiative. The Act envisaged that the

restriction ceases after ten years from the point at which the conditions allowing the measure to be applied arose. The Court assessed that the ten year period is neither excessive nor inconsistent with the Constitution; the legislature put it into place to protect the integrity of the business environment, excluding individuals who have acted in a reprehensible fashion from the business environment for a period of ten years, thereby re-establishing a high level of trust in economic relationships.

III. Point 1 of the operative provisions was adopted by six votes against two. Points 2, 3, and 5 of the operative provisions were adopted unanimously. Point 4 of the operative provisions was adopted unanimously, except as regards Points 1 and 3 of the first sentence of the sixth paragraph of Article 10a of the disputed Act, which were adopted by seven votes against one, and as regards the seventh paragraph of Article 10a, which was adopted by six votes against two.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2014-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 18.09.2013 / **e)** Up-383/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 17/2013 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
5.3.44 Fundamental Rights – Civil and political rights
– **Rights of the child.**

Keywords of the alphabetical index:

Child, custody, decision / Child, abduction.

Headnotes:

Criminal courts deciding on the criminal offence of abduction of a minor must ensure respect of the final judicial decision on custody, and take into account the principle of the child's best interests, striking an

appropriate balance between the two. In exceptional circumstances there may be a collision between respect for a final judicial decision and the principle of the child's best interests. In such cases, the criminal court must assess which constitutionally protected value should be assigned the higher weight. If the child makes it clear he or she does not want to return to the parent with custody, is mature enough to express his or her will, and if all other circumstances of the case show that the other parent acted in the child's best interests by not returning the child, such parent should not be found guilty of abducting a minor.

Summary:

I. The Court was asked to decide on the constitutional complaint of a father who had been found guilty of committing the criminal offence of the abduction of a minor. The applicant had allegedly committed the criminal offence by unlawfully abducting the minor from the mother who had custody of the child, detaining the minor, and preventing the minor from being with the person who had rights in respect of the minor. The Supreme Court found that the unlawfulness of the applicant's conduct had been established by a violation of the final judgment by which the mother had been granted custody of their minor child. Although the applicant subsequently obtained custody of the child, this did not have a retroactive effect on the unlawful act he committed when the child was still entrusted to his mother.

II. The Court assessed the allegations in the constitutional complaint from the viewpoint of Articles 54 and 56 of the Constitution. Article 54.1 of the Constitution determines that parents have the right and duty to maintain, educate, and raise their children. Article 56.1 of the Constitution determines that children enjoy special protection and care, and that they enjoy human rights and fundamental freedoms in accordance with their age and maturity. The Court stressed that parents must exercise the rights and obligations determined in Article 54.1 in the interests of their children. In proceedings regarding the relationships between parents and children, it has to be taken into account that a child is a person who should be respected as such within the family circle, and therefore his or her will should be considered in accordance with his or her age and maturity. In proceedings, the child should be treated as a subject; this means that children who, in accordance with their age and maturity, are capable of understanding the circumstances and independently expressing their will should be enabled to do so. Their will should be respected, provided it is consistent with the principle of the child's best interests.

The Court agreed in principle with the position of the ordinary courts that parents must act in accordance with final judicial decisions. Respect for final judicial decisions is a generally important constitutional value and one of the fundamental postulates of a state governed by the rule of law (Article 2 of the Constitution). However, in the field of child custody the finality of judicial decisions cannot be an absolute value. Changed circumstances on the side of the parents, but especially the development of the child's capabilities to express him or herself, in accordance with his or her age and maturity, on issues that are crucial to his or her upbringing can lead to a situation where recognition of the absoluteness of a final judicial decision might run counter to the principle of the child's best interests. This principle must also be considered in criminal proceedings where the criminal liability of a parent who did not respect a final judicial decision is at stake. The Court deciding in criminal proceedings must ensure respect for the final judicial decision consider the principle of the child's best interests and strike an appropriate balance between the two. In exceptional circumstances there may be a collision between respect for a final judicial decision and the principle of the child's best interests. The criminal court must then, depending on the content of the constitutionally protected values and circumstances of the individual case, assess which value should be assigned the higher weight.

In the case at issue, the Court established that at the time when the applicant was alleged to have committed the criminal offence the eleven-year old child had clearly expressed his desire to live with his father, not his mother. He strongly opposed being released to his mother, and the police did not use coercive measures to execute the final judgment by which he was entrusted into her custody. While the coercive measures would have formally ensured respect for the final judgment, they could have had severe consequences for the child's development. In addition, the applicant immediately pursued the legal path to securing the child's rights in order to achieve an amendment of the final District Court Decision, but the court only decided on his motion for a temporary injunction for a change in the child's custody after nine months. The criminal courts were informed of all these circumstances, but paid insufficient attention to them. If the courts in the criminal proceedings had considered the clearly expressed will of the minor son, who was, in accordance with his age and maturity, capable of making it clear that he did not want to return to his mother, and if they had considered all the other circumstances of the case, they would have had to conclude that the applicant had acted in the child's best interests, as is also his duty under Article 54.1 of the Constitution. In the

circumstances of the case at issue, the Court decided that the failure to comply with the child's best interests (Article 56.1 of the Constitution) led to a violation of the applicant's right referred to in Article 54.1. It overturned the challenged judgments and, in accordance with the mandate of the Constitutional Court Act, acquitted the applicant of the charges, because his conduct could not be assessed as having been unlawful.

Two judges were disqualified from deciding in the case. The decision was reached by six votes against one.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2014-1-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 21.11.2013 / **e)** Up-1056/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 108/2013 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Right to effective judicial protection / Court of Justice of the European Communities.

Headnotes:

When a national court is faced with a question the resolution of which falls within the exclusive jurisdiction of the Court of Justice of the European Union, it must not decide on it unless the Court of

Justice has already answered it or other conditions that allow the national court to adopt a decision are fulfilled. A national court that adopts a position inconsistent with this requirement is acting in breach of the right to judicial protection determined by the Constitution.

Summary:

I. The Constitutional Court was asked to decide on a constitutional complaint filed against a judgment of the Supreme Court. In a case regarding value added tax, the applicant referred to the case-law of the Court of Justice of the European Union, stating that he should not have been taxed for selling two plots of land. He suggested that the Supreme Court stay the proceedings and submit the case to the Court of Justice for a preliminary ruling. The Supreme Court dismissed the applicant's reference to European case-law as unfounded, as allegedly the factual circumstances were different. It did not take a position on his motion to submit the case to the Court of Justice.

II. The Constitutional Court firstly established that the regulation of value added tax has been partially transferred to the European Union. Courts must therefore interpret national regulations in light of European Union law and in conformity with its purpose (the principle of consistent interpretation). On the basis of the Constitution, national courts must take into consideration European Union law, including the case-law of the Court of Justice. The Court of Justice has exclusive jurisdiction to give preliminary rulings on questions concerning the interpretation of the Treaties and the validity and interpretation of European Union acts. Its task is therefore to ensure uniform interpretation and application of primary and secondary European Union law and its decisions are binding on all national courts and all other authorities and legal subjects in Member States. When a national court is faced with a question whose resolution falls within the exclusive jurisdiction of the Court of Justice, it must not decide on it unless the Court of Justice has already answered it or other conditions that allow the national court to adopt a decision are fulfilled. If the national court adopts a position inconsistent with this requirement, it will be in breach of the right to judicial protection determined by Article 23.1 of the Constitution.

In its decision, the Court established that the Court of Justice is an independent, impartial court constituted by law in the sense of Article 23.1 of the Constitution. Deciding on a preliminary question is part of a single judicial dispute and the answer to a question

regarding the interpretation of European Union law and/or the validity and interpretation of secondary legal acts of the European Union is of essential importance for the final decision in such dispute. The position of the Court was that there is no doubt that the Supreme Court is a court in the sense of Article 267 of the Treaty on the Functioning of the European Union, because it fulfils all criteria determined by the case-law of the Court of Justice. Since the Court of Justice is a court in the sense of Article 23.1, the right to judicial protection also guarantees that in the event a question of interpretation or validity of European Union law arises in a dispute such question is answered by the court that is competent under Article 267 of the Treaty to reply to it. The right of an individual who is party to original proceedings to the judicial protection determined by Article 23.1 of the Constitution therefore also refers to the duty of the Supreme Court to submit the case to the Court of Justice if the conditions for such are fulfilled.

Under Article 267.3 of the Treaty on the Functioning of the European Union, Member State courts must submit a preliminary question to the Court of Justice, unless it is established that the question is not relevant; this particular point of European Union law has already been the subject of interpretation by the Court of Justice, or the correct application of European Union law is so obvious as to leave no room for reasonable doubt. When a question of the validity of a legal act of the European Union is at issue, national courts must submit the case to the Court of Justice.

In order for the Court to be able to assess whether the individual was ensured judicial protection before a court constituted by law and whether the separation of jurisdiction determined by Article 267 was taken into consideration, the court at issue must have adopted a sufficiently clear position with regard to the questions related to European Union law. This includes reasoning explaining why, despite the party's motion to submit the case to the Court of Justice, the court at issue decided not to proceed in such manner. From the established constitutional case-law it follows that a substantiated judicial decision constitutes an essential part of a fair trial and that in a judicial decision courts must concretely and clearly determine the reasons that led them to adopt their decision.

In this particular case, the Court established that, regarding European Union law, the Supreme Court adopted positions from which it was not clear whether they were based on the case-law of the Court of Justice due to deficient reasoning, whereas with

regard to the question of whether there was an *acte clair* it did not adopt a position at all, nor did it adopt a position regarding the party's motion to submit the case to the Court of Justice for a preliminary ruling. The Court therefore found that a breach of Article 23.1 of the Constitution had occurred. It overturned the challenged judgment, and remanded the case to the Supreme Court for new adjudication.

The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).



South Africa

Constitutional Court

Important decisions

Identification: RSA-2014-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 20.02.2014 / **e)** CCT 122/13, 123/13 / **f)** Ronald Bobroff & Partners Inc v. De La Guerre; South African Association of Personal Injury Lawyers v. Minister of Justice and Constitutional Development and Another / **g)** www.constitutionalcourt.org.za/Archimages/21856.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
3.20 General Principles – **Reasonableness**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

Keywords of the alphabetical index:

Lawyer, contingency fee, statutory prohibition / Rationality, principle / Right and freedom, statutory limitation, requirement.

Headnotes:

The principle of legality requires that enacted laws be rationally connected to the ends they seek to achieve. This is a threshold enquiry that does not ask the Court to express a preference for a certain means of achieving an outcome. The Court must simply assess whether there is a rationally objective basis justifying the conduct of the legislature. Rationality is a less stringent standard than reasonableness, which comes into play when fundamental rights under the Bill of Rights are limited by legislation.

Summary:

I. At issue was whether it is justifiable for legal practitioners to charge contingency fees outside of the provisions of the Contingency Fees Act (hereinafter, the “Act”). The Legislature did not regulate agreements concluded by laypersons – where one party undertakes to promote litigation financially or otherwise in return for a share in the

proceeds. But it prohibited these agreements when an attorney was involved. The question was whether this was rational.

At common law legal practitioners were not allowed to charge their clients a fee calculated as a percentage of the proceeds that the clients might be awarded in litigation. The Act changed this by regulating the percentage that could be charged on a contingency basis and the circumstances in which these fees can be charged. Notwithstanding the provisions of the Act, certain Law Societies made provision, in their rules, for members to charge higher percentages.

Bobroff and Partners (hereinafter, “Bobroff”) was one of the firms that charged more than the Act permitted in accordance with the rules of its professional association. Ms De La Guerre, in this instance, was charged a contingency fee above the statutory maximum. Ms De La Guerre challenged the excess lawyers’ charges in the High Court. The South African Association of Personal Injury Lawyers (hereinafter, “Personal Injury Lawyers”) also brought an application challenging the constitutionality of the Act as a whole or, in the alternative, certain sections of it. The cases were heard simultaneously by the Full Bench of the High Court. The High Court found in favour of Ms De La Guerre in her application and upheld the constitutionality of the Act. Both the High Court and the Supreme Court of Appeal refused leave to appeal.

In the Constitutional Court, the Personal Injury Lawyers and Bobroff argued that it was irrational to regulate these agreements only in respect of legal practitioners and not laypersons and that this was an unreasonable limitation of the right of access to justice.

II. The Constitutional Court found that the Legislature’s decision to regulate contingency fee agreements in respect of only legal practitioners was not irrational. The Court held that the fact that regulation of agreements between laypersons may also be wise does not mean that the regulation of agreements between legal practitioners and laypersons specifically should be regarded as unwise. Therefore, the Court found no merit to the challenge as a whole. In respect of the challenge to particular provisions of the Act, the Court found that this was a challenge based on a limitation to fundamental rights. The Court found that the matter concerned the right of access to justice of legal practitioners’ *clients*, and not a right of the legal practitioners. The application was not brought by the applicants as representatives of their clients, but on behalf of the applicants themselves. And even if the applicants sought to bring it on behalf of others, there was no evidence

that their client's rights had been limited. Therefore, this challenge was rejected and the application dismissed.

Supplementary information:

Legal norms referred to:

- Section 36 of the Constitution of the Republic of South Africa, 1996;
- Sections 2 and 4 of the Contingency Fees Act 66 of 1997.

Cross-references:

- *Merafong Democratic Forum and Others v. President of the Republic of South Africa and Others*, *Bulletin* 2008/2 [RSA-2008-2-009].

Languages:

English.



Identification: RSA-2014-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 20.03.2014 / **e)** CCT 40/13 / **f)** Loureiro and Others v. iMvula Quality Protection (Pty) Ltd / **g)** www.constitutionalcourt.org.za/Archimages/21935.pdf / **h)** [2014] ZACC 4; CODICES (English).

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest.**

5.1.2 Fundamental Rights – General questions – **Horizontal effects.**

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

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

Keywords of the alphabetical index:

Security company, negligence / Security, avoidable, norm, thwarting / Crime prevention, private security company, public interest / Crime prevention, remunerated, public interest.

Headnotes:

A private security company is liable for the conduct of its employee when the employee contravenes a strict term of a contract that prohibits granting access to private property without prior authorisation. The company is also vicariously liable *in delict* when its employee negligently and wrongfully causes loss. In determining whether conduct is wrongful, normative and constitutional considerations must be taken into account. These include the public interest in ensuring that private security companies and their guards, in taking on the remunerated role of crime prevention, succeed in thwarting avoidable harm.

Summary:

I. The plaintiff entered into an oral agreement with a private security company for a 24-hour armed security guard service at his family home. He instructed the company not to allow anyone onto the premises without his prior authorisation. In January 2009, robbers masquerading as police officers approached the home and demanded entry. When the security guard on duty was not able to communicate with them over the intercom, he opened the pedestrian gate without first checking their identity or business. The robbers then attacked the family and their household staff, and stole items of high worth.

The family was successful in the High Court, which held the security company contractually and delictually liable. On appeal, a majority of the Supreme Court of Appeal overturned the High Court's decision, while a minority would have upheld it.

II. In a unanimous judgment, written by Van der Westhuizen J, the Constitutional Court granted leave to appeal and found in favour of the family.

The Court held the private security company liable for breach of contract. By allowing the imposters access, the security guard contravened a strict term of the contract. The Court also found the company vicariously liable *in delict*. The Court held that the majority conclusion on wrongfulness in the Supreme Court of Appeal failed to have regard to important constitutional considerations, including the constitutional rights to personal safety and protection from theft of or damage to one's property. Wrongfulness was established because the security guard opened the gate for the robbers. There is a public interest in ensuring that private security companies and their guards, in taking on the remunerated role of crime prevention, succeed in thwarting avoidable harm. Further, the employee acted negligently by failing to foresee the possibility that an unauthorised person

might attempt to gain access by purporting to be someone he is not; and by failing to take the fairly simple precautions a reasonable person in his position would have taken to guard against the harm. The amount of the claim (quantum) is to be determined by the High Court later, in separate proceedings.

Cross-references:

- *Carmichele v. Minister of Safety and Security*, Bulletin 2001/2 [RSA-2001-2-010];
- *Minister of Safety and Security v. Van Duivenboden*, [2002] ZASCA 79;
- *Steenkamp v. Provincial Tender Board of the Eastern Cape*, Bulletin 2006/3 [RSA-2006-3-012];
- *Trustees for the Time Being of Two Oceans Aquarium Trust v. Kantey & Templer (Pty) Ltd* [2005] ZASCA 109.

Languages:

English.



Identification: RSA-2014-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 20.03.2014 / **e)** CCT 71/13 / **f)** Savoi and Others v. National Director of Public Prosecutions and Another / **g)** www.constitutionalcourt.org.za/Archimages/14512.pdf / **h)** [2014] ZACC 5; CODICES (English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.13 General Principles – **Legality**.
 3.14 General Principles – **Nullum crimen, nulla poena sine lege**.
 4.5.2 Institutions – Legislative bodies – **Powers**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.3.13.1.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
 5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law**.

Keywords of the alphabetical index:

Culpability, standard / Legislature, culpability / Culpability, level, manifestly inappropriate / Crime, organised / Criminal procedure, evidence, admissibility / Evidence, admissibility / Evidence, exclusionary rule / Overbreadth doctrine.

Headnotes:

A trial is not rendered automatically unfair simply by admitting evidence that is ordinarily inadmissible, provided that its admission does not render the trial unfair or is not otherwise detrimental to the administration of justice.

Although expressed as a fair trial right, an accused person's right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed, forms part of the principle of legality, itself a sub-set of the rule of law. Central to the rule against retrospectivity is the need to forewarn people that conduct of a particular kind is proscribed and punishable criminally.

Overbreadth is not a self-standing ground for challenging the constitutional validity of a statute, but instead finds application when enquiring whether an infringement of a right is justified.

For statutory crimes, the standard of culpability is the Legislature's prerogative, provided that it has not abandoned the requirement for culpability or established a level of culpability manifestly inappropriate to the conduct or sentence in question.

Summary:

I. This case concerned an application to confirm the declaration of constitutional invalidity made by the KwaZulu-Natal High Court, Pietermaritzburg (hereinafter, the "High Court"). That Court declared certain paragraphs of the Prevention of Organised Crime Act (hereinafter, "POCA") invalid, but declined to find other provisions unconstitutional.

The applicants were charged with racketeering, fraud, corruption, money laundering and infringement of the Public Finance Management Act. They sought an order in the High Court declaring the definitions of "enterprise" and "pattern of racketeering activity" overbroad and void for vagueness, and declaring offences based on those definitions similarly unconstitutional. The applicants also challenged the constitutionality of other provisions of POCA on the basis of the rule of law and the right to a fair trial.

The High Court dismissed all of the applicants' arguments. Nevertheless, it found that the impugned paragraphs statutory definition of the crimes at issue were unconstitutional because they contain the words "ought reasonably to have known", which imposes a standard of negligence rather than intention, which it found unconstitutional.

In the Constitutional Court, the applicants sought to have the order of constitutional invalidity confirmed and to appeal against the High Court's decision to dismiss the remainder of their constitutional challenges. The respondents argued that the definitions are clear and that the High Court incorrectly made a declaration of invalidity.

II. In a unanimous judgment by Madlanga J, the Court found that the definition of "pattern of racketeering activity" was clear and not void for vagueness. While laws must be written in clear and accessible terms, this does not require perfect lucidity. The Court also found that 'overbreadth' is not a self-standing ground for challenging the constitutional validity of a statute, but instead finds application during the justification analysis. This challenge was accordingly dismissed.

The Court also found that a trial is not rendered automatically unfair merely because of admission of evidence that is ordinarily inadmissible. Whether this evidence renders a trial unfair is a matter best left to be determined by the trial court.

Further, the Court held that POCA does not breach the rule against retrospectivity because the statute does not seek to punish conduct that pre-dates it. Rather, it punishes offences predicated on "pattern of racketeering activity". The definition makes plain that for these offences to be punishable, at least one component part of the "pattern of racketeering activity" must have been committed after POCA came into operation. Hence, the fact that acts predated the enactment of POCA may be taken into account in establishing the criminal pattern did not offend against constitutional principle.

The Court declined to confirm the declaration of invalidity made by the High Court. First, the constitutionality of the negligence standard stipulated in POCA was not before the High Court. Second, the standard of culpability in statutory crimes is the prerogative of the Legislature, provided that the Legislature has not abandoned the requirement for culpability and has not established a level of culpability that is manifestly inappropriate to the unlawful conduct or potential sentence in question.

Supplementary information:

Legal norms referred to:

- Sections 35, 36.1 and 167.5 of the Constitution of the Republic of South Africa, 1996;
- Section 33 of the Interim Constitution of the Republic of South Africa, 1994;
- Sections 1 and 2 and Chapter 2 of the Prevention of Organised Crime Act 121 of 1998;
- Section 3.1 of the Law of Evidence Amendment Act 45 of 1998;
- Section 13 of the Drugs and Drug Trafficking Act 140 of 1992;
- Section 1.1 of the Corruption Act 94 of 1992;
- South African Reserve Bank Act 90 of 1989;
- Sections 1.1 and 1A.1 of the Intimidation Act 72 of 1982;
- Schedule 1 of the Criminal Procedure 51 of 1977;
- Section 36 of the Arms and Ammunition Act 75 of 1969;
- Section 2 of the Prevention of Counterfeiting of Currency Act 16 of 1965;
- Regulation 22 of the Exchange Control Regulations as promulgated by Government Notice R1111 of 1 December 1961;
- Section 20.1 of the Sexual Offences Act 23 of 1957;
- Sections 36 and 37 of the General Law Amendment Act 62 of 1955;
- Criminal Procedure Act 56 of 1955;
- Racketeer Influenced and Corrupt Organisations 18 U.S.C. §§ 1961-1968.

Languages:

English.



Identification: RSA-2014-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 25.03.2014 / **e)** CCT 77/13 / **f)** Member of Executive Council for Health, Eastern Cape and Another v. Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute / **g)** www.constitutionalcourt.org.za/Archimages/21613.pdf / **h)** [2014] ZACC 6; CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.13 Constitutional Justice – Jurisdiction – The subject of review – **Administrative acts**.
3.13 General Principles – **Legality**.

Keywords of the alphabetical index:

Administrative act, effects / Administrative act, judicial review / Administrative act, validity / Judicial review, time-limit / Measure, administrative, validity.

Headnotes:

A decision, even if considered unlawful by an administrative functionary, is not a non-decision. Its decision remains effectual until properly set aside and cannot be ignored. To properly impugn the validity of an administrative decision, a party must apply to court to set it aside – either through proceedings for judicial review or by bringing a counter-application – and comply with the necessary formalities, including prescribed time-limits.

Summary:

I. The matter concerned an application for leave to appeal by the Member of Executive Council for Health, Eastern Cape (hereinafter, “MEC”) and the Superintendent-General of the Eastern Cape Department of Health (Superintendent-General). The state parties sought leave to appeal against the decision of the Supreme Court of Appeal which affirmed the decision of the Eastern Cape High Court, Grahamstown (hereinafter, the “High Court”). At issue was an administrative decision Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute (hereinafter, “Kirland”) sought to rely on, and which the state parties said was invalid.

In July 2006 and May 2007, Kirland applied for approvals to establish private medical facilities. A provincial Advisory Committee recommended Kirland’s applications be refused. On the strength of this, the Superintendent-General declined to approve the applications. The decisions taken by the Superintendent-General were reduced to writing. However, before he signed them, he was incapacitated and took sick leave.

During his absence, an Acting Superintendent-General was appointed. The MEC in office at the time, a political office-bearer, instructed the Acting Superintendent-General to approve the applications. The Acting Superintendent-General complied and Kirland was informed of this decision in writing. Kirland, acting on the strength of the approvals,

submitted building plans and later sought to increase the capacity of the proposed hospitals. The Superintendent-General had by then resumed duties. He declined to approve Kirland’s new applications and further informed Kirland that the previous approval by the Acting Superintendent-General was withdrawn. Kirland appealed to the MEC, who dismissed its appeal. Kirland then took the matter on review to the High Court.

The High Court found in favour of Kirland but granted orders Kirland had not sought. The state parties appealed to the Supreme Court of Appeal and Kirland cross-appealed. The Supreme Court of Appeal also found in favour of Kirland. It dismissed the appeal by the state parties, but upheld Kirland’s cross-appeal.

II. The Constitutional Court affirmed the judgment of the Supreme Court of Appeal. The majority judgment, written by Cameron J, with whom six judges concurred, held that the validity of the Acting Superintendent-General’s decision was not before the Court. Kirland could not have known of the political machinations behind the decision, and did not ask the Court to rule on its validity. And the state parties never filed a counter-application to have the suspect decision declared invalid or set aside. To set that decision aside despite these considerations would mean that Kirland would have lost the opportunity to present its evidence on the validity of the decision, together with important procedural protections. In addition, the state parties would evade the requirement in the Promotion of Administrative Justice Act that a review application must be brought within 180 days; and the Court would have to exercise its discretion to set the decision aside without adequate evidence on the potential prejudice to Kirland.

Cameron J further held that South African law does not regard an unlawful decision as a “non-decision”. State officials cannot simply ignore a decision they consider unlawful. The decision of the Acting Superintendent-General, even if flawed, therefore remained effectual until properly set aside by a court.

III. In a separate concurrence agreeing with the majority judgment (and concurred in by Cameron J), Froneman J emphasised that even if it is accepted that in substance there was a review application before the Court, it is still obliged to determine whether the application was brought within the statutory time period.

The minority judgment, written by Jafta J, and concurred in by Madlanga J and Zondo J, would have set aside the Acting Superintendent-General’s approval on the ground that its validity was properly before the High Court and that, as a result, the

Constitutional Court had jurisdiction to make an order setting it aside. In a separate concurrence in the minority judgment, Zondo J agreed that the validity of the approval was properly before the Court and found that the approval was invalid and should be remitted to the Superintendent-General for the applications to be decided afresh. Jafta J concurred in the order proposed by Zondo J.

In the result, the Constitutional Court dismissed the appeal with costs.

Supplementary information:

Legal norms referred to:

- Sections 33 and 217 of the Constitution of the Republic of South Africa, 1996;
- Sections 1 and 6-8 of the Promotion of Administrative Justice Act 3 of 2000.

Cross-references:

- *Oudekraal Estates (Pty) Ltd v. City of Cape Town and Others*, [2004] ZASCA 48.

Languages:

English.



Identification: RSA-2014-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 04.04.2014 / **e)** CCT 173/13, CCT 174/13 / **f)** South African Informal Traders Forum and Others v. City of Johannesburg and Others; South African National Traders Retail Association v. City of Johannesburg and Others / **g)** <http://41.208.61.234/uhtbin/cgiisirsi/20140514183057/SIRSI/0/520/J-CCT173-13> / **h)** [2014] ZACC 8; CODICES (English).

Keywords of the systematic thesaurus:

1.5.4.7 Constitutional Justice – Decisions – Types – **Interim measures.**
 3.9 General Principles – **Rule of law.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

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

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

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

Keywords of the alphabetical index:

Application, urgent / Appeal, interim order / Eviction, unlawful / Trade, informal, regulation / Relief, interim / Constitutional Court, appeal against interim order / Harm irreparable / Effective remedy, alternative / Justice interests.

Headnotes:

There is no absolute rule preventing appeals against interlocutory decisions. Generally, however, an urgent appeal to the Constitutional Court against an interim order is permitted only as a last resort and when it is shown that the lower-court system does not provide an urgent procedure that could provide the relief sought. Considerations include: whether an applicant has a *prima facie* right; whether the balance of convenience favours the applicant; whether the applicant would suffer irreparable harm should the order not be granted; and whether the applicant has no other effective remedy.

Summary:

I. The applicants represent informal traders who had been trading in the City of Johannesburg in compliance with the City's Informal Trading By-laws for several years. In September 2013, the City of Johannesburg launched "Operation Clean Sweep", aimed at ensuring that only those legally entitled to trade in the inner City do so. During October 2013 the applicants, who were allegedly authorised and had licenses to trade informally, were removed from their trading locations and had their goods impounded by City officials.

Lawful traders, outraged by their unexpected removal, sought to engage the City through informal trading forums and associations. After negotiations, the traders agreed to be re-registered once their trading rights had been verified. But when the traders tried to return after being re-registered, they were again forcibly evicted. It became clear that the City was attempting to remove them permanently from their trading stalls and relocate them to unknown alternative designated areas while not allowing them to trade in the interim.

On 4 November 2013, the South African Informal Traders Forum and the South African National Traders Retail Association instituted proceedings in the High Court. The application was brought in two parts. In Part A, the traders sought urgent interim relief permitting them to return to their allocated trading locations, pending an application for final relief. Part B sought to review the City's decisions not to allow the traders to return to their places of business after re-registration; to relocate them permanently to undisclosed alternative designated trading areas; and to conduct a re-registration process by first removing the traders from their trading stalls.

The High Court struck the application from the roll due to an alleged lack of urgency. The implication of this was that the matter would have to be re-enrolled much later – with the earliest possible hearing date in February 2014. The traders' associations sought leave to appeal directly to the Constitutional Court against this decision on an urgent basis.

II. The Constitutional Court heard the matter and granted an order on 5 December 2013. The Court granted leave to appeal directly to it and upheld the appeal. It granted an interim interdict preventing the City from interfering in the trading of the applicant-traders, pending the determination of Part B of the application in the High Court.

In a unanimous judgment by Moseneke ACJ, the Court later furnished reasons for its order. The Court granted the applicants leave to appeal against the order of the High Court on an urgent basis because it was in the interests of justice to do so. The Court held that a refusal to grant leave to appeal would cause the traders irreparable harm. The undisputed evidence showed that the applicants and their families' livelihoods depended on their trading in the inner city. At the time of the hearing, they had been rendered destitute and unable to provide for their families for over a month. Seeing that an application for leave to appeal to the High Court would have been heard in February 2014 at the very earliest, the traders would not have been able to provide for their families until that time. The City's conduct impaired the dignity of the traders and their children and had a direct and on-going adverse effect on their rights to basic nutrition, shelter and basic health care services.

The Court reasoned that even if allowing the traders to continue trading while the verification process was underway were to cause prejudice to City residents, this would have been temporary. The immediate and irreversible harm that the traders suffered rendered their application manifestly urgent and justified the interim relief which this Court granted.

Supplementary information:

Legal norms referred to:

- Section 167 of the Constitution of the Republic of South Africa, 1996;
- Section 6A of the Businesses Act 71 of 1991.

Languages:

English.



Identification: RSA-2014-1-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 17.04.2014 / **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 (no. 2) / **g)** www.constitutional.court.org.za/Archimages/21981.pdf / **h)** [2014] ZACC 12; CODICES (English).

Keywords of the systematic thesaurus:

- 1.6.7 Constitutional Justice – Effects – **Influence on State organs.**
- 3.9 General Principles – **Rule of law.**
- 4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**
- 4.15 Institutions – **Exercise of public functions by private bodies.**
- 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
- 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

Keywords of the alphabetical index:

Accountability, principle / Contract, nullity / Court, supervisory powers / Public procurement / Public contract, tender, obligation / Obligation, constitutional / Remedy, appropriate / Remedy, violation constitutional right / Social assistance / Social security, grant, payment, possible interruption / State, party to a private law relationship / Suspension, temporary, impugned measure / Tender, annulment, effect / State, organ, determination.

Headnotes:

When ordering a just and equitable remedy, the rule of law requires the default position to be that the consequences of invalidity are corrected or reversed when they can no longer be prevented. Correction is thus the normal consequence flowing from a declaration of constitutional invalidity.

In determining whether a private entity is to be regarded for constitutional purposes as an organ of state, the presence or absence of governmental control over that entity is a factor, but in the constitutional era, is not determinative. Rather, the nature of the function being performed is a weighty consideration. Organs of state have obligations that extend beyond merely the contractual. Their actions attract actual constitutional obligations, including the duty to account to the public.

Summary:

I. This judgment ordered an appropriate remedy following the Constitutional Court's order in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer of the South African Social Security Agency and Others*, [2013] ZACC 42. In that case the Court declared the award of a large-scale public tender constitutionally invalid – but did not set it aside, pending consideration of remedy. The tender was for the payment of social grants to approximately 15 million beneficiaries and had been awarded by the South African Social Security Agency (hereinafter, "SASSA") to Cash Paymaster Services (Pty) Ltd, a private entity. However, given the potential ramifications of the invalidity on the distribution of social grants, the Court decided that it would be inappropriate to decide the issue of remedy without further information and argument. The Court therefore set a return date and asked the parties to provide information on affidavit and further written submissions.

II. Froneman J, on behalf of a unanimous Court, declared the contract between SASSA and Cash Paymaster for the payment of social grants invalid and ordered that the tender process be re-run. In initiating and implementing a new tender process, the order emphasised that payment of existing social grants to beneficiaries must not be disrupted.

Although the order required that there be a new tender process, the Court recognised that the decision on the proposed final solution lies with SASSA. The Court therefore ordered that the declaration of invalidity be further suspended to allow SASSA an opportunity to re-run the tender process and take a decision on whether

to award a new tender. During the period of suspension, the Court held that Cash Paymaster's contract with SASSA should remain in force, given its constitutional and contractual obligations to maintain a workable payment system.

To ensure effective monitoring, accountability and impartiality, the Court required SASSA to report back to the Court at each crucial stage of the new tender process. It also mandated that new members of the Bid Evaluation and Bid Adjudication committees be appointed.

If a new tender is awarded it must be for the same period as the original tender – five years. If the tender is not awarded, the declaration of invalidity of the contract will be further suspended until the conclusion of the period for which the contract was initially awarded. To ensure appropriate public accountability, Cash Paymaster was ordered to file an audited statement providing financial information.

Finally, the Court declined to make an order for AllPay, the disappointed tenderer and successful challenger, to be compensated in these proceedings. To the extent that AllPay may be entitled to further relief, it could pursue remedies in separate proceedings.

Supplementary information:

Legal norms referred to:

- Sections 27.1.c, 28.2, 172.1.b and 239 of the Constitution of the Republic of South Africa, 1996;
- Social Assistance Act 13 of 2004;
- South African Social Security Agency Act 9 of 2004.

Cross-references:

- *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer of the South African Social Security Agency and Others*, [2013] ZACC 42; 2014 (1) *South African Law Reports* 604 (CC);
- *Steenkamp NO v. Provincial Tender Board, Eastern Cape*, *Bulletin* 2006/3 [RSA-2006-3-012];
- *AAA Investments (Proprietary) Limited v. The Micro Finance Regulatory Council and Another*, *Bulletin* 2006/2 [RSA-2006-2-006];
- *Governing Body of the Juma Masjid Primary School and Others v. Essay NO and Others (Centre for Child Law and Another as Amici Curiae)*, [2011] ZACC 13; 2011 (8) *Butterworths Constitutional Law Reports* 761 (CC).

Languages:

English.

*Identification:* RSA-2014-1-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.05.2014 / **e)** CCT 114/13 / **f)** J v. National Director of Public Prosecutions and Another / **g)** <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT114-13> / **h)** [2014] ZACC 13; CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Child, best interests / Criminal law, sexual offence / Criminal procedure, juvenile / Offender, juvenile, sexual offence / Sex offender, registration, mandatory / Sexual offence against children, special nature.

Headnotes:

Mandatory registration on the National Register for Sex Offenders unjustifiably limits the constitutional right of child sex offenders to have their best interests considered of paramount importance. The right is infringed because mandatory registration fails to distinguish between adults and children; does not allow the child offender individualised justice; and does not afford the offender any opportunity to be heard or make representations on the matter. This is unjustifiable because there are less restrictive ways of achieving the aims of the Register by affording courts discretion as to whether to enter the particulars of a child offender onto the Register.

Summary:

I. The applicant was convicted of three counts of rape and one count of assault with intent to cause grievous bodily harm. He was a child at the time of the offence as were all four of his victims. The trial court sentenced the applicant and made an order that his particulars be entered on the Register, in accordance with the compulsory provisions of Section 50.2 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act). That section required that when a person is convicted of a sexual offence against a child or person who is mentally disabled, a court must make an order to include the offender's particulars on the National Register for Sex Offenders (hereinafter, "Register"). Being entered on the Register entails limitations in employment, in licensing facilities and ventures, and in the care of children and persons with mental disabilities.

The Western Cape High Court, Cape Town (hereinafter, "High Court") reviewed the order. It held that the section infringed an offender's right to a fair hearing as it does not allow for an offender to make representations to persuade a court not to make the order. Its order did not differentiate between adult and child offenders. The High Court ordered that Section 50.2 be declared constitutionally invalid, but suspended the effect of the invalidity for 18 months to allow the Legislature time to rectify the defect. In the meantime, the High Court read words into Section 50.2 to allow courts discretion not to enter an offender's particulars onto the Register if, after hearing representations on the matter, the Court is satisfied that there is good cause.

The matter came before the Constitutional Court for confirmation of the declaration of invalidity.

None of the parties opposed confirmation. The applicant supported the reasoning of the High Court that the provision breached an offender's right to a fair hearing under the Constitution. The state respondents argued that the High Court's order was over-broad because it included adult offenders when the case before the High Court concerned only child offenders. The friends of the Court (three non-profit organisations that provide support services and programmes to children) agreed that it was impermissible for the order of the High Court to extend to adults. Instead, the correct basis for the finding of invalidity should have been the best-interests principle.

II. In a unanimous judgment, Skweyiya ADCJ held that Section 50.2.a of the Sexual Offences Act infringes the right of child offenders to have their best interests considered of paramount importance in terms of Section 28.2 of the Constitution. The right is infringed because the mandatory registration of child sex offenders fails to distinguish between adults and children; does not allow the offender individualised justice; and does not afford the offender any opportunity to be heard or make representations on the matter.

The Register fulfils a vital function in protecting children and persons with mental disabilities from sexual abuse. However, the limitation of the child offender's right is unjustifiable because a court has no discretion whether to make the order and because there is no related opportunity for child offenders to make representations. The Court limited its declaration of constitutional invalidity to child offenders. It held that the constitutionality of the provision in relation to adult offenders was not properly before the Court.

The Court suspended the declaration of invalidity for 15 months to give the Legislature an opportunity to correct the constitutional defect. The state respondents were further directed to provide a report to the Court setting out the details of child offenders currently listed on the Register, so that they could, if need be, be assisted to take remedial steps.

Supplementary information:

Legal norms referred to:

- Sections 28, 34 and 172 of the Constitution of the Republic of South Africa, 1996;
- Convention on the Rights of the Child of 1989;
- Section 50.2 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act).

Languages:

English.



Switzerland Federal Court

Important decisions

Identification: SUI-2014-1-001

a) Switzerland / **b)** Federal Court / **c)** First Chamber of Public Law / **d)** 26.02.2014 / **e)** 1B_369/2013 / **f)** A. v. Geneva Canton prosecution department / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 140 I 125 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Detainee, treatment, poor conditions / Detention pending trial, conditions / Prison, treatment.

Headnotes:

Article 7 of the Federal Constitution (securing human dignity) and Article 10.3 of the Federal Constitution (prohibiting torture and any other cruel, inhuman or degrading treatment or punishment); Article 3 ECHR; Article 3.1 of the Swiss Code of Criminal Procedure (dignity of persons involved in procedure) and Article 235 of the Swiss Code of Criminal Procedure (restricting the freedom of persons detained on charges only to the extent required by the aim of detention and by preservation of order and security in the prison). Conditions of detention in the Champ-Dollon prison (Geneva Canton).

Treaty, constitutional and federal and cantonal legislative requirements in respect of conditions of detention (recitals 3.1 and 3.2); case-law of the Federal Court and the European Court of Human Rights (recitals 3.3 and 3.4); prevailing judicial opinion (recital 3.5).

Description of the conditions of detention in the prison which for some years has been in a serious and chronic state of prison overcrowding. Partial admission of the appeal and recognition of the unlawful detention conditions of the applicant during 157 consecutive days (recital 3.6).

Summary:

A. was placed in custody – pending trial then on grounds of security – in the Champ-Dollon prison on suspicion of having participated in large-scale cocaine trafficking. By a judgment of 2 October 2013, the Geneva Canton criminal court imposed a six year custodial penalty on him. This judgment was appealed; the case is currently pending before the court of appeal.

In connection with an application by the prosecution to extend his detention pending trial, A. complained of the conditions of his detention, relying on Article 3 ECHR. The court responsible for coercive measures (hereinafter, “Tmc”) ordered the extension of the detention pending trial and opened a procedure to verify the existence of irregularities that would constitute a violation of the European Convention of Human Rights, of federal law or of cantonal law.

The Tmc subsequently found that the conditions of detention for 199 days, particularly in a cell with less than 4 m² of floor space per inmate, that is 3.83 m², were not in accordance with the European Prison Rules. The cantonal appeals authority dismissed the claim of the remand prisoner and upheld that of the prosecution, set aside the decision of the Tmc and ruled that the conditions of detention complied with the legal requirements.

Acting through the channel of appeal from a criminal judgment, A. asked the Federal Court principally to set aside the judgment and ascertain the unlawfulness of the conditions of detention, and in the alternative to refer the case back to the cantonal authority for a new ruling on the lawfulness of the detention. The prosecution reached the conclusion that the application should be dismissed. The Federal Court partially admitted the application, set aside the impugned cantonal judgment and found that the conditions of detention pending trial had been unlawful for 157 days.

At the treaty level, Article 3 ECHR stipulates that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. At the constitutional level, Article 7 of the Federal Constitution requires that human dignity be respected and protected, and Article 10.3 of the Constitution prohibits torture and any other cruel, inhuman or

degrading treatment or punishment. The Geneva Canton Constitution embodies these fundamental rights in Articles 18 and 14.

Where detention is concerned, Switzerland has ratified the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which sets up a Committee competent to examine the treatment of detainees during inspections and to draw up a report with recommendations.

At the legislative level, Article 3.1 of the Swiss Code of Criminal Procedure restates the principle of human dignity. Articles 234.1 and 235 of the code provide for detention pending trial in facilities set aside for that use for brief deprivations of liberty, as restrictions on the freedom of persons facing charges are permitted only to the extent required by the purpose of the detention and by the preservation of order and security in the facility, and compliance with the general principle of proportionality, the detention regime being settled by the cantons.

In Geneva Canton a regulation provides in particular that each cell should allow decent and healthy living, detainees being entitled to have regular showers, one hour per day of exercise, and one visiting hour per week. On the other hand, this regulation contains no particulars as to the cell’s design, appointments and dimensions or the floor space inside it from which each occupant should benefit.

The Committee of Ministers of the Council of Europe adopted Recommendation Rec (2006) 2 on the European Prison Rules (EPR), prescribing detailed conditions of detention in keeping with human dignity. These rules were further elaborated in a Comment issued by the CPT, particularly minimum standards of floor space estimated at 4 m² per inmate in a dormitory and 6 m² in a single cell, with the number of hours spent outdoors to be taken into account. Although these are simple directives, a prison detention code (*soft law*) is spoken of, and the Federal Court has long had regard to it in the fulfilment of fundamental rights. It has nevertheless conceded that conditions of detention pending trial may be more restrictive where risks of absconding, collusion or reoffending are high or security is imperilled, provided that the term of detention is short. In excess of about three months, the demands of the detention regime are higher. Finally, the Court has insisted on the overall assessment of all material conditions of detention.

With regard to the present case, the National Commission on prevention of torture made a three day visit to the Champ-Dollon prison and delivered a

detailed report early in 2013. This indicates that the approximately 200% occupancy has represented serious and chronic overcrowding for several years. According to a report by the prison governor, the appellant, most significantly, spent 27 nights in a 12 m² cell with three inmates and 199 nights, 157 of them consecutive, in a 23 m² cell occupied by six detainees, leaving an individual net space of 4 and 3.83 m² respectively, and this was for 23 out of 24 hours. Although it is a difficult condition for three to be accommodated in a single cell, it does not constitute degrading treatment affronting human dignity. Conversely, the fact of one cell having six occupants with 3.83 m² of individual floor space, further restricted by furniture, may constitute a violation of Article 3 ECHR if it covers a long period and is compounded by other poor conditions of detention. A length of time verging on three consecutive months seems the limit beyond which the above-mentioned conditions can no longer be countenanced, and the very limited time (one hour of exercise) which the appellant was permitted to spend outside his cell further aggravated the situation. In the final analysis, the combined effect of these factors rendered the mode of detention incompatible with the inevitable degree of suffering inherent in deprivation of liberty, and the distress or ordeal to which it subjected the appellant was akin to degrading treatment contrary to respect for human dignity and privacy. Consequently the cantonal court infringed the law by holding that the appellant's detention complied with the legal, constitutional and treaty requirements regarding conditions of detention.

In addition, sharing a cell with smokers did not impair human dignity if it was of limited duration and no direct health damage was ascertained for the remand prisoner, a non-smoker, and sleeping on a mattress laid on the floor with no bedstead did not constitute inhuman treatment.

Languages:

French.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2014-1-001

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 26.02.2014 / **e)** U.br. 138/2013 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Association, non-profit, registration / Legal person / *Locus standi*, constitutional.

Headnotes:

Abstract constitutional review is allowed only against general acts, i.e., acts that contain general rules of conduct that govern the relations of the subjects in law generally and which establish general rights and obligations of an indefinite range of subjects in law.

Request for protection of human rights and freedoms is allowed against individual acts, i.e., court judgments and administrative decisions regulating relations *inter partes*. The request however, may be lodged only by an individual, which means a natural person, not a legal person.

Summary:

I. The association "Radko" from the municipality of Ohrid filed an application with the Constitutional Court to initiate a procedure to appraise the constitutionality and legality of judgments of the Higher Administrative Court, first instance Administrative Court, a decision of the Central Registry of the Republic of Macedonia and a decision of the Appeals Commission. It also requested protection of the freedoms and rights

envisaged in Article 110.3 of the Constitution (this article guarantees the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation). It claimed that the challenged acts violated the right to association referred to in Article 20.1.2 of the Constitution and discriminated against certain groups of citizens of the Republic of Macedonia on the grounds of national and cultural self-identification. The petitioner alleged that the challenged acts were contrary to international treaties and a judgment of the European Court of Human Rights which found a violation of the right of association.

II. The Court cited Article 110.1 of the Constitution and noted that not all regulations may be subject to appraisal before the Constitutional Court, but only regulations containing general rules of conduct that govern the relations of the subjects in law generally and that establish general rights and obligations of an indefinite range of subjects in law. The challenged acts in this case do not, by their nature, govern relations between an indefinite number of entities in a general way, but are individual acts regulating relations *inter partes*. Given that the constitutional review of individual acts is not within the jurisdiction of the Constitutional Court, the Court found that the contested acts are not eligible for review by the Constitutional Court and dismissed the application.

With respect to the request for protection of the rights and freedoms that relate to the right of association, the Court noted that under Article 51 of the Rules of the Constitutional Court, each citizen believing that an individual act or action violated a right or freedom defined in Article 110.3 of the Constitution may require protection by the Constitutional Court within two months from the date the final or effective individual act was served, or the date of learning about the taking of an action that committed the violation, but not later than five years from the date the action was taken. The Court noted that the request for the protection of freedoms and rights in this concrete case was filed by a legal entity, the Association “Radko” – Ohrid, which is contrary to Article 51 of the Rules. In fact, one part of the initiative contains a request for the protection of the freedoms and rights, in the sense of Article 110.3 of the Constitution, which, according to the applicant association, were violated on grounds of discrimination in view of the other groups of citizens in the Republic of Macedonia, that is, on grounds of national and cultural self-identification.

However, the Court found that in terms of the said Article of the Rules, only a natural person, that is, a citizen, may apply for protection of the freedoms and rights set out in Article 110.3 of the Constitution. Accordingly, the Court dismissed the application.

The Court had in mind the judgment of the Supreme Court of the Republic of Macedonia Uzp.br. 940/2010 of 17 May 2011, and the Judgment of the European Court of Human Rights adopted on the application of the *Association of Citizens Radko & Paunkovski v. the Republic of Macedonia*, no. 74651/01, but found that they do not have an impact given the fact that in the present case there are procedural obstacles for a decision *in meritum*.

Languages:

Macedonian, English (translation by the Court).



Identification: MKD-2014-1-002

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 05.03.2014 / **e)** U.br. 53/2013 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities**.

Keywords of the alphabetical index:

University, autonomy.

Headnotes:

The guarantee of university autonomy laid down in Article 46 of the Constitution does not rule out the possibility for the state to influence the work of the university in each segment of its activity. The Law on Higher Education analysed *vis-à-vis* Article 46 of the Constitution, does not constitute a conceptual denial of university autonomy for the reason that it provides for strengthening of the relationship of the academic with the wider public in society, which significantly ensures the quality of the qualifications that students acquire and simultaneously provides an opportunity

for the development of scholarly-research activity according to current societal needs. Hence, the Law on Higher Education observed within the social and economic development as a whole may not be questioned from the point of view of the Constitution and Article 46 thereof, which guarantees university autonomy.

Summary:

I. The applicants in this matter, a group of university professors, requested the Court to examine the constitutionality of several articles of the Law on Higher Education and its Amendments adopted in 2013. They complained that the Law on Changing and Supplementing the Law on University Education as a whole was unconstitutional because it had been adopted in summary procedure. Separate Articles of the Law which were contested, according to the petitioners restricted the autonomy of the University to regulate by itself its internal organisation and work, to define the rules of studying and to determine the conditions and criteria for studies in the first, second and third cycle. Contested articles negated the university's autonomy in planning, realising and developing university activity, that is, restricted the autonomy of the university in planning and development. Financial autonomy of the University has also been violated by provisions that imposed the university a concrete way of spending its own funds. Some of the contested articles restricted the autonomy of the university in the realisation of international cooperation. The petitioners further claimed that the contested articles of the Law were contrary also to the international standards on university autonomy defined in the Bologna Declaration, Graz Declaration, Prague Declaration, Lisbon Declaration and Salamanca Convention.

II. Taking Article 44 of the Constitution (right to education), Article 46 of the Constitution (autonomy of the university) and Article 47.1 of the Constitution (freedom of scholarly, artistic and other forms of creative work) as its starting points, the Court noted that university autonomy is not an absolute category exhausted only with the constitutional provision, because the Constitution leaves the definition of university autonomy and its constituent elements to regulation by law.

Following its position on the autonomy of the university already expressed in the case U.br. 98/2011, the Court found that in the elaboration of the challenged law, the legislator had followed the experience and regulation on higher education in the countries of the European Union and countries in the region, as well as relevant international documents: the Magna Carta of universities (*Bologna Magna Charta Universitatum*)

adopted in Bologna in 1988, the basic principles and recommendations of the Bologna Declaration signed in 1999 by the Ministers of Education of 29 European countries, as well as documents and recommendations arising from the overall Bologna process.

The analysis of the entire Law clearly shows that study programmes reflect changes in relation to the priorities of researches and emerging disciplines, and the fact that researches are aimed at supporting teaching and learning. Hence, the claim in the application about restriction of the autonomy of the university may not be sustained, even more since, according to the Court, the scholarly institute within the university cannot be viewed as an isolated entity.

With regard to the issue of the international cooperation of the universities raised by the applicants, the Court noted that it cannot be questioned in view of Article 46 of the Constitution. This is for the reason that the contested provision provides a wide range of universities (500 highly ranked universities according to the Shanghai list, that is, 100 top-ranked universities in the MBA programme and an accredited higher education institution in one of the first 200 top-ranked universities in the relevant scholarly area, in accordance with Shanghai Cio Tong University) with which the University has an obligation to engage in cooperation. Hence, this clearly shows the right of the university to decide by itself as regards cooperation with foreign entities, given the large number of entities specified in the disputed article of the Law.

The Court found unsubstantiated the claims in the initiative that the competition for enrolment of studies should be exclusively run and announced by the university without any consent of the Government. According to the Court, the operation of the university cannot be viewed in isolation and separate from overall social development. Namely, it is necessary to adjust and adapt it to the needs of the state, that is, society and employers. It is in this context that the need emerges for the consent of the Government which, as a relevant stakeholder, creates social policies in order to achieve the final effect from the completed studies. In the Court's view, innovation and entrepreneurship are two crucial elements to increase employment and the socio-economic development of a country. Hence, the addition of mandatory subjects of entrepreneurship and innovation, in the opinion of the Court, is in line with the requirements of the state and is also aimed at providing students with innovative and entrepreneurial knowledge, skills and abilities.

The Court also did not accept the arguments regarding restriction of the financial autonomy of the university by some of the contested articles. The Court observed that the entire content of the impugned provisions clearly indicates the circumstances that all funds that are acquired by the university are used for improving the qualifications of students and their personal and professional development, as well as for scholarly-research activity, that is, scholarly-research projects, announcing competitions for funding by the university.

The Court also did not accept the claim that the autonomy of the university is restricted in a way that the Government has a legal obligation to determine, with a decision, the number of quotas of the students exempted from paying the registration fee for doctor's and master's studies. It found that the contested provision is aimed at raising the level of subjective and objective quality of the services the university provides to society as a whole, which undoubtedly cannot be of concern only to the university.

Analysing as a whole all challenged provisions of the Law on Higher Education *vis-à-vis* Article 46 of the Constitution, the Court found that they do not stipulate conceptual denial of the autonomy of the university for the reason that they provide for strengthening of the relationship of the academic with the wider public in society, which significantly ensures the quality of the qualifications that students acquire and simultaneously provides an opportunity for the development of scholarly-research activity according to current societal needs. Hence, a university may not be observed in isolation from society as a whole and socio-economic development.

The application challenged the whole of the Law on Changing and Supplementing the Law on Higher Education regarding the procedure of its adoption. The Court noted that it decides on the conformity of laws with the Constitution but is not competent to assess whether the procedure for its adoption is in accordance with the Rules of Procedure of the Assembly. Namely, the Constitutional Court assesses the content of the law *vis-à-vis* the Constitution, while the formal aspect of enacting laws, that is, their preliminary procedure for enactment exceeds the powers of the Constitutional Court for constitutional-judicial analysis in this direction. For these reasons, the Court decided to dismiss the application in this respect due to lack of jurisdiction.

The Court also dismissed the application with respect of articles for which it already (by Resolution U.no.98/2011 of 13 February 2013) had found not to be contrary to the Constitution.

III. Judge Natasha Gaber Damjanovska disagreed with the majority and submitted a separate opinion which is attached to the Resolution.

Languages:

Macedonian, English (translation by the Court).



Identification: MKD-2014-1-003

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 16.04.2014 / **e)** U.br. 27/2013 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 73/2014, 08.05.2014 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

4.5.4.3 Institutions – Legislative bodies – Organisation – **Sessions**.
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:

Media, broadcasting, freedom / Parliament, session, broadcasting.

Headnotes:

Physical removal of journalists from the gallery of the Parliament, imposed due to the concrete situation of escalating chaos and disorder in the hall and intended to protect them and to ensure order in the hall, was carried out neither to prevent the exercise of their activity of informing the public nor to restrict their freedom of expression.

Summary:

I. The Association of Journalists of the Republic of Macedonia, its president and a group of journalists filed an application to the Constitutional Court for the protection of the freedoms and rights related to the freedom of public expression.

According to the application, on 24 December 2012 a large group of journalists including the applicants were present in the gallery of the Assembly Hall of the Assembly of the Republic of Macedonia to attend the session at which the budget for 2013 was supposed to be adopted. The passing of the budget was of exceptional interest to the public because there was a conflict between the Representatives from the Government and the opposition over whether the procedure was observed for the adoption of the budget. At one point, a large group of Assembly security staff approached the gallery and began to remove the journalists from the gallery. Some journalists reacted to this kind of removal from the gallery, for the reason that the situation of conflict in the assembly hall at that point in time had escalated and the public had an interest in being informed, without obstruction, about these developments. Some of the journalists, among whom were also the applicants, opposed to being removed from the gallery, following which they were forcibly ejected by the use of physical force. They argued that, due to their removal, they were prevented from carrying out their professional duty to report on the event, regarding which there was enormous and legitimate public interest.

The application argued that the act of forcible removal of journalists from the gallery of the Assembly Hall violated the freedom of expression guaranteed by Article 16 of the Constitution and Article 10 ECHR. The right to receive and impart information was an integral part of the freedom of expression and with the right to public information encompassed the right of the media to unobstructedly perform its activities and inform the public. The applicants argued that the intervention of the state, in removing the reporters from the assembly hall and preventing them from following the course of the session, did not meet the condition of being stipulated by law and necessary in a democratic society. This act was contrary to Article 70 of the Constitution, Article 43 of the Law on the Assembly and several articles of the Rules of Procedure of the Assembly.

II. The Constitutional Court at its session, on the basis of the evidence that was submitted with the application for the protection of rights and freedoms and the response received from the Assembly of the Republic of Macedonia, established the facts of the case that are presented in detail in the full text of the decision.

The Court recalled that the freedom of the media is an integral part of freedom of expression, which *inter alia* includes the freedom of public information and the freedom to receive and impart information, which are foundations of a democratic society because free

communication of information and ideas on political and other social issues of public concern is essential for any society. This implies freedom of the media to obtain information on the basis of which they can perform their role, to comment and report on all important issues of public interest without restrictions in order to inform the public.

The Court considered that the action to remove the journalists from the gallery of the Assembly Hall represented an interference with the right of journalists to unobstructedly perform their activities and to inform the public about an event that is undoubtedly of major importance for the citizens of the Republic of Macedonia; namely, developments in the Assembly in connection with the adoption of the budget for 2013, which the public had a great interest in following and being informed about.

The Court considered that, in assessing the reasonableness and necessity of the application of the contested measure, that is, the action of removing the journalists from the assembly hall, the starting point must be the specific circumstances of the case. These circumstances, included the events of 24 December 2012 in the hall for sessions inside the Assembly building, as well as the riots and disturbances of order taking place in front of the Assembly building. The Court stated what must be considered is the tense atmosphere in the Assembly Hall which practically precluded the regular and normal beginning and course of the session. In this sense, one should take into account in particular the fact that the said situation resulted from the circumstance that following the entry of the President of the Assembly in the plenary hall in order to start the scheduled session, he was attacked by a large group of representatives and immediately taken outside the hall by security.

In the context of such a situation, accompanied, in objective terms, with a whole range of incidents, disarray, breaking of the inventory, which culminated with throwing objects around the room and towards the gallery, the security personnel estimated, and in the interest of protecting the integrity and lives of the journalists present in the gallery, to act in such a way as to transfer them to a safer place in which their lives would not be endangered. In the Court's view, this assessment of the Assembly security, which was solely regarding security and for the purpose of protecting the persons present in the Assembly, should in no way be correlated with the guaranteed right of journalists to be present in the Assembly and to report on events to which they themselves were also direct witnesses. After all, the present journalists, most of them on the same day, submitted and published their reports in the evening editions of their

media, suggesting that in the present case there cannot be a violation of freedom of expression of the present group of journalists.

The very fact that since the morning of 24 December 2012 journalists were present in the Assembly and in front of the Assembly building and were reporting on the developments suggests that despite announcements and expectations that the discussion and adoption of the Budget would take place in a tense atmosphere, journalists were given access to the Assembly building and the gallery of the Assembly Hall in order to perform their job and to inform the public about the session. That means that there was no advance intent to obstruct the journalists and prevent them from reporting on the session. Also, after leaving the gallery hall, the applicants and other media representatives had the opportunity to stay in other rooms in the building – the press centre which is equipped with computer equipment from where they could follow the live broadcast of the session, which broadcast also went live via web streaming on the Assembly website and the assembly channel of MRT.

From the above, it may be inferred that the very presence of reporters in the hall and direct reporting does not make a session public, since there are more ways that allow publicity of the work of the Assembly which were applied in this case. Physical removal of journalists from the gallery of the Assembly Hall which was imposed by the concrete situation of escalating chaos and disorder in the hall was intended to protect them and to ensure order in the hall, not to prevent the exercise of their activity – informing the public – and to restrict their freedom of expression.

Accordingly, the Court found that the removal of the applicants from the gallery hall of the Assembly of the Republic of Macedonia on 24 December 2012 had not violated their freedom of expression, and hence it rejected the application for the protection of rights and freedoms.

III. Judge Natasha Gaber Damjanovska disagreed with the majority and submitted a separate opinion which is attached to the Decision.

Languages:

Macedonian, English (translation by the Court).



Ukraine Constitutional Court

Important decisions

Identification: UKR-2014-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.02.2014 / **e)** 1-rp/2014 / **f)** Official interpretation of the provisions of Article 1241.1 of the Civil Code (the case on the right to a mandatory share in the legacy for adult disabled children of the testator) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.3.4.13 Constitutional Justice – Jurisdiction – Types of litigation – **Universally binding interpretation of laws.**

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

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

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

Keywords of the alphabetical index:

Inheritance, right, compulsory portion, adult, disabled, child.

Headnotes:

Provisions of Article 1241.1 of the Civil Code concerning the right of disabled adult children of the testator to a mandatory share in the legacy should be understood as reading that this right that is enjoyed *inter alia* by the testator's adult children who were recognised as disabled in accordance with the respective legal procedure regardless of their disability classification.

Summary:

I. In a constitutional appeal, the applicant O.S. Zaporozhtsev maintains that courts of general jurisdiction when hearing cases on classifying Group III disabled persons as disabled adult children of the testator inconsistently applied the provisions of Article 1241.1 of the Civil Code (hereinafter, the

“Code”). This violated his constitutional right to acquire private property pursuant to the procedure provided for by law (Article 41 of the Constitution).



II. The Constitutional Court ruled on this issue proceeding, among other things, from the following premise.

In property law, the testator (bequeather) in the case of his or her death has a right by means of making a will to dispose of his or her property – the legacy. This includes all rights and responsibilities that the testator held as of the moment of opening the legacy and not terminated after his or her death (Articles 318, 1218, 1233, 1235, and 1236 of the Code).

In terms of its legal nature, the freedom to dispose one’s property by drawing a will (freedom of last will) is one of the fundamental principles of inheritance law, which, however, is not absolute. The Code provides for certain limitations of the testator’s will concerning his or her right to dispose of property (restrictions of the principle of freedom of last will) by establishing a separate category of persons entitled to a mandatory share of the legacy. The right to a mandatory share of the legacy is granted to minor, underage, adult disabled children of the testator, disabled widow (widower), and disabled parents who inherit, regardless of the contents of the will, a half of the share that they would have if they inherited it by law (the mandatory share) (Article 1241.1.1 of the Code).

When explaining the notion of “adult disabled children” in Article 1241.1.1 of the Code with regard to the right to a mandatory share in the legacy, the Constitutional Court referred to the provisions of Article 75.3 of the Family Code. In Article 75.3 of the Family Code, the “disabled” category includes disabled individuals of Groups I, II and III as well as pension legislation and laws that regulate social insurance and contain a definition of the “disabled”.

Therefore, according to Article 1.4 of the Law “On Minimum Subsistence Level” no. 966-XIV dated 15 July 1999 and Article 1.1.17 of the Law “On Mandatory State Pension Insurance” no. 1058-IV dated 9 July 2003 the category of disabled persons also includes the persons recognised as disabled pursuant to a respective legal procedure.

Languages:

Ukrainian.

Identification: UKR-2014-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 14.03.2014 / **e)** 2-rp/2014 / **f)** Conformity with the Constitution (constitutionality) of the Resolution of the *Verkhovna Rada* of the Autonomous Republic of Crimea “On conducting all-Crimean Referendum” (case on conducting local referendum in the Autonomous Republic of Crimea) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.8.1 General Principles – Territorial principles – **Indivisibility of the territory.**
4.9.2.1 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility.**

Keywords of the alphabetical index:

Prohibition / Referendum local / Change of territories.

Headnotes:

The Constitution upholds the principles of territorial indivisibility and inviolability. These principles are violated when the territory’s borders are narrowed down, or when any subject of its composition has been withdrawn or when the status of the administrative and territorial unit has been altered by means of conducting a local referendum.

Summary:

I. The Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea drafted the Resolution “On conducting all-Crimean referendum” no. 1702-6/14 dated 6 March 2014 (hereinafter, the “Resolution”) which provided to:

- join the Russian Federation as its subject;
- designate all-Crimean referendum on 16 March 2014 (including the city of Sevastopol), at which to pose the following alternative questions:

“1. Are you in favour of the reunification of Crimea with Russia as a subject of the Russian Federation?”

2. Are you in favour of restoring the 1992 Constitution and the status of Crimea as a part of Ukraine?"

- approve the text of the paper ballot for the referendum held on 16 March 2014 and to establish that the ballot shall be printed in Russian, Ukrainian and Crimean Tatar languages;
- approve the Provisional Regulations on the referendum;
- establish the Commission of the Autonomous Republic of the Crimea to conduct the referendum; and
- appeal to President of the Russian Federation and to the State Duma of the Federal Assembly of the Russian Federation to initiate the procedure to join the Russian Federation as its subject.

II. After reviewing the constitutionality of the Resolution, the Constitutional Court made the following decision.

The Constitution proclaims that the sovereignty of Ukraine extends throughout its entire territory, and the components of state sovereignty are the indivisibility and inviolability of the territory of Ukraine within its present borders. The protection of sovereignty and territorial indivisibility are the most important state functions, which concern all citizens (Articles 2 and 17.1 of the Constitution).

The citizens' will is expressed through elections, referendum and other forms of direct democracy. Citizens possess the right to participate in the administration of state affairs and vote at the all-Ukrainian referendum and local referendums (Articles 38.1 and 69 of the Constitution).

The all-Ukrainian referendum has nationwide importance, as the result reflects the destiny of Ukrainians – citizens of all nationalities. Local referendum resolves exclusively the issues ascribed to the competence of the bodies of local self-government of the respective administrative and territorial unit.

The system of the administrative and territorial structure of Ukraine is composed of the Autonomous Republic of Crimea, oblasts, districts, cities, city districts, settlements and villages (Article 133.1 of the Constitution). According to Article 133.2 of the Fundamental Law of Ukraine, the Autonomous Republic of the Crimea and the city of Sevastopol are part of Ukraine. However, they have a separate administrative and territorial structure within Ukraine. Sevastopol, which is accorded special status by law, is not a part of Crimea.

The Constitutional Court stresses that the Constitution established principles of indivisibility and inviolability of the territory of Ukraine within its present borders and the sovereignty of Ukraine throughout its entire territory. Contravention of such constitutional principles occurs in the following cases: narrowing of the present borders, withdrawing any subject of the administrative and territorial structure of Ukraine from its composition, and altering the constitutionally stipulated status of the administrative and territorial unit, namely Crimea and Sevastopol, as inseparable constituent part of Ukraine by means of conducting a local referendum.

The issues of altering the territory of Ukraine are resolved exclusively by the all-Ukrainian referendum (Article 73 of the Constitution). The designation of the referendum on the issues, as determined by Article 73 of the Constitution, belongs to the authorities of the *Verkhovna Rada* (Article 85.1.2 of the Fundamental Law).

Crimea is inseparable constituent part of Ukraine. Within the limits of its authorities as determined by the Constitution, Crimea decides issues ascribed to its competence (Article 134 of the Constitution).

The constitutional status of Crimea corresponds to the European Charter of Local Self-Government, ratified by the Law of Ukraine, no. 452/97–VR dated 15 July 1997. According to the law, the basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. Also, local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter neither excluded from their competence nor assigned to any other authority (Article 4.1 and 4.2).

Pursuant to the Constitution of Ukraine, the competence of Crimea comprises organising and conducting local referendums (Article 138.1.2) determined by the law of Ukraine (Article 92.1.20).

The Constitutional Court reviewed the *Verkhovna Rada* of Crimea's Resolution, which envisages joining the Russian Federation as its subject. It considered the appeal to the President of the Russian Federation and to the State Duma of the Federal Assembly of the Russian Federation on the initiation of the procedure to join the Russian Federation as its subject, and submission of the above issues for the referendum. The Court ruled that the Resolution violated the constitutional principle of the territorial indivisibility of Ukraine and went beyond the limits of its competence. Thus, the Resolution does not correspond to Articles 1, 2, 5, 8, 19.2, 73, 85.1.3, 92.1.13, 92.1.18, 92.1.20, 132, 133, 134, 135, 137 and 138 of the Constitution.

The Resolution also contradicts the fundamental principles of state sovereignty and territorial indivisibility. The principles are embedded in international legal acts, particularly the principle of mutual respect for each state's sovereignty, which includes political independence and the possibility to alter borders in accordance with international law peacefully or by agreement. As a result, member states shall refrain from violation of territorial indivisibility or political independence of any state, and the use of force or assault or any other way incompatible with the purposes of the United Nations. They should also refrain from actions directed against territorial indivisibility or unity of any member state (Charter of the United Nations, Final Act of the Conference on Security and Co-operation in Europe of 1975, Framework Convention for the Protection of National Minorities of 1995).

Under the Resolution, the Council of Ministers of Crimea shall organise financial, logistical and other provision to conduct the referendum. Given that the Resolution contradicts the Constitution of Ukraine and according to Article 81.2 of the Law of Ukraine "On the Constitutional Court of Ukraine", the activity of all bodies established to fund and conduct this referendum shall be terminated, and the ballot papers and campaign materials shall be destroyed.

III. Judges O.Serheichuk and O.Tupytskyi attached their dissenting opinion.

Supplementary information:

European Charter of Local Self-Government, Charter of the United Nations, Final Act of the Conference on Security and Co-operation in Europe of 1975, Framework Convention for the Protection of National Minorities of 1995.

Languages:

Ukrainian.



Identification: UKR-2014-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.03.2014 / **e)** 3-rp/2014 / **f)** Concerning Constitution (constitutionality) of the Resolution of the *Verkhovna Rada* of the Autonomous Republic of Crimea "On Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol" / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
 3.6.1 General Principles – Structure of the State – **Unitary State**.
 3.8.1 General Principles – Territorial principles – **Indivisibility of the territory**.
 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.
 5.5.4 Fundamental Rights – Collective rights – **Right to self-determination**.

Keywords of the alphabetical index:

Autonomy, secession, unilateral / Declaration of independence.

Headnotes:

Ukraine is a sovereign and independent state. Its sovereignty extends throughout the entire territory. The territory of Ukraine within its present border is indivisible and inviolable. The protection of the sovereignty and territorial indivisibility of Ukraine are the most important functions of the State and a matter of concern for all the Ukrainian people (Articles 1, 2 and 17.1 of the Constitution).

Summary:

I. The Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea by its Resolution "On the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol", no. 1727-6/14 dated 11 March 2014 (hereinafter, the "Resolution") approved the Declaration of Independence of Crimea and the City of Sevastopol (hereinafter, the "Declaration"). Members of the *Verkhovna Rada* of Crimea and Sevastopol city council adopted the Declaration, which stipulated that following the result of the all-Crimean referendum on 16 March 2014:

1. A decision will be adopted whether the Autonomous Republic of the Crimea and the city of Sevastopol will join the Russian Federation, and

Crimea will be proclaimed to be an independent and sovereign state with a republican form of government.

2. Crimea will be a democratic, secular and multinational state and obliged to maintain peace and inter-ethnic and inter-confessional consent within its territory.

3. Crimea as an independent and sovereign state will propose to join the Russian Federation as a new constituent entity, on the basis of an appropriate interstate treaty.

II. Deciding on the constitutionality of the Resolution, the Constitutional Court proceeds from the following.

Ukraine is a sovereign and independent state. Its sovereignty extends throughout the entire territory. The territory of Ukraine within its present border is indivisible and inviolable. The protection of the sovereignty and territorial indivisibility of Ukraine are the most important functions of the State and a matter of concern for all the Ukrainian people (Articles 1, 2 and 17.1 of the Constitution).

The Constitutional Court referred to its Decision no. 1-rp/2003 dated 16 January 2003 in the case of the Constitution of Crimea, in which the Court had stated that state sovereignty, nationality and other features of the state are not inherent to Crimea as an administrative-territorial unit of Ukraine. Borders of Crimea with other administrative and territorial units of Ukraine are not state borders though the term "state territory" (territory of Ukraine) and "territory of the respective administrative-territorial unit", in particular Crimea, referred to in Article 7 of the Constitution of Crimea are interrelated, yet their content differ. The Constitution of Ukraine stipulates that the sovereignty of Ukraine extends throughout its entire territory (Article 2 of the Constitution); it is a constitutional stipulation of the territorial rule of Ukraine.

Under Article 133 of the Fundamental Law of Ukraine, Crimea and Sevastopol are parts of Ukraine, but maintain separate administrative-territorial structures. The city of Sevastopol is not a part of Crimea. It has a special status, which is determined by law.

According to Article 134 of the Constitution of Ukraine, Crimea is an inseparable constituent part of Ukraine and decides on issues ascribed to its competence within the limits of authority determined by the Constitution. Envisaged in Articles 137 and 138 of the Fundamental Law of Ukraine, the list of issues determined by the authorities of Crimea and issues over which it exercises regulatory control,

makes it impossible to resolve issues related to its territorial structure, constitutional order and state sovereignty.

In view of the above, the Constitutional Court of Ukraine concluded that approval by the Resolution of the *Verkhovna Rada* of Crimea of the Declaration adopted by the deputies of the *Verkhovna Rada* of Crimea and the Sevastopol City Council, does not belong to the authorities of the *Verkhovna Rada* of Crimea. This contradicts Article 2, 8, 132, 134, 135.2, 137 and 138 of the Constitution. Therefore, having adopted the Resolution, the *Verkhovna Rada* exceeded the limits of authorities prescribed by the Constitution, thus violating Article 19.2 of the Fundamental Law.

In accordance with generally recognised principles and norms of international law, people possess the right to self-determination. This should not be interpreted as authorising or encouraging any actions that violate or undermine (fully or partially) territorial integrity or political unity of sovereign and independent states that support the principle of equality and self-determination. Therefore, governments shall represent the interests of all the people on its territory without any distinctions (Charter of the United Nations, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations dated 24 October 1970, the Final Act of the Conference on Security and Co-operation in Europe of 1975).

The Constitutional Court stressed that the right to self-determination in Crimea and Sevastopol was implemented by citizens as an integral part of the entire Ukrainian people during a national referendum on 1 December 1991. Taking into account the results of this referendum, the *Verkhovna Rada* on behalf of Ukrainian citizens of all nationalities on 28 June 1996 adopted the Constitution, which proclaimed that Ukraine is a sovereign and independent state (Article 1 of the Constitution) and enshrined the principle of the territorial integrity (Article 2 of the Constitution).

The Constitution does not provide for a right of a separate part of the citizens of Ukraine (including national minorities) on the unilateral self-determination, which would change the territory of Ukraine as a united state. The issue of changing the borders should be decided on the all-Ukrainian referendum, designated by the *Verkhovna Rada* according to Articles 73, 85.1.2 of the Fundamental Law.

Thus, the Constitutional Court ruled that by adopting this Resolution, the *Verkhovna Rada* of Crimea violated the provisions of Articles 73 and 85.1.2 of the Constitution.

III. Judges of the Constitutional Court O.Serheichuk and O.Tupytskyi submitted their dissenting opinion.

Supplementary information:

Charter of the United Nations, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), the Final Act of the Conference on Security and Co-operation in Europe (1975).

Languages:

Ukrainian.



Identification: UKR-2014-1-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 22.04.2014 / **e)** 4-rp/2014 / **f)** Official interpretation of the provisions of Article 293.1.10 of the Code of Civil Procedure in conjunction with the provisions of Article 129.3.8 of the Constitution of Ukraine, Article 293.2 of the Code of Civil Procedure / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.3 Institutions – Judicial bodies – **Decisions**.
5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.

Keywords of the alphabetical index:

Appeal, court ruling, correction / Appeal, court ruling, refusal, correction.

Headnotes:

The provisions of Article 293.1.10 of the Code of Civil Procedure in conjunction with Article 129.3.8 of the

Constitution, Article 293.2 of the Code of Civil Procedure should be understood as reading that rulings of first instance courts both on introducing corrections to the decisions as well as on refusing to make such corrections are subjected to challenge in the appellate instance separate from the court decision.

Summary:

I. In a constitutional appeal, the applicant Reinish L.V. requested the Constitutional Court for the official interpretation of the provisions of Article 293.2 of the Code of Civil Procedure (hereinafter, the “Code”) in conjunction with the provisions of Article 129.3.8 of the Constitution. The issue was whether rulings of courts of first instance, which are not specified in Article 293.1 of the Code, are subject to a separate challenge in appellate instance.

Human and citizen’s rights and freedoms are protected by court. Everyone is guaranteed the right to appeal against decisions, actions or omissions of public authorities, local authorities, officers and employees (Articles 55.1, 55.2 of the Basic Law). A court’s refusal to admit claims and complaints, issued in accordance with the procedural law, violates the right to judicial protection, which, under Article 64 of the Constitution, cannot be restricted.

Realisation of judicial proceedings in conformity with principles defined in the Constitution is a constitutional guarantee of everyone’s right to judicial protection. One of these principles is to ensure the appeal and cassation appeal against court decision, except in cases established by law (Article 129.3.8 of the Constitution).

The principle of ensuring the appeal and cassation appeal of court’s decision is specified in Chapters 1, 2 of Section V of the Code, which regulates the procedure to review court decisions and rulings in civil proceedings. In particular, Article 293.1 of the Code provides for a list of decisions of courts of first instance that may be challenged in appeal separately from the court decision. According to Article 293.2 of the Code, objections to rulings that may not be appealed separately from court decision shall be included into the appellate claim against the court decision. Analysis of provisions in these articles gives grounds to conclude that they set forth specific features of appealing rulings of courts of first instance, namely along with court decision or apart from it.

II. According to the Constitutional Court, the provisions of Article 129.3.8 of the Constitution on ensuring challenge in appeal of court decision, except

in cases determined by law, should be understood as reading that rulings in civil proceedings may be appealed. An exception to such appeal occurs when the law prohibits it. The list of court rulings of first instance, which may be appealed separately from court decision, specified in Article 293 of the Code, is not exhaustive.

Under Article 293.1.10 of the Code, apart from court decision rulings of courts of first instance on introducing corrections in the decision may be appealed.

The Constitutional Court considers that a specific feature of rulings of courts of first instance on corrections made into the decision or refusal to make them is that the court may render them at any time, including after the decision enters into force. Under these conditions, such rulings of the court of first instance actually may not be appealed together with the court decision.

In addition, the refusal of the courts of first instance to make corrections in the decision separately from the court decision in cases when errors existing in the text of court decision (arithmetic or clerical errors) relate to substantial circumstances. The inability to challenge in appeal such decisions may complicate or even prevent the enforcement of court decision. The Constitutional Court has previously stated that enforcement of court decision is an integral part of everyone's right to judicial protection. It includes, in particular, actions aimed at the protection and restoration of violated rights, freedoms and lawful interests of individuals and legal entities, society and the state determined by law. The failure to execute a court decision threatens the essence of the right to a fair trial by the court.

The Constitutional Court considers that the possibility to challenge rulings of court of first instance on refusal to make corrections in the decision in the same manner as rulings on making corrections to the decision is in line with justice. This is part of the principle of the rule of law and basic principles of justice. Particularly, it underlies the equality of all participants of a trial before law and the court, ensuring appeal and cassation appeal against the decision of the Court, except in cases established by law, specified in Article 129.3 of the Constitution.

Cross-references:

- no. 11-rp/2007, 11.12.2007;
- no. 3-rp/2010, 27.01.2010;
- no. 12-rp/2010, 28.04.2010;
- no. 18-rp/2010, 08.07.2010.

European Court of Human Rights:

- *Hoffmann v. Germany*, no. 34045/96, 11.10.2001;
- *Kudla v. Poland*, no. 30210/96, 26.10.2000;
- *Shmalko v. Ukraine*, no. 60750/00, 20.07.2004.

Languages:

Ukrainian.



United States of America

Supreme Court

Important decisions

Identification: USA-2014-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 14.01.2014 / **e)** 11-965 / **f)** Daimler AG v. Bauman / **g)** 134 *Supreme Court Reporter* 746 (2014) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 4.7.1 Institutions – Judicial bodies – **Jurisdiction.**
 5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings.**

Keywords of the alphabetical index:

Due process / Jurisdiction, personal.

Headnotes:

Constitutional due process permits a court to exercise personal jurisdiction over a defendant located outside the forum if the defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

When the cause of action is unrelated to a foreign defendant's activity in the forum, only a limited set of affiliations with the forum will render a defendant amenable to jurisdiction there; it is not sufficient in itself that the defendant engages in a substantial, continuous, and systematic course of business in the forum.

Unless a defendant's activity in the forum makes a defendant answerable with respect to those particular acts, constitutional due process permits the exercise of jurisdiction over the defendant only if the defendant's affiliations with the forum are so constant and pervasive as to render the defendant essentially "at home" in the forum, and the paradigm bases indicating that a corporation is at home in the forum are the place of incorporation and its principal place of business.

Summary:

I. Plaintiffs, 22 residents of Argentina, filed suit in 2004 in federal court in the State of California, naming DaimlerChrysler Aktiengesellschaft (hereinafter, "Daimler") as the defendant. Daimler, a German corporation, was Daimler AG's predecessor in interest. The suit alleged that an Argentinian subsidiary of Daimler's, Mercedes-Benz Argentina (hereinafter, "MB Argentina"), had collaborated with security forces during Argentina's 1976-1983 "Dirty War" to kidnap, detain, torture, and kill certain MB Argentina workers including the plaintiffs or persons closely related to the plaintiffs. It did not claim that any of MB Argentina's alleged collaborative acts with Argentinian authorities took place in California or anywhere else in the United States.

Daimler moved to dismiss the suit for absence of personal jurisdiction. In response, the plaintiffs maintained that the court's jurisdiction over Daimler could be founded on the California contacts of Mercedes-Benz USA, (hereinafter, "MBUSA"), an indirect subsidiary of Daimler's incorporated in the State of Delaware with its principal place of business in the State of New Jersey. MBUSA had multiple facilities in California and made sales there. According to the plaintiffs, MBUSA served as Daimler's agent for jurisdictional purposes, and MBUSA's California contacts should be imputed to Daimler.

The U.S. District Court granted Daimler's motion to dismiss. It concluded that MBUSA had not acted as Daimler's agent and therefore declined to attribute MBUSA's California contacts to Daimler on an agency theory.

The federal Court of Appeals for the Ninth Circuit reversed the District Court's decision. The Court of Appeals ruled that an agency relationship existed between MBUSA and Daimler, and that MBUSA's contacts with California could therefore be imputed to Daimler, providing a basis for jurisdiction over Daimler.

II. The U.S. Supreme Court agreed to review the decision of the Court of Appeals in order to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, Daimler would be amenable to suit in California. The Fourteenth Amendment states in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law." The Supreme Court reversed the Court of Appeals decision.

Under the Court's case-law, beginning with *International Shoe Company v. Washington* (1945), the Due Process Clause permits a court to exercise personal jurisdiction over a foreign defendant (from another State in the United States, or from outside the United States) if the defendant has certain minimum contacts with the State such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Cases involving foreign corporate defendants are classified into assertions of "specific" (or "conduct-linked") jurisdiction or "general" (or "all-purpose") jurisdiction. Specific jurisdiction entails circumstances where a foreign corporation's activity in the forum gives rise to the particular cause of action. General jurisdiction, on the other hand, encompasses situations where a corporation's operations within a forum are so substantial and of such a nature as to justify suit against it on causes of action entirely unrelated to those operations. The instant case addressed the exercise of general jurisdiction.

In *Goodyear Dunlop Tires Operations, S. A. v. Brown* (2011), the Supreme Court addressed the question of a court's general jurisdiction over foreign subsidiaries of a U.S. parent corporation. The Court ruled that the subsidiaries' distribution of some of their products in the forum was not in itself sufficient to warrant the exercise of general jurisdiction over them. Instead, according to the Court, only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction there: when its affiliations with the forum are so constant and pervasive as to render the defendant essentially "at home" in the forum.

In the instant case, the Court determined that Daimler was not "at home" in California, even if MBUSA's California contacts were imputed to it, and therefore could not be sued there for MB Argentina's alleged acts in Argentina. The Court explained that while other indicators in support of general jurisdiction might be found in a particular, exceptional case, the paradigm bases of general jurisdiction over a corporation are the place of incorporation and its principal place of business. The plaintiffs, however, were proposing that the Court look beyond these paradigm bases and approve the exercise of general jurisdiction in every State in which a corporation engages in substantial, continuous, and systematic activities. This approach, while applicable in specific jurisdiction, is not appropriate for general jurisdiction on causes of action unrelated to those activities.

Daimler and MBUSA were not incorporated in California and did not have their principal places of business there. If MBUSA's California activities were sufficient to allow adjudication of this Argentina-rooted case in California, this same global reach

might subject foreign corporations to general jurisdiction wherever they have an affiliate that does sizable business within a forum. Such "exorbitant" exercises of general jurisdiction would scarcely permit foreign defendants to structure their activities with some "minimum assurance as to where that conduct will and will not render them liable to suit."

As to the general proposition of the Court of Appeals that an agency relationship might be sufficient to impute a subsidiary's contacts in a forum to a foreign corporate parent, the Supreme Court said that it was not necessary to rule on this question.

III. The Court's judgment was unanimous. However, Justice Sotomayor wrote a separate opinion, concurring in the judgment but differing with the Court's reasoning.

Cross-references:

- *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011);
- *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

Languages:

English.



Identification: USA-2014-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 24.02.2014 / **e)** 13-6440 / **f)** Hinton v. Alabama / **g)** 134 *Supreme Court Reporter* 1081 (2014) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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.

Headnotes:

The Constitution guarantees the right of a criminal defendant to effective assistance of counsel.

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.

In evaluating a claim of ineffective assistance of counsel, a court first must determine whether counsel's performance fell below an objective standard of reasonableness and if so, must then determine whether there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.

For purposes of the constitutional guarantee of effective assistance of counsel, the proper measure of attorney performance is reasonableness under prevailing professional norms: defence counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

A defence attorney's ignorance of a point of law that is fundamental to the client's case, combined with a failure to perform basic research on that point, is a quintessential example of constitutionally unreasonable performance under the standard for the right to effective assistance of counsel.

Summary:

I. A jury in a court of the State of Alabama found Anthony Ray Hinton guilty of murder and recommended that he be sentenced to death. The trial judge accepted the jury's recommendation and imposed a death sentence.

Following his conviction, Hinton contended in the Alabama courts that his trial attorney had been ineffective. He claimed that his attorney did not request additional State funding in order to replace an expert forensics witness whom the attorney knew to be inadequate. According to Hinton, his attorney mistakenly believed that he had received all the funding he could obtain under the Alabama legislation for indigent defendants. The Alabama trial court and Court of Criminal Appeals, concluding that Hinton had not been prejudiced by the allegedly poor performance of the expert witness, denied Hinton's petition.

The U.S. Supreme Court accepted review and vacated the decision of the Alabama Court of Appeals. It remanded the case back to the Alabama courts for further proceedings.

II. The right to a free trial guaranteed in the Sixth Amendment to the U.S. Constitution includes the right to effective assistance of defence counsel in criminal proceedings. The Sixth Amendment, which is applied to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, states in relevant part that "In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence."

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 right to effective assistance of counsel. In the two-prong *Strickland* test, a criminal defendant must establish as a threshold matter that the counsel's performance fell below an objective standard of reasonableness. If the court agrees, it then must determine whether counsel's deficient performance was prejudicial: in other words, whether there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.

According to the Court, the first prong of the *Strickland* test, constitutional deficiency, is linked to the practice and expectations of the legal community. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Defence counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. An attorney's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

In the instant case, the Court concluded, it was unreasonable for Hinton's lawyer to fail to seek additional funds to hire an expert witness where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at a fixed amount. Hinton's defence counsel failed to make an adequate investigation of the applicable law. According to the Court, an attorney's ignorance of a point of law that is fundamental to the client's case, combined with a failure to perform basic research on that point, is a quintessential example of unreasonable performance under the *Strickland* rule.

Having concluded that the Alabama courts had incorrectly applied the constitutional requirements for evaluating claims of ineffective assistance of counsel and that the first prong of the *Strickland* test was satisfied, the Court turned to the second prong question of whether the deficient performance of Hinton's attorney was prejudicial. Because no court had yet evaluated this question by applying the proper *Strickland* inquiry to the facts of the case, the Court remanded the case to the Alabama courts.

The Court's judgment was unanimous.

Cross-references:

- *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Languages:

English.



Identification: USA-2014-1-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 02.04.2014 / **e)** 12-536 / **f)** McCutcheon, *et al.* v. Federal Elections Commission / **g)** 134 *Supreme Court Reporter* 1434 (2014) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Contributions, electoral campaign / Corruption, political / Corruption, *quid pro quo*.

Headnotes:

The donation of monetary political campaign contributions and the expenditure of funds by candidates and political organisations are acts of participatory democracy that lie at the core of

constitutional protections safeguarding political expression and political association.

When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.

The only legitimate governmental interest in limiting campaign contributions is the prevention of *quid pro quo* corruption or the appearance of *quid pro quo* corruption, and the meaning of such corruption in this context is limited to a direct exchange of an official act for money.

A firm line between *quid pro quo* corruption, the targeting of which may serve a legitimate governmental interest in limiting campaign contributions, and general political influence must be respected in order to safeguard basic rights of freedom of expression and association.

Compelling reasons preclude defining the boundaries of the constitutional protections of freedom of expression and association by reference to a generalised conception of the public good; the whole point of such rights is to afford individuals protection against invalid interferences.

Summary:

I. In 2012, a natural person (Scott McCutcheon) and a political party organisation (the Republican National Committee (hereinafter, "RNC")) filed a complaint in a U.S. District Court, challenging the constitutionality of certain provisions in federal laws regulating financial contributions to election campaigns. The complaint alleged that the provisions, in the Federal Election Campaign Act of 1971 (hereinafter, "FECA") as amended by the Bipartisan Campaign Reform Act of 2002 (hereinafter, "BCRA"), impermissibly burdened the exercise of rights of freedom of expression and freedom of association guaranteed under the First Amendment to the U.S. Constitution. The First Amendment states in relevant part that "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble."

The complainants challenged the BCRA's "aggregate" limits on a natural person's political campaign contributions in a two-year period. Aggregate limits restrict the amount of money an individual may contribute in total to all candidates for federal office and to party committees. The BCRA's provisions also include "base" limits, which restrict the amount of money that an individual may contribute to the campaign of a particular candidate or committee. McCutcheon and the RNC did not challenge the validity of the base limits.

II. The District Court dismissed the complaint. The court concluded that the aggregate limits were valid because their objective was to counteract evasion of the law's base limits, which in turn furthered the legitimate governmental objective of preventing political corruption or the appearance of corruption.

On direct appeal, the U.S. Supreme Court reversed the District Court's decision. Under the Supreme Court's campaign finance case-law, beginning with *Buckley v. Valeo* (1976), the donation of monetary political campaign contributions and the expenditure of funds by candidates and political organisations are acts of participatory democracy that lie at the core of First Amendment protections safeguarding political expression and political association. In *Buckley*, the Court upheld the constitutionality of base limits because they advance the important governmental interest in preventing corruption and the appearance of corruption. The *Buckley* decision addressed aggregate limits only briefly, observing simply that they served to prevent circumvention of the base limits, but without examining any other governmental interests that they might purportedly advance. Such circumvention might occur when an individual legally contributes large amounts of money intended for eventual receipt by a particular candidate by making un-earmarked (non-designated) contributions to entities that are themselves likely to contribute to that candidate.

In the instant case, the Court noted that legislature and Federal Elections Commission since the time of the *Buckley* decision had considerably strengthened safeguards against circumvention through statutory additions and the adoption of a comprehensive regulatory scheme. The Court concluded that the purpose of the aggregate limits in preventing circumvention of the base limits did not justify the unnecessary intrusion on the right of citizens to choose who shall govern them. Because the indiscriminate aggregate limits are poorly tailored to the governmental interest in preventing circumvention of the base limits, they impermissibly restrict participation in the political process.

The only legitimate governmental interest in restricting campaign contributions, the Court emphasised, is the prevention of corruption and the appearance of corruption. The aggregate limits do not advance this interest. In this regard, the Court explained that the meaning of "corruption" in this context is closely circumscribed to include only "*quid pro quo*" corruption, which means a direct exchange of an official act for money. Thus, a donor's contributions of large sums of money in connection with elections, but without the purpose of controlling the exercise of an officeholder's official duties, does not in itself give rise to *quid pro quo* corruption. Citing its 2010 decision in *Citizens United v.*

Federal Election Commission, the Court also stated that *quid pro quo* corruption does not encompass the possibility that an individual who spends large sums will gain influence over elected officials or political parties, or access to them. To legitimise the government's targeting of such characteristics of governance would compromise the political responsiveness at the heart of the democratic process, and allow the government to favour some participants in that process over others.

According to the Court, this firm line between *quid pro quo* corruption and general influence must be respected in order to safeguard basic First Amendment rights. Moreover, there are compelling reasons not to define the boundaries of the First Amendment by reference to a generalised conception of the public good. The whole point of the First Amendment is to afford individuals protection against such infringements.

The Court also identified a number of alternative approaches available to the legislature that would serve to prevent circumvention of the base limits. In addition, it noted that disclosure requirements minimise the potential for abuse of the campaign finance system. The required disclosure of campaign contributions does burden speech, the Court acknowledged, but unlike the aggregate limits does not impose a ceiling on speech.

The instant case was decided by a five to four vote among the Justices. Justice Thomas filed a separate opinion, in which he concurred in the Court's judgment but disagreed with its decision to retain *Buckley's* rationale for validity of base limits. Justice Breyer filed a dissenting opinion that three other Justices joined. An important point of disagreement between the Court and the dissenting Justices was the Court's closely circumscribed definition of the type of corruption that campaign finance regulations legitimately may target.

Cross-references:

- *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976);
- *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2014-1-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 24.02.2012 / **e)** Series C 239 / **f)** Atala Riffo and daughters v. Chile / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

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

Keywords of the alphabetical index:

State, responsibility, international.

Headnotes:

When interpreting the words “any other social condition” of Article 1.1 of the American Convention on Human Rights (hereinafter, “ACHR”), it is always necessary to choose the alternative that is most favourable to the protection of rights enshrined in the treaty, based on the principle of the rule most favourable to the human being. The specific criteria set out in Article 1.1 ACHR do not constitute an exhaustive or limited list. The inclusion of the term “another social condition” in Article 1.1 ACHR allows for the inclusion of other categories that have not been explicitly indicated within these criteria, in virtue of which discrimination is prohibited.

A person's sexual orientation is a category protected by the American Convention on Human Rights (under Article 1.1 ACHR). Therefore, any regulation, act, or practice that discriminates based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by State authorities or individuals, may diminish or restrict the rights of a person based on his or her sexual orientation. A right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation.

A person's sexual orientation or the exercise thereof cannot provide grounds, under any circumstances, for a disciplinary proceeding. The reason is that there is no connection between the correct performance of a person's professional duties and his or her sexual orientation.

The determination of a child's best interest in cases involving the care and custody of minors must be based on an assessment of specific parental behaviours and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child's well-being, and not those that are speculative or imaginary. Speculations, assumptions, stereotypes, generalised considerations regarding the parents' personal characteristics, or cultural preferences for traditional conceptions of the family are not admissible for such a determination.

“The child's best interest” is a legitimate goal in abstract terms, but the mere reference to this purpose, absent specific proof of the risks posed to the child by a parent's sexual orientation, cannot serve as a basis upon which to restrict a protected right. A determination based on unfounded and stereotyped assumptions about the parent's capacity and suitability to ensure and promote the child's well-being and development is not appropriate for the purpose of guaranteeing the legitimate goal of protecting the child's best interest.

Pre-conceptions regarding the attributes, behaviours, or characteristics of homosexual persons or the impacts these may have on children are not admissible in custody proceedings.

The justification of a difference in treatment and the restriction of a right based on the alleged possibility of social discrimination, proven or not, that a minor might face due to his or her parents' situation cannot be used as legal grounds for a decision. While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatment.

Potential social stigma due to a parent's sexual orientation cannot be considered as a valid "harm" for the purposes of determining the child's best interest. If the judges who analyze such cases confirm the existence of social discrimination, it is completely inadmissible to legitimise that discrimination with the argument of protection the child's best interest.

The scope of protection of the right to privacy has been interpreted broadly by international human rights courts, and in this sense, the sexual orientation of a person is connected to the concepts of freedom and self-determination. These concepts imply the possibility to choose freely the options and circumstances that give meaning to one's existence, according to one's own choices and convictions. The emotional life with a spouse or permanent companion, including sexual relations, is one of the main aspects of this area or circle of intimacy.

Sexual orientation is an essential component of a person's identity. To require a mother to limit her lifestyle options implies using a "traditional" concept of women's social role as mothers, according to which it is socially expected that women bear the main responsibility for their children's upbringing and that in pursuit of this she should have given precedence to raising her children, renouncing an essential aspect of her identity.

The American Convention on Human Rights does not establish a limited concept of family, nor does it protect only a "traditional" model of the family. The concept of family life is not limited only to marriage, and must encompass other *de facto* family ties such as cohabitation outside of marriage.

Privacy is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings. Thus, privacy includes the way in which the individual views himself or herself and to what extent and how he or she decides to project this view to others.

The right to a hearing established in Article 8.1 ACHR must be interpreted according to Article 12 of the Convention on the Rights of the Child. Article 12 of the Convention on the Rights of the Child contains stipulations on the child's right to be heard, for the purposes of facilitating the child's intervention in a proceeding according to his or her circumstances and ensuring that the proceeding does not harm his or her interests. Children should be informed of their right to be heard directly, or through a representative, if they so wish.

Summary:

I. A custody proceeding was brought before the Chilean courts by the father of the girls M., V., and R. against their mother, Karen Atala Riffo. The father believed that her sexual orientation and living with a same-sex partner would harm the three girls. Ms Atala lost custody of her daughters due to a ruling issued by the Supreme Court of Justice that found, *inter alia*, that the girls could become the object of discrimination and could become confused with respect to gender roles, and that by living with a same-sex partner, Ms Atala had put her own interests before those of her daughters. Additionally, Ms Atala, a judge, was subjected to a disciplinary investigation ordered by the Court of Appeal of Temuco because she had revealed to the press that she was lesbian.

On 17 September 2010, the Inter-American Commission on Human Rights filed a claim against the Republic of Chile alleging the violation of Article 8.1 ACHR (Right to a Fair Trial), Article 11 ACHR (Right to Privacy), Article 17.1 and 17.4 ACHR (Rights of the Family), Article 19 ACHR (Rights of the Child), Article 24 ACHR (Right to Equal Protection) and Article 25 ACHR (Right to Judicial Protection), in relation to Article 1.1 ACHR. Likewise, the Commission requested that the Court order the State to adopt measures of reparation.

On the merits, the Court found that Chile violated Article 24 ACHR, in relation to Article 1.1 thereof, to the detriment of Karen Atala Riffo, and in relation to Article 19 ACHR, to the detriment her three daughters. The Court held that although the judgments of Chilean courts sought to protect the best interest of Atala Riffo's daughters, a legitimate and imperative aim, it was not demonstrated that the grounds stated in the decisions were appropriate to achieve the said purpose. The Chilean courts did not prove that Ms Atala's cohabitation with a same-sex partner affected her daughters negatively in any way, but instead relied upon abstract, stereotyped, and/or discriminating arguments to justify taking custody away from her.

Furthermore, because the Chilean courts discussed Atala Riffo's sexual orientation in the course of the proceedings, aspects of her private life were exposed. The Chilean courts should have limited themselves to examining parental behaviour without exposing and scrutinising Atala Riffo's sexual orientation. As a result, the Court found that during the custody proceeding, there was an arbitrary interference into Atala Riffo's private life, based on a stereotyped vision of her sexual orientation. This action constituted a violation of Article 11.2 ACHR, in conjunction with Article 1.1 ACHR, to the detriment of Ms Atala Riffo.

With regard to the alleged violation of the right to family life, the Court emphasised that the ACHR contains two provisions that protect this right in a complementary manner. The Court indicated that a judicial imposition of a single concept of family should be analysed not only as an arbitrary interference into family life, in accordance with Article 11.2 ACHR, but also in terms of the impact it may have on a family unit, in light of Article 17 ACHR. The Court found that Atala Riffo had created a family unit with her partner and her children. As such, this family unit was protected under Articles 11.2 and 17 ACHR. Thus, because the rulings issued by the Chilean courts constituted arbitrary interference into Atala Riffo's private life and had the effect of separating her family, they also constituted a violation of Articles 11.2 and 17 ACHR to the detriment of Atala Riffo and her daughters. With regard to the latter, these rulings also constitute a violation of Article 19.

Addressing the allegations related to judicial protections, the Court found that a violation of Article 8.1 ACHR for alleged lack of judicial impartiality must be based on specific, concrete evidentiary elements that indicate a situation in which judges have clearly allowed themselves to be influenced by aspects or criteria outside of the legal provisions. The Court found that neither the Commission nor the representative had provided specific evidence to disprove the presumption of the judges' subjective impartiality. Consequently, the Court found no violation of Article 8.1 ACHR with regard to the decisions of the Chilean courts in the case.

However, with regard to the alleged violation of Article 8.1 ACHR to the detriment of Atala Riffo's daughters, in relation to their right to be heard and to have their opinions taken into consideration, the Court considered the provisions of this Article in conjunction with those of Article 19 ACHR. The Court also considered other provisions of the Convention on the Rights of the Child (Articles 3 and 12). In the present case, the decision of the Supreme Court of Justice of Chile based its decision on the alleged best interest of the three minors without giving reasons for why it considered it legitimate to contradict the wishes expressed by the girls during the custody proceeding, particularly given the connection between a child's right to participate and the goal of complying with the principle of the child's best interest. As a result, the Court concluded that the decision issued by the Supreme Court of the Justice violated Article 8.1 ACHR, in connection with Articles 19 and 1.1 ACHR, to the detriment of Ms Atala's three daughters.

In regard to the professional disciplinary hearings initiated against Atala Riffo in her capacity as a judge due to her sexual orientation, the Court found that this action constituted a violation of Articles 24, 11.2, and 8.1 ACHR, in conjunction with Article 1.1 ACHR, to the detriment of Atala Riffo. There is no connection between the correct performance of a person's professional duties and his or her sexual orientation.

Accordingly, the Court ordered that the State: provide medical and psychological or psychiatric care free of charge, through its specialised public health institutions, to those victims who so request it; issue publications of the Court's judgment; hold a public act of acknowledgment of international responsibility; continue to implement permanent education and training programs directed at public officials at the regional and national levels; and pay pecuniary and non-pecuniary damages.

Languages:

Spanish, English.



Identification: IAC-2014-1-002

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 27.06.2012 / **e)** Series C no. 245 / **f)** The Kichwa Indigenous People of Sarayaku v. Ecuador / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

- 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
- 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.**
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**
- 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:

Obligation, positive, State / State, responsibility, international / Integrity, physical, right / Investigation, effective, requirement / Damage, non-pecuniary, compensation.

Headnotes:

Article 21 of the American Convention on Human Rights (hereinafter, the “ACHR”) protects the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from them. Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources. This connection must be upheld to ensure they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed, and protected by the States.

One of the fundamental guarantees to ensure the participation of indigenous peoples and communities is to recognise their right to consultation. The obligation to consult the indigenous and tribal communities and peoples on any administrative or legislative measure is directly related to the general obligation to guarantee the free and full exercise of the rights recognised in the Convention. This entails the duty to appropriately organise government structures and, in general, all organisations through which public power is exercised. It also includes the obligation to structure laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively.

The State must ensure that the rights of indigenous people are not ignored in any other activity or agreement reached with private individuals or in the context of decisions by public authorities. Therefore, the State must also carry out the tasks of inspections and supervision, and when pertinent, deploy effective means to safeguard the rights of indigenous communities through the corresponding judicial organs.

In order to ensure the effective participation of the members of an indigenous community or people in the planning of a development or investment project within their territory, the State is obliged to consult the

community in an active and informed manner. These consultations must be undertaken in good faith, conducted in accordance with the indigenous community’s own traditions, and must ensure that the members of the people or the community are aware of the potential benefits and risks of the proposed project. Further, the consultation must take into account traditional decision-making practices of the people or community. Failing to comply with this obligation or engaging in consultations without observing their essential characteristics gives rise to the State’s international responsibility.

The State – not the indigenous people – must prove that all aspects of the right to prior consultation were effectively guaranteed. “Good faith” requires the absence of any form of coercion by the State or by agents or third parties acting with its authority or acquiescence. Furthermore, consultation in good faith is incompatible with practices such as attempts to undermine the social cohesion of the affected communities, either by bribing community leaders establishing parallel leaders, or negotiating with individual members of the community, all of which are contrary to international standards.

The Court has recognised that ‘disregard for the ancestral right of indigenous communities over their territories could affect other basic rights, such as the right to cultural identity and the very survival of indigenous communities and their members.’ Given that the effective enjoyment and exercise of the right to communal ownership of the land ‘guarantees that indigenous communities conserve their heritage,’ States must respect that special relationship in order to guarantee their social, cultural, and economic survival. Under the principle of non-discrimination established in Article 1.1 ACHR, recognition of the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect, and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities.

The right to cultural identity is a fundamental right and a collective nature of the indigenous communities that should be respected in a multicultural, pluralistic, and democratic society. This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs, and forms of organisation.

The State must provide effective judicial remedies to persons who claim to be victims of human rights violations. These remedies must be substantiated in accordance with the rules of due process of law.

Furthermore, with regard to indigenous peoples, it is essential that the States grant effective protection that takes into account the inherent particularities of indigenous peoples, their economic and social characteristics, their special vulnerability, and their customary law, values, practices, and customs.

Summary:

I. The case concern the exploration and exploitation of oil resources in a territory of Ecuador known as “Block 23,” of which 65% is ancestrally and legally owned by the Kichwa People of Sarayaku (hereinafter, the “Sarayaku”). In 1996, a State-owned petroleum company signed a contract with two privately owned petroleum companies, enabling the exploration of hydrocarbons and the exploitation of crude oil within Block 23. The State did not appropriately and effectively consult with the Sarayaku regarding the exploration and exploitation of their territory. The community, subsequently, accused one of the private companies of trying to divide the community in order to obtain consent for its activities. As a result of the exploration activities, the Sarayaku experienced the destruction of at least one important spiritual site and of diverse natural resources of great environmental, cultural, and subsistence value to the community. One of the privately owned companies also buried explosives within Sarayaku territory, some at surface level. In 2002, the Sarayaku sought the protection of the Ecuadorian Ombudsman and submitted a constitutional recourse (“*amparo*”) before a local court that ordered the cessation of activities that could harm the community. In 2007, the State-owned company ended its partnership with at least one of the privately owned companies.

The Inter-American Commission (hereinafter, the “Commission”) filed an application against the State of Ecuador on 26 April 2010 alleging violations of Article 21 ACHR (Right to Property), in relation to Articles 13 (Freedom of Thought and Expression), 23 ACHR (Right to Participate in Government), and Article 1.1 ACHR (Obligation to Respect Rights) thereof, to the detriment of the Sarayaku; Articles 4 ACHR (Right to Life), 8 ACHR (Right to a Fair Trial), and 25 ACHR (Right to Judicial Protection), in relation to Article 1.1 thereof, to the detriment of the Sarayaku; Article 22 ACHR (Freedom of Movement and Residence), in relation to Article 1.1 thereof, to the detriment of the Sarayaku; Article 5 ACHR (Right to Humane Treatment), in relation to Article 1.1 thereof, to the detriment of 20 members of the Sarayaku; and Article 2 ACHR (Domestic Legal Effects). In addition, the Commission asked the Court to adopt specific measures of reparation.

The representatives generally agreed with the allegations of the Commission, asking the Court to declare the international responsibility of the State for the alleged violation of the same articles of the American Convention that the Commission had indicated, but with a broader scope. Additionally, the representatives argued that the State had violated Article 26 ACHR (Progressive Development), in relation to Article 1.1 thereof, to the detriment of the Sarayaku; and Articles 5 ACHR (Right to Humane Treatment) and 7 ACHR (Right to Personal Liberty), in relation to Article 1.1 thereof, as well as Article 6 of the Inter-American Convention to Prevent and Punish Torture (ICPPT), to the detriment of four Sarayaku leaders that were allegedly detained illegally on 25 January 2003 by the Ecuadorian Army.

On 12 March 2011, the State submitted a preliminary objection on failure to exhaust domestic remedies. In the course of a delegation visit of the Court, the Commission, the State, and the representatives to the territory of the Sarayaku in April 2012, the State made a public statement acknowledging its international responsibility for the alleged human rights violations.

II. In its judgment, the Court declared that the State’s acknowledgement of responsibility should be given full effect as an admission of the facts and as a form of reparation for the human rights violations committed. The Court then proceeded to analyse and specify the scope of those violations. The Court found the State had violated the right to prior consultation, to collective property, and to cultural identity, under Article 21 ACHR, in relation to Articles 1.1 and 2 thereof. The reasons is that it allowed a private oil company to carry out exploration activities in Sarayaku territory without consulting the community. In addition, the Court found the State responsible for severely jeopardising the rights recognised in Articles 4.1 and 5.1 ACHR, in relation to Articles 1.1 and 21 thereof, to the detriment of the Sarayaku, due to the acts committed during the exploration phase of activities, which included the burial of explosives. Finally, the Court found violations of the rights to judicial protection and guarantees established in Articles 8.1 and 25 ACHR, in relation to Article 1.1 thereof, to the detriment of the Sarayaku. The Court declined to analyse the facts presented in light of Articles 7, 13, 22, 23 and 26 ACHR.

Regarding the scope of Article 21 ACHR (Right to Property), the Court noted that Inter-American jurisprudence has established that this provision protects the “close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these.” While communal and/or collective land ownership schemes

may not conform to the classic conception of property, they warrant equal protection under Article 21 ACHR.

Because of indigenous peoples' intrinsic relationship with their ancestral territory, protection of their property rights and the use and enjoyment thereof is critical to their survival. Consequently, the protection of the natural resources contained within indigenous territories cannot be separated from these rights. This connection between territory and the natural resources therein that have traditionally been used by indigenous communities and are necessary for their physical and cultural survival, must be protected by Article 21 ACHR. In the present case, there was no dispute as to the Sarayaku's ownership of their territory; this was expressly recognised by the State in 1992. However, the Court emphasised that States must recognise indigenous communities' right to consultation on measures that may affect their property rights. This right to consultation is established in the ILO Convention no. 169 and other international instruments, and the corresponding obligation to consult is a general principle of international law.

Therefore, the State has the obligation to conduct, in accordance with the community's customs and traditions, within the framework of continuing communication between the parties, good faith consultations aimed at reaching an agreement. Such consultations must be undertaken in accordance with the indigenous community's own traditions and during early stages of the development/investment plan. The State bears the obligation to ensure that members of the indigenous community are aware of the potential benefits and risks of the proposed project, on the basis of an environmental and social impact assessment carried out by technically capable and independent entities, and the consultation process must take into account the traditional decision-making practices of the community. The obligation to consult may not be avoided by delegating this task to private entities, in particular, to the entity or party interested in the exploitation of natural resources within the ancestral territory.

In analysing the State's fulfilment of its obligation to ensure consultation in accordance with the above-noted parameters, the Court began by noting that it was uncontested that the State had failed to undertake any consultation with the Sarayaku. Regarding the requirement of good faith, the Court indicated that the State could not delegate, *de facto*, its obligation to consult to a private company. In this regard, the Court noted that the State did not even monitor the private company's actions. In addition, the actions undertaken by the oil company, aimed at

breaking down social cohesion through bribery or deals with individual members of the community, or through the creation of parallel leadership structures, cannot be considered a consultation undertaken in good faith. With regard to the environmental impact assessment undertaken, the Court found that the study conducted by the private entity interested in the oil exploitation without State monitoring or control, without the community's participation, and without taking into account social, spiritual and cultural impacts, all of which was contrary to international standards.

In its previous jurisprudence, the Court has noted that the disregard of indigenous peoples' rights over their ancestral territories may affect their enjoyment of other rights, such as those to cultural identity and to survival. Because effective ownership and control of their ancestral lands guarantees that indigenous communities can conserve their heritage, States must respect that special relationship to ensure their social, cultural, and economic survival. Further, the Court considers the right to cultural identity a collective, fundamental right of indigenous peoples. In this case, it was undisputed that the private entity involved destroyed or affected zones of high environmental and cultural importance to the community, which are vital to their subsistence. This led to the cancellation of cultural acts and ceremonies, which affected the community's customs and traditions and generated suffering among its members.

In light of the above, the Court found the State violated Article 22 ACHR, specifically the rights to consultation, cultural identity, and property, in relation to Articles 1.1 and 2 thereof.

Furthermore, the Court pointed to the extensive distribution of explosives throughout the area of the Sarayaku territory (such as areas typically used for hunting) carried out with State support, which became more problematic due to the lack of compliance with the provisional Court order to remove all the explosive material. As such, the Court ruled that the State severely jeopardised the rights enshrined in Articles 4.1 ACHR (Right to Life) and 5.1 ACHR (Right to Personal Integrity).

The Court also addressed the alleged violations of rights to judicial guarantees and to judicial protection. Regarding the complaints filed in relation to alleged threats and attacks against members of the Sarayaku, the Court decided that the State had failed to act with due diligence or in accordance with its obligation to guarantee the right to personal integrity recognised in Article 5.1 ACHR. Consequently, the State was found responsible for violating this Article of the ACHR, in conjunction with Article 1.1 thereof.

With respect to the constitutional complaint (*amparo*) filed by OPIP (the umbrella organisation for the Kichwa People of Pastaza) relating to activities being conducted by the oil company, the Court found noted the irregularities and delays in processing of the complaint. As such, the State failed to guarantee an effective remedy to the juridical situation violated. Also, it did not ensure that the appropriate competent authority ruled on the rights of the persons who filed the remedy, or that the decisions were executed through effective judicial protections. In light of this, the Court declared the State responsible for breaching Articles 8.1, 25.1, 25.2.a and 25.2.c ACHR, all in relation to Article 1.1 thereof, to the detriment of the Sarayaku.

Accordingly, the Court ordered that the State:

- a. neutralise and remove all explosives on the surface and buried within the territory of the Sarayaku;
- b. consult with the Sarayaku in a prior, adequate, and effective manner, in accordance with relevant international standards, any time that resource extraction or any other development or investment plan within their territory is proposed;
- c. within a reasonable time, adopt the appropriate legislative, administrative, or other measures necessary to give effect to the right to prior consultation of indigenous communities;
- d. organise training programs for police, military, and other government officials on the rights of indigenous peoples;
- e. carry out an act of public acknowledgment of international responsibility;
- f. publish the sentence of the Court in national media; and
- g. pay pecuniary and non-pecuniary damages.

Languages:

Spanish, English.



Identification: IAC-2014-1-003

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 28.11.2012 / **e)** Series C 257 / **f)** Artavia Murillo *et al.* (“In Vitro Fertilisation”) v. Costa Rica / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

- 5.1.3 Fundamental Rights – General Questions – **Positive obligations of the State.**
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
- 5.3.4 Fundamental Rights – Civil and political rights – **Right to Physical and Psychological Integrity.**
- 5.3.31 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:

Obligation, positive, State / State, responsibility, international / Damage, non-pecuniary, compensation.

Headnotes:

The right to private life encompasses more than just the right to privacy. It also covers a series of factors associated with the dignity of the individual, including the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life involves aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world. The effective exercise of the right to private life is decisive for the possibility to exercise personal autonomy over the future course of events that are important for a person’s quality of life.

Private life includes the way an individual views himself and how he projects it towards others. Private life is an essential condition for the free development of the personality. Furthermore, motherhood is an essential part of the free development of a woman’s personality. The decision of whether to become a parent is part of the right to private life and includes, in this case, the decision whether to become a mother or father in the genetic or biological sense.

The right to privacy enshrined in Article 11.2 of the American Convention (hereinafter, “ACHR”) is closely related to the rights of the family recognised in Article 17 ACHR. Article 17 ACHR recognises the central role of the family and family life in a person’s existence and in society in general. The right to the protection of family life entails, among other State obligations, facilitating, in the broadest possible terms, the development and strength of the family unit. This is such a basic right of the American

Convention that it may not be waived even in extreme circumstances. Article 17.2 ACHR protects the right to found a family.

The right to private life is related to:

1. reproductive autonomy, and
2. access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right.

This right is violated when restrictions are imposed on the means by which a woman can exercise the right to control her fertility. Thus, the protection of private life includes respect for the decisions both to become a mother or a father, and a couple's decision to become genetic parents.

The rights to private life and to personal integrity are also directly and immediately linked to health care. The lack of legal safeguards to take reproductive health into consideration can seriously impair the rights to reproductive autonomy and freedom. Therefore, there is a connection between personal autonomy, reproductive freedom, and physical and mental integrity.

The right to private life and reproductive freedom is related to the right to access medical technology necessary to exercise that right. Therefore, in keeping with Article 29.b ACHR, the scope of the rights to private life, reproductive autonomy and to found a family, as derived from Articles 11.2 and 17.2 ACHR, extends to the right of everyone to benefit from scientific progress and its application. The right to access scientific progress in order to exercise reproductive autonomy and the possibility to found a family give rise to the right to have access to the best health care services in assisted reproduction techniques. At the same time, it gives rise to the prohibition of disproportionate and unnecessary restrictions, be they *de jure* or *de facto*, to the exercise of reproductive decisions that correspond to each individual.

Under different methods of interpretation, the Court has reached the conclusion that an embryo cannot be understood to be a person for the purposes of Article 4.1 ACHR. In addition, after analysing the available scientific data, the Court has concluded that "conception" in the sense of Article 4.1 occurs at the moment when the embryo becomes implanted in the uterus. Further, it can be concluded from the Article's inclusion of the words "in general" that the protection of the right to life under this provision, is not absolute, but rather gradual and incremental, according to its development.

In weighing the importance of protecting an embryo against the limitations on the rights to personal integrity, personal liberty, private life, intimacy, reproductive autonomy, access to reproductive health services, and the right to found a family, considered in the context of a prohibition on the use of in vitro fertilisation treatment (hereinafter, "IVF"), the limitation on these rights is severe and entails a violation. The reason is that, in practice, they are annulled for those persons whose only possible treatment for infertility is IVF. Further, the interference with these rights has a differentiated impact on the victim, depending on his/her situation of disability, gender stereotypes and, in some cases, financial situation. In contrast, the limitation on the protection of the embryo is very slight, given that the risk of embryonic loss is present both in IVF and in natural pregnancy. The embryo, prior to implantation, is not covered by the terms of Article 4 ACHR.

Summary:

I. This case concerns the issuance of Executive Decree no. 24029-S by the Ministry of Health of Costa Rica on 3 February 1995, which authorised and regulated the practice of In Vitro Fertilisation (hereinafter, "IVF") in the country. Although the IVF technique was practiced for about five years, on 15 March 2000, the Constitutional Chamber of the Supreme Court of Costa Rica declared the decree unconstitutional, arguing, *inter alia*, that the treatment violated the right to life of the embryos created for implantation. This judgment, which effectively banned IVF in Costa Rica, consequently interrupted the medical treatment that several persons had already begun, while others, having no other option, resorted to traveling abroad to be able to have access to IVF.

On 29 July 2011, the Inter-American Commission (hereinafter, the "Commission") submitted a brief to the jurisdiction of the Inter-American Court (hereinafter, the "Court") against the state of Costa Rica (hereinafter, the "State"). The Commission requested the Court to declare the State's international responsibility for violations of Articles 11.2, 17.2 and 24 ACHR, in relation to Articles 1.1 and 2 of the treaty, to the detriment of the alleged victims.

Representatives of the alleged victims submitted their respective briefs and pleadings to the Court on 9 December 2011. The representatives generally agreed with the allegations of the Commission. A representative of a segment of victims also alleged the violation of Articles 4.1, 5.1, 7, 11.2, 17.2, and 24 of the Convention, in relation to Articles 1.1 and 2 thereof, to the detriment of the victims he represented.

The State submitted three preliminary objections, arguing: failure to exhaust domestic remedies, the petition presented by two of the alleged victims was time-barred, and the Inter-American Court's lack of jurisdiction to hear supervening facts after the submission of the petition. The Court rejected all three of these preliminary objections.

II. On the merits, the Court found the State responsible for violating Articles 5.1, 7, 11.2 and 17.2 in relation to Article 1.1 ACHR, to the detriment of the alleged victims. The Inter-American Court held that the judgment of the Constitutional Chamber of the Supreme Court of Costa Rica effectively interrupted the medical treatment already initiated by some of the alleged victims, and forced others to travel to other countries to access IVF. This constituted a restriction in the private and family lives of the victims, as they were forced to modify their decisions regarding the methods they wished to seek out for the purpose of conceiving a biological child. The Court then analysed whether this restriction violated the American Convention. Using a proportionality test, the Court considered whether the restriction had to be established in the law, sought a legitimate aim, was adequate and necessary in order to achieve that aim, and had disproportionately impacted the rights of the alleged victims with respect to the benefits to be achieved by the implementation of the measure.

The Court weighed the extent to which the rights were limited in this case against the importance of protecting the embryo. The Court concluded that the effects on the rights to personal integrity, personal liberty, private life, intimacy, reproductive autonomy, access to reproductive health services, and to found a family were severe and had consequently violated these rights. The reason is that, in practice, they were completely annulled for those persons whose only possible treatment for infertility was IVF. In addition, the restriction had a disparate impact on the victims owing to their situation of disability (inability to conceive), their gender (the women felt the interruption of the treatment in their own bodies, and some of the men were impacted by gender stereotypes) and, for some of the victims, their financial situation (those who could not afford to seek treatment in other countries faced greater impacts).

In contrast, the impact on the protection of prenatal life was slight, because the risk of embryonic loss is present both in IVF and in natural pregnancy. The Court underlined that the embryo, prior to implantation, is not covered by the terms of Article 4 of the Convention, and recalled the principle of the gradual and incremental protection of prenatal life.

Therefore, the Court concluded that the Constitutional Chamber based its decision on an absolute protection of the embryo. By failing to weigh in or take into account the other competing rights, the decision constituted an arbitrary and excessive interference in private and family life. As such, the interference was disproportionate. Moreover, the restriction had discriminatory effects.

Accordingly, the Court ordered the State to promptly adopt appropriate measures to annul the prohibition to practice IVF; regulate the aspects that it considered necessary for the implementation of IVF, and establish systems of inspection and quality control of the institutions and professional qualified that perform this type of assisted reproduction technique; include the availability of IVF within the infertility treatments and programs offered by its health care services; provide the victims with psychological treatment, free of charge and immediately, for up to four years; publish the Inter-American Court's judgment; implement permanent education and training programs and courses on human rights, reproductive rights and non-discrimination for judicial officials; and pay pecuniary and non-pecuniary damages as well as costs and expenses.

Languages:

Spanish, English.



Identification: IAC-2014-1-004

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 14.05.2012 / **e)** Series C 260 / **f)** *Mendoza et. al. v. Argentina* / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

5.1.1.4.1 Fundamental Rights – General questions – Entitlements to rights – Natural persons – **Minors.**
 5.3.3 Fundamental Rights – Civil and political rights- **Prohibition of torture and inhumane and degrading treatment.**
 5.3.5 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

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

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

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

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

Keywords of the alphabetical index:

State, responsibility, international / Juvenile Criminal Law / Life Imprisonment / Right to appeal / Due diligence / Social Reintegration.

Headnotes:

The Convention on the Rights of the Child considers the child's best interests as a reference point to ensure the effective realisation of all the rights recognised in that instrument. The actions of the State and society to protect children, and promote and preserve their rights must adhere to this standard. Based on the consideration that the child's best interests is an interpretative principle to ensure the maximum satisfaction of the rights of the child, it should also serve to ensure minimal restriction of such rights. Regarding measures or sentences involving the deprivation of liberty of children, the following principles apply:

1. exceptional, *ultima ratio* application for the shortest possible time;
2. a specified period of deprivation of liberty at the time of sentencing; and
3. periodic review of the measures of deprivation of liberty of children.

Thus, for children, life imprisonment or reclusion for life is incompatible with Article 7.3 of the American Convention on Human Rights (hereinafter, the "ACHR"). Neither one of them is an exceptional punishment. The reason is that such deprivation of liberty is not handed down for the shortest possible time or for a period specified at the time of sentencing. Also, the punishments do not entail a periodic review of the necessity for such deprivation of liberty.

The penalty for an offense must have the objective of reintegrating the child into society. The proportionality of the sentence is closely related to its purpose, pursuant to Article 5.6 ACHR. Owing to their characteristics, the sentences of life imprisonment

and reclusion for life do not achieve the objective of reintegrating juveniles into society. Rather, this type of sentence involves the maximum exclusion of the child from society, functioning in a purely retributive sense, because the expectations of re-socialisation are annulled. Therefore, such sentences are not proportionate to the objective of the criminal sanction of children. The extreme psychological impact derived from the disproportionality of the sentences constitutes cruel and inhumane treatment.

The consideration of elements in sentencing other than the offense committed, as well as the possibility of imposing on children criminal sanctions established for adults, is contrary to the principle of proportionality in the criminal sanction of children.

If the State fails to comply with its obligation to conduct periodic and regular examinations of those deprived from liberty, in order to safeguard their health, such failure constitutes inhumane treatment.

Subjecting a detained person to strong blows to the feet consistent with the practice of "*falanga*" constitutes a typical form of torture. Although there may be no evidence to determine the purpose or objective of the blows received by the victims, according to the Inter-American Convention to Prevent and Punish Torture (hereinafter, the "ICPPT"), this conduct can be carried out for "the purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose.

State authorities must follow up and investigate the deaths of detainees to determine whether the prison staff was potentially responsible. The omissions related to his conditions of detention and/or a detainee's state of depression could have contributed to his death. The State must disprove the possibility of the responsibility of its agents, taking into account the measures that they should have adopted in order to safeguard the rights of a person in custody, and to collect the evidence necessary therefor.

The determination of criminal and/or administrative responsibility each has its own substantive and procedural rules. Consequently, the failure to determine criminal responsibility should not prevent the continuation of the investigation into other types of responsibilities, such as administrative responsibilities.

The State cannot place its obligation to investigate upon the presumed victims; this obligation cannot depend upon the procedural initiative of the victims or their next of kin or on private contributions of evidence.

Article 8.2 ACHR refers, in general terms, to the minimum guarantees for a person subjected to an investigation and criminal proceedings. These minimum guarantees must be protected at different stages of the criminal proceedings, including the investigation, indictment, prosecution, and sentencing. The right to appeal the judgment to a higher court is a guarantee for the individual in relation to the State. The right to appeal the judgment is also provided for in the Convention on the Rights of the Child. Therefore, the right to appeal the judgment becomes especially relevant when determining the rights of children, when they have been sentenced to imprisonment for the perpetration of offenses.

The Convention requires an integral review of judgments. The lack of examination of the merits of a matter, without considering issues relating to the facts and evidence, does not conform to the provisions of Article 8.2.h ACHR. The reason is that a review of the facts and evidence can overturn a criminal conviction.

A fixed period after which a release can be requested does not take into account the circumstances of each child, which change with the passage of time and, at any moment, could reveal progress that would enable reintegration into society. The timeframe allowing children to request their release for the first time, and to reintegrate into society must be proportionate. Children should not be forced to remain deprived of their liberty for longer than the time lived before the perpetration of the offense and the imposition of the punishment.

Summary:

I. The case concerns five minors who were sentenced to life imprisonment under Argentinian Law no. 22.278 for committing an offense. During their imprisonment, one of the children suffered loss of vision due to the lack of medical attention after an injury, two of them were tortured after attaining the age of majority, and one of them committed suicide after attaining the age of majority but the latter incident was not investigated. In this case, the only recourse available to the five children, a recourse in cassation, did not allow a higher court to review questions of fact and evidence.

On 17 June 2011, the Inter American Commission of Human Rights submitted the case, alleging violations to Articles 4.1, 5.1, 5.2, 5.6, 7.3, 8.1, 8.2.d, 8.2.e, 8.2.h, 19 and 25 ACHR.

II. On the merits, the Court found violations to Articles 7.3, 5.6 and 5.1 in relation to Articles 1.1 and 19 ACHR to the detriment of the five children. It further established violations to Articles 8.1 and 25 ACHR in relation to Article 1.1 ACHR to the

detriment of the parents of the detainee who passed away, and to the detriment of the tortured detainees, the latter in combination with Articles 1, 6 and 8 ICPPT. It also declared the violation of Article 8.2.h ACHR in relation to Articles 1.1, 2 and 19 ACHR, to the detriment of those parties who exercised the recourse of cassation, and of Article 5.1 ACHR to the detriment of the next of kin of the five children. Additionally, it declared the State's lack of compliance with Article 2 ACHR in relation to Articles 7.3, 8.2.h and 19 ACHR.

The Court determined that the sentence of life imprisonment for the five individuals was not exceptional and did not apply the restriction of liberty for the shortest possible time. Also, it neither allowed for a periodic review of the need to deprive the children of their liberty nor provided for their social reintegration. As such, they violated Articles 7.3 and 5.6 ACHR to their detriment. It also determined that the high psychological impact of the sentence of life imprisonment constituted cruel and inhumane treatment, in violation of Article 5.1 and 5.2 ACHR.

The Court also determined that two of the detainees who had reached the age of majority were subjected to torture during their detention. The injuries sustained on their feet, which were consistent with the practice of "*falanga*," violate Article 5.1 and 5.2 ACHR, as well as of Articles 1, 6 and 8 of the Inter American Convention to Prevent and Punish Torture. The lack of proof regarding the purpose of the torture was not enough to discredit the existence of torture. Under the Inter American Convention to Prevent and Punish Torture, the acts committed can seek "any [...] purpose". The lack of investigation of such torture constituted a further violation to Argentina's obligations under Articles 8.1 and 25.1 ACHR.

The State was also held responsible for the suicide death of one of the detainees who had reached majority. With regard to the investigation into his death, the Court observed that State authorities had knowledge he was in a depressive condition prior to his death, possibly related to the deplorable conditions of detention in which he was held. The lack of investigation into those conditions and of possible responsibilities therefore, even of an administrative nature, constituted a further violation to the rights to a fair trial and judicial protection under Articles 8.1 and 25.1 ACHR.

The Court finally referred to the recourse in cassation available in Argentina, exercised by the five convicted persons, which did not allow for the review of questions of fact and evidence related to convictions by a judge or superior tribunal, and limited higher courts to reviewing issues of law. The Court

determined that the cassation recourse violated the right to an appeal under Article 8.2.h ACHR, since the review had to be of an integral nature.

Accordingly, the Court ordered, *inter alia*, that the State: provide free health treatment to the four detainees still interned, including the surgical needs required to aid the individual who lost his sight during detention; provide educational services for the victims, even at a university level; adjust its juvenile criminal system to international standards and implement policies toward the prevention of juvenile crime; ensure that no life imprisonment sentences would be imposed again for crimes committed during childhood, and that those persons serving life sentences for crimes committed during childhood have the opportunity to request the review of their sentences; adapt their laws to allow for an integral right to appeal criminal convictions; implement educational programs on human rights and children's rights for penitentiary personnel and for judges with jurisdiction over cases related to children; investigate the death and torture of the victims; and pay a sum for pecuniary and non-pecuniary damages.

Languages:

Spanish, English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2014-1-001

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 13.05.2014 / **e)** C-131/12 / **f)** Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González / **g)** *European Court Reports* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Internet, right to information / Right to private and family life, protection / Internet, right to be forgotten / Internet, search engine, data, removal.

Headnotes:

1. Processing of personal data carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. This is all the more true as the internet and search engines render the information contained in such a list of results ubiquitous. In the light of the potential seriousness of that interference it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. A fair balance should be sought between the legitimate

interest of internet users to information and the data subject's fundamental rights under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

2. In order to comply with the rights laid down in the provisions of the Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

Summary:

I. In 2010 Mario Costeja González, a Spanish national, lodged with the national data protection authorities a complaint against *La Vanguardia Ediciones SL* (the publisher of a daily newspaper with a large circulation in Spain, in particular in Catalonia) and against Google Spain and Google Inc. Mr Costeja González contended that, when an internet user entered his name in the search engine of the Google group ('Google Search'), the list of results would display links to two pages of *La Vanguardia's* newspaper, of January and March 1998. Those pages in particular contained an announcement for a real-estate auction organised following attachment proceedings for the recovery of social security debts owed by Mr Costeja González.

Mr Costeja González requested, first, that *La Vanguardia* be required either to remove or alter the pages in question (so that the personal data relating to him no longer appeared) or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that the data no longer appeared in the search results and in the links to *La Vanguardia*.

The Spanish authority rejected the complaint against *La Vanguardia*, taking the view that the information in question had been lawfully published by it. On the other hand, the complaint was upheld as regards Google Spain and Google Inc. and it was requested from those two companies to take the necessary measures to withdraw the data from their index and to render access to the data impossible in the future. Google Spain and Google Inc. brought two actions

before the referring court, claiming that the national authority's decision should be annulled.

II. The Court of Justice found, first of all, that the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Directive 95/46 when that information contains personal data. Furthermore, according to the Court, the operator of the search engine must be regarded as the 'controller' in respect of that processing, given that it is the operator which determines the purposes and means of the processing.

Next, so far as concerns the extent of the responsibility of the operator of the search engine, the Court held that the operator is, in certain circumstances, obliged to remove links to web pages that are published by third parties and contain information relating to a person from the list of results displayed following a search made on the basis of that person's name.

The Court pointed out in this context that processing of personal data carried out by the operator of the search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data.

Finally, the Court held that, if it is found, following a request by the data subject, that the inclusion of those links in the list is, at this point in time, incompatible with the directive, the links and information in the list of results must be erased. The Court observed in this regard that even initially lawful processing of accurate data may, in the course of time, become incompatible with the Directive where, having regard to all the circumstances of the case, the data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-1-002

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 27.05.2014 / **e)** C-129/14 PPU / **f)** Zoran Spasic / **g)** *European Court Reports I-586* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – European law – **Charter of fundamental rights**.

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

Keywords of the alphabetical index:

Sentence, cumulation, principle *ne bis in idem*, application between Member States, derogation.

Headnotes:

1. Article 54 of the Convention Implementing the Schengen Agreement (hereinafter, the “CISA”), which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed ‘has been enforced’ or is ‘actually in the process of being enforced’, is compatible with Article 50 of the Charter of Fundamental Rights of the European Union, in which that principle is enshrined.

The additional condition laid down in Article 54 CISA constitutes a limitation of the *ne bis in idem* principle that is compatible with Article 50 of the Charter, since that limitation is covered by the explanations relating to the Charter as regards Article 50 which are directly referred to in the third subparagraph of Article 6.1 Treaty of the European Union and Article 52.7 of the Charter. In any event and irrespective of the wording used in the explanations relating to the Charter as regards Article 50, the execution condition which subjects the more extensive protection offered by Article 50 to an additional condition constitutes a limitation of the right enshrined in that article within the meaning of Article 52 of the Charter.

2. Article 54 of that convention must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty ‘has been enforced’ or is ‘actually in the process of being enforced’ within the meaning of that provision.

Summary:

I. Mr Zoran Spasic, a Serbian national, is being prosecuted in Germany for fraud committed in Milan in 2009 (an individual was defrauded of €40,000 in small denomination banknotes in exchange for €500 banknotes which were subsequently found to be counterfeit). In parallel, Mr Spasic was convicted in Italy for the same offence and sentenced to a one-year custodial sentence and a fine of €800. Mr Spasic, who was already imprisoned in Austria for other offences, paid the fine, but did not serve his custodial sentence.

As a result of a European arrest warrant issued by Germany, the Austrian authorities surrendered Mr Spasic to the German authorities. Mr Spasic has been remanded in pre-trial custody since the end of 2013, awaiting judgment for the fraud offence committed in Italy. Mr Spasic claims that in accordance with the *ne bis in idem* principle he cannot be prosecuted for the same acts, since he already received a final and enforceable conviction in Italy.

II. In this judgment, the Court, ruling on a request for a preliminary ruling from the *Oberlandesgericht Nürnberg*, holds that the additional enforcement condition laid down in the CISA constitutes a limitation of the *ne bis in idem* principle that is compatible with the Charter of Fundamental Rights. Moreover, the Court considers that the enforcement condition laid down in the CISA does not call into question the *ne bis in idem* principle as such, since its only purpose is to avoid a situation in which persons finally convicted in a Member State go unpunished.

The Court holds that where a custodial sentence and a fine are imposed as principal penalties (as in Mr Spasic’s case), the payment of the fine alone is not sufficient to consider that the penalty has been enforced or is in the process of being enforced within the meaning of the CISA. In that respect, the Court points out that, although the CISA provides that ‘a penalty’ must have been enforced or be in the process of being enforced, that condition covers the situation where two principal penalties have been imposed. Any other interpretation would lead to rendering the *ne bis in idem* principle set out in the CISA meaningless and would undermine the effective application of that convention.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-1-003

a) European Union / **b)** Court of Justice of the European Union / **c)** Third Chamber / **d)** 05.06.2014 / **e)** C-146/14 PPU / **f)** Bashir Mohamed Ali Mahdi / **g)** *European Court Reports* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – Foreigners – **Refugees and applicants for refugee status.**

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

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

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

Keywords of the alphabetical index:

Immigrant, expulsion, administrative detention.

Headnotes:

I. The Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, read in the light of Articles 6 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision.

II. The supervision that has to be undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus

having power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings.

Summary:

I. On 9 August 2013, Mr Bashir Mohamed Ali Mahdi, a Sudanese national without a valid identity document, was arrested in Bulgaria. Mr Mahdi was taken to a special detention facility pending implementation of the administrative measures ordering his removal from Bulgaria. On 12 August 2013 Mr Mahdi signed a statement that he would return voluntarily to Sudan.

Mr Mahdi subsequently went back on his statement. The Sudanese Embassy confirmed Mr Mahdi's identity but refused to issue him with travel documents because he was not willing to return to Sudan. Following an initial period of detention, the Bulgarian authorities brought proceedings before a Bulgarian administrative court seeking to have the detention extended: they relied, in particular, on the risk of Mr Mahdi absconding and on a lack of cooperation on his part.

II. Firstly, the Court observed that under the Directive 2008/115 the only requirement concerning adoption of a written measure is the requirement that detention be ordered in writing with reasons being given in fact and in law. That requirement must be understood as also covering decisions to extend detention, given that detention and extension are comparable and that a third-country national must be able to ascertain the reasons for a decision taken concerning him. Thus, if the Bulgarian authorities, before bringing the matter before the administrative court, had taken a decision on the continuation of the detention, there had to be a measure in writing with reasons being given in fact and in law. If, however, the Bulgarian authorities simply re-examined Mr Mahdi's situation without deciding on the application to extend the detention (a matter which it is for the referring court to determine), they were not obliged to adopt an express measure since the Directive makes no provision to that effect.

Then, so far as the question of judicial review of an application for an initial period of detention to be extended is concerned, the Court of Justice stated that a court dealing with an application for an initial period of detention to be extended must be able to rule on all relevant matters of fact and of law in order to determine whether the extension is justified; that requires an in-depth examination of the facts specific to the individual case. The Court must be able to

replace the decision ordering the initial detention with its own decision and order either, extension of the detention, an alternative, less coercive, measure, or release of the third-country national where that is justified. The Court must take into account all relevant matters in giving such a decision. Accordingly, the powers of the court in the context of such a review can under no circumstances be confined to the evidence adduced by the administrative authority.

The Court also pointed out that the risk of the third-country national absconding is a matter to be taken into account in the context of the initial detention. However, the risk of absconding is not one of the two conditions for extending detention set out in the directive. That risk is therefore relevant only in relation to the re-examination of the circumstances which initially gave rise to the detention. That thus requires the actual facts surrounding Mr Mahdi's situation to be assessed in order to consider whether a less coercive measure may be effectively applied in his case. It is only if there continues to be a risk of the third-country national absconding that the fact that there are no identity papers may be taken into account. Accordingly, the lack of such documentation may not, on its own, justify extending the detention.

Lastly, the Court stated that, whilst Bulgaria is not obliged to issue Mr Mahdi with an autonomous residence permit or authorisation to stay should he be released, it must nonetheless provide him, in accordance with the Directive, with written confirmation concerning his situation.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-1-004

a) European Union / **b)** Court of Justice of the European Union / **c)** First Chamber / **d)** 19.06.2014 / **e)** C-507/12 / **f)** *Jessy Saint Prix v. Secretary of State for Work and Pensions* / **g)** not yet published / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26.1 General Principles – Principles of EU law – **Fundamental principles of the Common Market.**
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

Keywords of the alphabetical index:

Free movement of workers / Worker, definition / Pregnancy, worker, protection.

Headnotes:

1. Article 45 of the Treaty on the Functioning of the European Union (hereinafter, “TFEU”) must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of ‘worker’, within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

2. A woman in the situation of Ms Saint Prix, who temporarily gives up work because of the late stages of her pregnancy and the aftermath of childbirth, cannot be regarded as a person temporarily unable to work as the result of an illness, in accordance with Article 7.3.a of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. However, it cannot be argued, contrary to what the United Kingdom Government contends, that Article 7.3 of Directive 2004/38 lists exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status.

Summary:

I. *Jessy Saint Prix* is a French national who entered the UK on 10 July 2006 where she worked, mainly as a teaching assistant, from 1 September 2006 until 1 August 2007. At the beginning of 2008 Ms Saint Prix took up agency positions, working in nursery schools. On 12 March 2008, already nearly six months’ pregnant, Ms Saint Prix stopped that work because the demands of caring for young children had become too strenuous. The claim for income support made by Ms Saint Prix was refused by the UK authorities on the grounds that Ms Saint had lost her status as a worker. On 21 August 2008, three months after the birth of her child, Ms Saint Prix resumed work.

In the United Kingdom, income support is a benefit which may be granted to certain categories of people whose income does not exceed a defined amount. However, 'people from abroad' (that is, claimants who do not habitually reside in the UK) are not entitled to that benefit, unless they have acquired the status of worker within the meaning of the Directive on the right of free movement and residence of Union citizens.

II. The Court has considered the preliminary questions under Article 45 TFEU and Article 7 of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and it has stated that a woman in the situation of Ms Saint Prix should retain the status of "worker".

In support of its reasoning, the Court noted that an EU citizen who no longer pursues an activity can still retain the status of worker in specific cases (temporarily unable to work, involuntary unemployment or vocational training). Although Ms Saint Prix cannot be regarded as a person temporarily unable to work as the result of an illness, she cannot be deprived of the status of 'worker', in accordance with Directive 2004/38. In that regard, it must be noted that, according to the settled case-law of the Court, the concept of 'worker', within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the TFEU Treaty, must be interpreted broadly. Accordingly, any national of a Member State, irrespective of his place of residence and of his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence falls within the scope of Article 45 TFEU. The same situation applies once the employment relationship has ended, the person concerned, as a rule, loses the status of worker, that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker. It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship. In that regard, the Court stated that Article 7.3 of Directive 2004/38 does not list exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status.

In those circumstances, the fact that the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of

'worker'. The fact that she was not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement. Otherwise, an EU citizen would be deterred from exercising their right to freedom of movement if they risked losing their status as workers in the host Member State.

In order to determine whether the period that has elapsed between childbirth and starting work again may be regarded as reasonable, the national court concerned should take account of all the specific circumstances of the case in the main proceedings and the applicable national rules on the duration of maternity leave.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-1-005

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 10.07.2014 / **e)** C-138/13 / **f)** Naime Dogan v. Bundesrepublik Deutschland / **g)** not yet published / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26.1 General Principles – Principles of EU law – **Fundamental principles of the Common Market.**
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

Keywords of the alphabetical index:

Family reunion, right / Family reunion, language, knowledge, requirement.

Headnotes:

Article 41.1 of the Additional Protocol, to the Agreement establishing an Association between the European Economic Community and Turkey must be interpreted as meaning that the 'standstill' clause set out in that provision precludes a measure of national law, introduced after the entry into force of that additional protocol in the Member State concerned, which imposes on spouses of Turkish nationals residing in that Member State, who wish to enter the territory of that State for the purposes of family reunification, the condition that they demonstrate beforehand that they have acquired basic knowledge of the official language of that Member State.

Indeed, a restriction, whose purpose or effect is to make the exercise by a Turkish national of the freedom of establishment in national territory subject to conditions more restrictive than those applicable at the date of entry into force of the Additional Protocol, is prohibited, unless it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it.

In that regard, on the assumption that the prevention of forced marriages and the promotion of integration, can constitute overriding reasons in the public interest, it remains the case that a national provision such as that at issue in the main proceedings goes beyond what is necessary in order to attain the objective pursued, in so far as the absence of evidence of sufficient linguistic knowledge automatically leads to the dismissal of the application for family reunification, without account being taken of the specific circumstances of each case.

Summary:

I. Mrs Dogan, a Turkish national residing in Turkey, wishes to join her husband in Germany. The latter, also a Turkish national, has lived since 1998 in that country where he manages a limited liability company of which he is the majority shareholder and where he possesses an unlimited-term residence permit. In January 2012, the German embassy in Ankara refused again to grant Mrs Dogan a visa for the purpose of family reunification, on the ground that she does not possess the necessary linguistic knowledge.

Mrs Dogan therefore brought an action before the *Verwaltungsgericht* Berlin (Administrative Court, Berlin, Germany). That Court asks the Court of Justice whether the language requirement imposed by Germany since 2007 is compatible with European Union law and, in particular, with the 'standstill' clause agreed at the beginning of the 1970s in the context of the Association

Agreement with Turkey. That clause prohibits the introduction of new restrictions on the freedom of establishment.

II. In the judgment, the Court stated that the 'standstill' clause precludes a national measure which, introduced after the entry into force of that clause in the Member State concerned, requires the spouse of a Turkish national residing in that State to prove beforehand the acquisition of basic knowledge of the official language of the State in question to be able to enter the territory of the latter for the purpose of family reunification.

Such a language requirement makes family reunification more difficult by tightening, in relation to the rules applicable when the 'standstill' clause entered into force, the conditions of the first admission to the territory of the Member State concerned of the spouse of a Turkish national. Such legislation constitutes, within the meaning of that clause, a new restriction of the exercise of the freedom of establishment by Turkish nationals.

The Court notes that family reunification constitutes an essential way of making possible the family life of Turkish workers who belong to the labour force of the Member States, and contributes both to improving the quality of their stay and to their integration in those Member States.

The decision of a Turkish national, such as Mr Dogan, to establish himself in a Member State in order to exercise there a stable economic activity could be negatively affected where the legislation of that Member State makes family reunification difficult or impossible, so that that national could, as the case may be, find himself obliged to choose between his activity in the Member State concerned and his family life in Turkey.

Finally, although the introduction of a new restriction may be allowed in so far as it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it, the Court considers that such conditions are not satisfied in the present case.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2014-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 28.01.2014 / **e)** 35810/09 / **f)** O’Keeffe v. Ireland / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Education, sexual abuse / Minor, sexual crime, victim / Education, delegation to private body, state, responsibility / Education, delegation, control, positive obligation.

Headnotes:

Having regard to the fundamental nature of the rights guaranteed by Article 3 ECHR and the particularly vulnerable nature of children, it is an inherent obligation of Contracting States to ensure their protection from ill-treatment, especially in a primary education context, through the adoption of special measures and safeguards. The existence of useful detection and reporting mechanisms were fundamental to the effective implementation of the criminal law designed to deter child sexual abuse. A State could not absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals.

Summary:

I. The applicant alleged that she had been subjected to sexual abuse by a teacher (hereinafter, “LH”) in 1973 when she was a pupil in a state-funded National School owned and managed by the Catholic Church. National Schools were established in Ireland in the

early nineteenth century as a form of primary school directly financed by the State, but administered jointly by the State, a patron, and local representatives. Under this system the State provided most of the funding and laid down regulations on such matters as the curriculum and teachers’ training and qualifications, but most of the schools were owned by clerics (the patron) who appointed a school manager (invariably a cleric). The patron and manager selected, employed and dismissed teachers.

LH resigned from his post in September 1973 following complaints of abuse by other pupils. However, at that stage the Department of Education and Science was not informed about those complaints and no complaint was made to the police. LH moved to another National School, where he continued to teach until his retirement in 1995. The applicant suppressed the abuse to which she had been subjected and it was not until the late 1990s, after receiving counselling following a police investigation into a complaint by another former pupil, that she realised the connection between her psychological problems and the abuse suffered. She made a statement to the police in 1997. LH was ultimately charged with 386 criminal offences of sexual abuse involving some 21 former pupils of the National School the applicant had attended. In 1998 he pleaded guilty to 21 sample charges and was sentenced to a term of imprisonment.

The applicant was subsequently awarded compensation by the Criminal Injuries Compensation Tribunal and damages in an action against LH. She also brought a civil action in damages alleging negligence, vicarious liability and constitutional responsibility on the part of various State authorities (but for technical reasons, she did not sue the Church). However, the High Court rejected those claims in a judgment that was upheld by the Supreme Court, essentially on the grounds that the Irish Constitution specifically envisaged a ceding of the actual running of National Schools to interests represented by the patron and the manager, that the manager was the more appropriate defendant to the claim in negligence and that the manager had acted as agent of the Church, not of the State.

In her complaint to the European Court, the applicant complained, *inter alia*, that the State had failed to structure the primary education system so as to protect her from abuse (Article 3 ECHR) and that she had not been able to obtain recognition of, or compensation for, the State’s failure to protect her (Article 13 ECHR).

II. It was an inherent obligation of Contracting States to ensure the protection of children from ill-treatment, especially in a primary education context, through the adoption of special measures and safeguards. In this connection, the nature of child sexual abuse was such, particularly when the abuser was in a position of authority over the child, that the existence of useful detection and reporting mechanisms were fundamental to the effective implementation of the criminal law designed to deter such abuse. A State could not absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals. Nor, if the child had selected one of the State-approved education options (whether a National School, a fee-paying school or home schooling), could it be released from its positive obligation to protect simply because of the child's choice of school.

The Court therefore had to decide whether the State's framework of laws, and notably its mechanisms of detection and reporting, had provided effective protection for children attending a National School against any risk of sexual abuse of which the authorities had, or ought to have had, knowledge at the material time. Since the relevant facts had taken place in 1973, any State responsibility in the applicant's case had to be assessed from the point of view of facts and standards existing at that time, disregarding the awareness society had since acquired of the risk of sexual abuse of minors in an educational context.

It was not disputed that the applicant had been sexually abused by LH or that her ill-treatment fell within the scope of Article 3 ECHR. There was also little disagreement between the parties as to the structure of the Irish primary school system, which as a product of Ireland's historical experience was unique in Europe with the State providing for education (setting the curriculum, licencing teachers and funding schools) while the National Schools provided the day-to-day management. Where the parties disagreed was on the resulting liability of the State under domestic law and the Convention.

In determining the State's responsibility, the Court had to examine whether the State should have been aware of a risk of sexual abuse of minors such as the applicant in National Schools at the relevant time and whether it had adequately protected children, through its legal system, from such ill-treatment.

The Court found that the State had to have been aware of the level of sexual crime against minors through its prosecution of such crimes at a significant rate prior to the 1970s. A number of reports from the 1930s to the 1970s gave detailed statistical evidence

on the prosecution rates in Ireland for sexual offences against children. The Ryan Report of May 2009 also evidenced complaints made to the authorities prior to and during the 1970s about the sexual abuse of children by adults. Although that report focused on reformatory and industrial schools, complaints about abuse in National Schools were also recorded.

Accordingly, when relinquishing control of the education of the vast majority of young children to non-State actors, the State should have adopted commensurate measures and safeguards to protect the children from the potential risks to their safety through, at minimum, effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body.

However, the mechanisms that had been put in place and on which the Government relied were not effective. The 1965 Rules for National Schools and the 1970 Guidance Note outlining the practice to be followed for complaints against teachers did not refer to any obligation on a State authority to monitor a teacher's treatment of children or provide a procedure for prompting children or parents to complain about ill-treatment directly to a State authority.

Indeed, the Guidance Note expressly channelled complaints about teachers directly to non-State managers, generally the local priest, as in the applicant's case. Thus, although complaints about LH were in fact made in 1971 and 1973 to the manager of the applicant's school, he did not bring them to the notice of any State authority. Likewise, the system of school inspectors, on which the Government also relied, did not specifically refer to any obligation on the inspectors to inquire into or monitor a teacher's treatment of children, their task principally being to supervise and report on the quality of teaching and academic performance. While the inspector assigned to the applicant's school had made six visits from 1969 to 1973, no complaint had ever been made to him about LH. Indeed, no complaint about LH's activities was made to a State authority until 1995, after his retirement. The Court considered that any system of detection and reporting which allowed over 400 incidents of abuse by a teacher to occur over such a long period had to be considered ineffective.

Adequate action taken on the 1971 complaint could reasonably have been expected to avoid the applicant being abused two years later by the same teacher in the same school. Instead, the lack of any mechanism of effective State control against the known risks of sexual abuse occurring had resulted in the failure by the non-State manager to act on prior complaints of sexual abuse, the applicant's later abuse by LH and, more broadly, the prolonged and

serious sexual misconduct by LH against numerous other students in the same National School. The State had thus failed to fulfil its positive obligation to protect the applicant from sexual abuse.

There had accordingly been a violation of Article 3 ECHR in its substantive aspect.

III. Separate opinions: As soon as a complaint of sexual abuse by LH of a child from the National School was made to the police in 1995, an investigation was opened during which the applicant was given the opportunity to make a statement. The investigation resulted in LH being charged on numerous counts of sexual abuse, convicted and imprisoned. The applicant had not taken issue with the fact that LH was allowed to plead guilty to representative (exemplative) charges or with his sentence. There had accordingly been a no violation of Article 3 ECHR in its procedural aspect.

The applicant had been entitled to a remedy establishing any liability of the State. Accordingly, the proposed civil remedies against other individuals and non-State actors on which the Government had relied must be regarded as ineffective in the present case, regardless of their chances of success. Equally, while central to the procedural guarantees of Article 3 ECHR, LH's conviction was not an effective remedy for the applicant within the meaning of Article 13 ECHR. As to the alleged remedies against the State, it had not been shown that any of the national remedies (the State's vicarious liability, a claim against the State in direct negligence or a constitutional tort claim) was effective as regards the applicant's complaint concerning the State's failure to protect her from abuse. There had accordingly been a violation of Article 13 ECHR.

Cross-references:

European Court of Human Rights:

- *A. v. United Kingdom*, no. 100/1997/884/1096, 23.09.1998, *Reports of Judgments and Decisions* 1998-VI;
- *Airey v. Ireland*, no. 6289/73, 09.10.1979, Series A, no. 32;
- *Beganović v. Croatia*, no. 46423/06, 25.06.2009;
- *C.A.S. and C.S. v. Romania*, no. 26692/05, 20.03.2012;
- *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (merits)*, nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23.07.1968, Series A, no. 6;

- *Campbell and Cosans v. United Kingdom*, nos. 7511/76 and 7743/76, 25.02.1982, Series A, no. 48;
- *Costello-Roberts v. United Kingdom*, no. 13134/87, 25.03.1993, Series A, no. 247 C;
- *D. v. Ireland (dec.)*, no. 26499/02, 27.06.2006;
- *D.P. and J.C. v. United Kingdom*, no. 38719/97, 10.10.2002;
- *E. and Others v. United Kingdom*, no. 33218/96, 26.11.2002;
- *El Masri v. "The former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, 13.12.2012, *Reports of Judgments and Decisions* 2012;
- *Grzelak v. Poland*, no. 7710/02, 15.06.2010;
- *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no. 19986/06, 10.04.2012;
- *Juppala v. Finland*, no. 18620/03, 02.12.2008;
- *M.C. v. Bulgaria*, no. 39272/98, 04.03.2004, *Reports of Judgments and Decisions* 2003-XII;
- *Mahmut Kaya v. Turkey*, no. 22535/93, 28.03.2000, *Reports of Judgments and Decisions* 2000-III;
- *Marckx v. Belgium*, no. 6833/74, 13.06.1979, Series A, no. 31;
- *McFarlane v. Ireland* [GC], no. 31333/06, 10.09.2010;
- *Osman v. United Kingdom*, no. 87/1997/871/1083, 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *Storck v. Germany*, no. 61603/00, 16.06.2005, *Reports of Judgments and Decisions* 2005-V;
- *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18.09.2009, *Reports of Judgments and Decisions* 2009;
- *X and Y v. Netherlands*, no. 8978/80, 26.03.1985, Series A, no. 91;
- *Z and Others v. United Kingdom* [GC], no. 29392/95, 10.05.2001, *Reports of Judgments and Decisions* 2001-V.

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.

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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

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¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

-
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³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁶ Only for issues concerning applicability and not simple application.

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³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

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⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

⁵² Including the body responsible for revising or amending the Constitution.

-
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 - 4.3.2 National language(s)
 - 4.3.3 Regional language(s)
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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

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⁶² Representative/imperative mandates.

⁶³ 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.

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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.

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⁸¹ See also keywords 5.3.41 and 5.2.1.4.

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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.

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⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

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¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Taxes and other duties towards the state.

¹⁰⁹ Universal and equal suffrage.

¹¹⁰ According to the European Convention on Nationality of 1997, ETS no. 166, “‘nationality’ means the legal bond between a person and a state and does not indicate the person’s ethnic origin” (Article 2) and “... with regard to the effects of the Convention, the terms ‘nationality’ and ‘citizenship’ are synonymous” (paragraph 23, Explanatory Memorandum).

¹¹¹ For example, discrimination between married and single persons.

¹¹² This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

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¹¹³ Detention by police.

¹¹⁴ Including questions related to the granting of passports or other travel documents.

¹¹⁵ May include questions of expulsion and extradition.

¹¹⁶ Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

¹¹⁷ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁸ This keyword covers the right of appeal to a court.

¹¹⁹ Including the right to be present at hearing.

¹²⁰ Including challenging of a judge.

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¹²¹ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²² This keyword also includes the right to freely communicate information.

¹²³ Militia, conscientious objection, etc.

¹²⁴ Aspects of the use of names are included either here or under "Right to private life".

¹²⁵ Including compensation issues.

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¹²⁶ This keyword also covers "Freedom of work".

¹²⁷ This should also cover the term freedom of enterprise.

¹²⁸ Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this *Bulletin* are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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