

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
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T. Markert

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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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Kyrgyzstan	A. Baetov		

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

Strasbourg, May 2015

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There was no relevant constitutional case-law during the reference period 1 May 2014 – 31 August 2014 for the following country:

Norway.

Andorra

Constitutional Court

Important decisions

Identification: AND-2014-2-001

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 05.05.2014 / **e)** 2014-1-PI / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 14.05.2014 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension.**

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

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

5.2 Fundamental Rights – **Equality.**

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

Keywords of the alphabetical index:

Crisis / Civil servants / Reduction measures / Proportionality / Pay.

Headnotes:

A preliminary question procedure converted into an abstract mechanism in order for a review of the constitutionality of laws is inadmissible.

The provisions included in law must not only be duly justified in light of the objective pursued but also proportionate.

Summary:

I. The administrative section of the court of first instance (*la Batllia*) referred to the Constitutional Court a preliminary question as to the constitutionality of certain provisions of the law on public expenditure measures that reduce by 5 to 10%, progressively, the

pay of civil servants whose gross salary was € 3,000 per month or more.

The question centred on whether this treatment might be discriminatory, infringing on the principle of equality and the right to contribute to public expenditure according to capacity through a just tax system (Articles 6 and 37 of the Constitution).

Initial discrimination might result from the exclusion by the law itself of its applicability to those civil servants working for certain State bodies which enjoyed budgetary autonomy.

Further discrimination might result from the different treatment between staff employed by the civil service and staff working in the private sector, insofar as the reduction measures might not meet the requirement for reasonable proportionality between the measures adopted and the purposes pursued by the law.

Lastly, the administrative section of the court considered that the pay reduction of the civil servants affected might equate to the introduction of a hidden tax.

II. The Constitutional Court, first, pointed out that the Constitution made provision *expressis verbis* for the budgetary autonomy of certain bodies, as it was the only way of preserving their independence in the day-to-day performance of their function. According to the procedure for a preliminary question, the question referred to the Court must be necessary in order to resolve the dispute on its merits, which was not the case in this instance.

In practice, it was not for the Court to reconsider the substance of the Constitution as it had been intended by the Constituent Assembly. In doing so, the section to which the case was referred could not attempt to convert a procedure for a preliminary question relating to unconstitutionality into an abstract mechanism for the constitutionality of laws. That part of the question therefore had to be considered inadmissible.

Where the second allegation was concerned, after specifying that the distinction made by the law was not a distinction in treatment prohibited by the Constitution (discrimination based on birth, race, gender, origin, etc.), the Court examined whether the justification for the differentiated treatment was reasonable and not disproportionate to the objective pursued by the legislature.

On one hand, it ruled that the staff employed by the civil service were in a legal situation different in nature from those staff who worked in the private

sector (particularly where access to and maintenance of their employment was concerned). On the other hand, it pointed out that the legislature had taken into account not only the acceleration of public expenditure and the stagnation of profits due to the slowing in economic activity, but also the amount of pay, when introducing, progressively, a differentiated legal system which was intended to protect the lowest salaries. The Court concluded that the measures adopted were both duly justified in the light of the objective pursued and proportionate to that objective, since they had taken into account a criterion of progressiveness.

Where the final point relating to the introduction of a hidden tax was concerned, the Court considered that it was inadmissible to place on the same footing the fact of receiving reduced remuneration as compared to the previous pay and the obligation to contribute to public expenditure.

Based on these considerations, the Court ruled that the impugned provisions conformed to the Constitution.

Languages:

Catalan.



Identification: AND-2014-2-002

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 14.07.2014 / **e)** 2014-9-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 30.07.2014 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Address / Summons / Home / Vigilance of the courts.

Headnotes:

The right of access to a court is essential, which depends on the effectiveness of all the other rights guaranteed by the Constitution. Therefore all courts must proactively make access to a court possible for members of the public.

Summary:

I. The applicant alleged that her right of access to a court was violated because she had not been duly summoned to hear an application made against her, notwithstanding the fact that she had appeared before a court for other proceedings with the same participants.

The other party declared that the summons had been delivered to the address that the applicant had supplied to the Court, and that it did not know where she actually lived.

II. The Court declared that the right of access to a court was essential to the proper administration of justice and depended on the effectiveness of all the other rights guaranteed by the Constitution. To that end, all courts must be both particularly vigilant and diligent so to do everything within their power to make effective access to a court possible for members of the public.

In this case, it appears that the plaintiff not only knew that the applicant no longer lived at the address to which the summons had been sent, but also had in its possession her personal telephone number, which should have been obtained for the Court of first instance.

The Court concluded that the aforementioned right had been infringed on because not everything had been done to ensure that the applicant could be duly informed of her summons to appear. It consequently deferred examination of the case until such time as the applicant had been summoned.

Languages:

Catalan.



Armenia

Constitutional Court

Statistical data

1 May 2014 – 31 August 2014

- 51 applications have been filed, including:
 - 10 applications, filed by the President
 - 38 applications, filed by individuals
 - 1 application by a court
 - 2 applications by the Human Rights Defender
- 14 cases have been admitted for review, including:
 - 4 applications, based on individual complaints concerning the constitutionality of certain provisions of laws
 - 10 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
- 9 cases heard and 9 decisions delivered (including decisions on applications filed before the relevant period) including:
 - 6 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 1 decision on cases initiated on individual complaints concerning the constitutionality of certain provisions of laws
 - 1 case on the basis of the application of a court
 - 1 case on the basis of the application of the Human Rights Defender

Important decisions

Identification: ARM-2014-2-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 03.06.2014 / **e)** / **f)** On the conformity with the Constitution of the provisions of Customs Code / **g)** *Tegekagir* (Official Gazette) / **h).**

Keywords of the systematic thesaurus:

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

4.6 Institutions – **Executive bodies.**

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:

Right to property, limitations, seizure, Customs Code.

Headnotes:

The seizure of property guarantees the effectiveness of a procedure instituted as a consequence of a breach in customs rules. One of the principles of administrative responsibility is responsibility in accordance with guilt, which serves as a mandatory mental element of an administrative offence and sole prerequisite for responsibility. This principle also refers to the principle of personal responsibility, according to which a person is deemed responsible only for the offence committed by himself or herself. Interfering with the right to property as a result of another person's wrongdoing to guarantee the fulfilment of obligations of the offender constitutes a disproportionate interference with the right to property of the innocent person.

Summary:

I. The applicant challenged the provision of the Customs Code that allows customs authorities to seize property subject to transportation, irrespective of ownership, to guarantee payment of a fine issued to the person transporting the goods for breaching customs rules. The applicant argued that the regulation contradicts the right to property stipulated in the Constitution, as it deprives a person not responsible for the offence from his or her property. The applicant also stated that the impugned interference with the right to property is not a necessary and appropriate mean for achieving the goals of customs policy. The reason, according to the applicant, is that the elimination of the interference is conditioned by the behaviour of a third party, not the owner of the property.

II. In framing the case, the Constitutional Court assessed the completeness of the legislative mechanisms of the challenged regulation to ascertain the constitutional content of "deprivation of property". The Court also considered whether the argued

regulation falls within the ambit of the meaning of deprivation of property enshrined in Article 31 of the Constitution, whether it causes restriction to right to property, whether it pursues a legitimate aim and is proportionate and necessary in a democratic society for reaching the legitimate aim, and whether the legislation stipulates necessary and sufficient guarantees for protection of human rights within execution of the considered regulation.

Governed by the respective provisions of the Customs Code as well as the Law on Legal Acts, stipulating that chapeaux of articles of laws shall comply with their content, the Constitutional Court stated that the article prescribing the argued provision shall pursue merely an aim to stipulate the terms of returning of the seized goods. The reason is that, as it carries relevant chapeaux, whilst besides its direct content, the discussed article includes the institute of seizure of goods for ensuring the payment of fines and customs payments. In this context, the Court also noted that the Customs Code includes neither a provision stating the appropriate authority of customs authorities, nor a provision regulating the procedure to exercise that authority. Due to the aforementioned, the Court held that a person is deprived of the possibility to protect his or her rights within the current regulation.

Regarding deprivation of property, the Court reiterates the relevant legal positions expressed in its previous decisions. It also stated that in case of deprivation of property, the suspension of right to property towards certain goods is being executed beyond the will of the owner and without any compensation. The deprivation of property is exercised as a sanction, and leads to simultaneous and complete suspension of all proprietary rights without guaranteeing their continuity. The Court considered the discussed institute of seizure of goods in light of the mentioned criteria. It found that it did not fall within the scope of deprivation of property as the goods are being taken for guaranteeing the payment of fines and customs payments. Also, the Court noted that it is not executed as a sanction, and the interference is eliminated after the customs obligations are fulfilled.

The Court referred to Article 1 Protocol 1 ECHR and held that the discussed interference with the right to property aims to ensure the fulfilment of the constitutional obligations concerning the payment of taxes, fines and other payments. Simultaneously the Court stated that the interference is proportionate and necessary for achieving the legitimate aim only if it is directed at restricting the right to property of the wrongdoer and merely within the amount equivalent with the obligation.

Based on the aforementioned, the provision allowing the customs authorities to take the property irrespective of its ownership has been declared unconstitutional and void.

Languages:

Armenian.



Austria

Constitutional Court

Important decisions

Identification: AUT-2014-2-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 12.03.2014 / **e)** B 166/2013 / **f)** / **g)** / **h)** www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

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

5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage.**

Keywords of the alphabetical index:

Charter of Fundamental Rights of the European Union, application / Couple, same-sex / Discrimination, sexual orientation / Equality / Marriage, same-sex.

Headnotes:

Neither Article 14 ECHR, read in conjunction with Article 8 ECHR, nor the general principle of equality enshrined in Article 7 of the Federal Constitutional Act must be construed as precluding the application of a provision that limits the right to marry to heterosexual couples.

Summary:

I. The applicants, two male Dutch citizens who married under Dutch civil law in 2002, requested to renew their marriage in Austria, where they have been living for several years. They claimed that, when dealing with local authorities in addition to their social

and business life, the validity of their marriage has been continually challenged.

The Governor of Tyrol (*Landeshauptmann von Tirol*), acting as the competent registry office of last instance, refused the applicants' request. According to Austrian civil law, marriage is restricted to heterosexual relationships. Same-sex couples can enter a so-called registered partnership (*Eingetragene Partnerschaft*) under the Registered Partnership Act of 2009 (*Eingetragene Partnerschaften-Gesetz*).

The applicants lodged a constitutional complaint against this decision, claiming they were discriminated because of their sex and sexual orientation. They maintained that national legislation was contrary to the constitutional principle of equality, as laid down in Article 7 of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*), Article 14 read in conjunction with Article 8 ECHR as well as Article 21 of the Charter of Fundamental Rights of the European Union (hereinafter, "CFR").

II. The Constitutional Court endorsed the Governor's finding that same-sex marriage is not recognised in the Austrian legal system. The Governor, hence, was not obliged by virtue of the principle of equality to interpret Austrian civil law as allowing same-sex partners to marry. The reason is that neither Article 14 ECHR nor Article 7 of the Federal Constitutional Act imposes an obligation to grant a same-sex couple, such as the applicants, access to marriage.

Regarding Article 21 CFR, the Constitutional Court considered the scope of its application. It claimed that the rights guaranteed by the Charter of Fundamental Rights of the European Union may be invoked as constitutionally guaranteed rights, provided that the guarantee enshrined in the Charter of Fundamental Rights of the European Union is similar in wording and purpose to rights guaranteed by the Austrian Federal Constitution, as is the case with Article 21 CFR.

However, the Constitutional Court found that the national provisions relevant to the case did not implement EU law within the meaning of Article 51.1 CFR, as interpreted by the Court of Justice of the European Union in its settled case-law. Consequently, Article 21 CFR does not apply in the present case. The Constitutional Court added that, even if the Charter of Fundamental Rights of the European Union were applicable, the provisions at issue (as construed by the Governor) would not violate Article 21 CFR, owing to the broad discretion granted to the Contracting States on the issue of same-sex marriage.

Cross-references:

- nos. U 466/11, U 1836/11, 14.03.2012, *Bulletin* 2012/2 [AUT-2012-2-003].

European Court of Human Rights:

- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010.

Court of Justice of the European Union:

- no. C-206/13, 06.03.2014, *Siragusa*.

Languages:

German.

*Identification:* AUT-2014-2-003

a) Austria / b) Constitutional Court / c) / d) 27.06.2014 / e) G 47/2012, G 59/2012, G 62,70,71/2012 / f) / g) / h) www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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:

Database / Data, personal, collecting, processing / Privacy, balance between rights and interests.

Headnotes:

Data retention may be a suitable means to control serious crime. However, whether it conforms with the

requirements of data protection and with the right to respect for privacy depends on the conditions for the storage of such data, requirements governing their deletion, and measures in place to access the retained data.

Summary:

I. Article 102a of the Telecommunication Act of 2003 (*Telekommunikationsgesetz* 2003) obliged providers of public communication services to store certain categories of data from the time of generation or processing up to six months after the communication is terminated. The data were to be stored solely for the purpose of investigating, identifying and prosecuting criminal acts, which shall require, due to the severity, an order pursuant to Article 135 of the Code of Criminal Procedure (*Strafprozessordnung*) (hereinafter, “CCP”).

According to Article 135 CCP, the information contained in such data must be given to prosecution authorities in specific cases and in accordance with national laws. The situations include: if the provision of such information was expected to help investigate a wilfully committed criminal act that carried a sentence of more than six months and the owner of the technical device which was or would be the source or target of data communication granted explicit consent. The data must also be surrendered to competent authorities if such information was expected help investigate a wilfully committed criminal act carrying a sentence of more than one year and it could be assumed based on given facts that the provision of such information would allow data about the accused to be ascertained. Alternatively, if, based on given facts, it was expected that the whereabouts of a fugitive or an absent, accused person who was strongly suspected of having wilfully committed a criminal act carrying a sentence of more than one year could be established.

According to Article 53.3a of the Security Police Act (*Sicherheitspolizeigesetz*), police authorities are entitled to request information concerning the name and address of a user who was assigned an IP address at a particular time from providers of public communication services. They can make the request if the data serve as an essential prerequisite to counter a concrete danger to the life, health or freedom of an individual in the context of the first general obligation to render assistance, a dangerous attack or a criminal association, “even if the use of retained data is required for this”.

Pursuant to Article 53.3b of the Security Police Act, police authorities are further entitled to require from providers of public telecommunication services information about location data and the international

mobile subscriber identity (IMSI) of the carried equipment of a person in danger or a person accompanying the person in danger, “even if the use of retained data is required for this”.

In spring 2012, subscribers to various communication services within the meaning of Article 102a of the Telecommunication Act of 2003 filed a request for constitutional review with the Constitutional Court. They maintained that the provisions governing data retention breached their constitutionally guaranteed rights. The applicants criticised that these provisions required the operator of their communication networks to store specified data without any concrete suspicion, irrespective of technical requirements or billing purposes, and regardless of, or even against, their will.

II. In November 2012, the Constitutional Court stayed its constitutional review proceedings. It referred to the Court of Justice of the European Union for a preliminary ruling as to the question whether the Data Retention Directive of 2006 was compatible with Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union. The reason for this request was that the Directive, if implemented into national law, would be incompatible with the fundamental rights to respect for private life pursuant to Article 8 ECHR and to protection of personal data set out in Article 1 of the Data Protection Act of 2000 (hereinafter, “CPA 2000”, *Datenschutzgesetz* 2000). As a result, the Constitutional Court could be precluded from reviewing the legal regulations on data retention. On 8 April 2014, however, the Court of Justice of the European Union ruled that the Data Retention Directive was invalid. Consequently, there was no obstacle for the Constitutional Court to assess the provisions under review against the measure of the fundamental right to protection of personal data.

Pursuant to Article 1 CPA 2000, every person is entitled to secrecy for personal data concerning him or her, especially with regard to his or her private and family life, insofar as he or she has an interest worthy of such protection. Any restriction to this right must be based on laws necessary for the reasons stated in Article 8.2 ECHR. Going beyond Article 8.2 ECHR, Article 1.2 CPA 2000 requires that any law providing for the use of data worthy of special protection must provide suitable safeguards for the protection of the private interest in secrecy.

The Constitutional Court held that both the storage of personal data of the users of public communication services and the obligation to provide information about this data to police and prosecution authorities constitute an interference with the fundamental right to data protection and the right to respect for private and family life.

The Constitutional Court agreed that the provisions concerning the retention of data and information on retained data were, in principle, suitable to achieve the objectives mentioned in Article 8 ECHR, particularly the maintenance of public peace and order and the protection of rights and freedoms of others.

However, as the provisions under review did not establish any limitation relating to the seriousness of the offence that would justify interference with the fundamental rights of the individuals concerned, the Constitutional Court found that this interference was not proportionate to the aim pursued.

Moreover, the Constitutional Court established that the retention of personal data failed to satisfy the requirement of proportionality. The Court pointed out that this measure was particularly burdensome, given that, first, it concerned the exercise of fundamental rights, particularly the freedom of expression, information and communication. Secondly, the vast majority of the individuals affected were without previous criminal conviction. Lastly, a vast number of people could potentially have access to the stored data, which posed an increased risk of unauthorised access and abusive use of personal data.

However, the statutory rules regarding the data retention lacked appropriate measures to alleviate this interference, such as criminalising any improper use of retained data and ensuring that individuals affected could exercise their right to erase *vis-à-vis* providers of public communication services effectively.

Finally, with a view to the right of erasure, the national law did not provide any specifics that would address the requirement of a statutory regulation within the meaning of Article 1.2 CPA 2000. In particular, it was unclear if the data had to be deleted in such a way that the recoverability of the data was excluded.

Cross-references:

Court of Justice of the European Union:

- nos. C-293/12 and C-594/12, 08.04.2014, *Digital Rights Ireland Ltd et al.*

Languages:

German.



Azerbaijan

Constitutional Court

Important decisions

Identification: AZE-2014-2-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 04.04.2014 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazeti, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Private property, equal protection.

Headnotes:

The restrictions that may be placed on the right to property in the Constitution are subject to limits under the Constitution. The restriction of the right to property should be executed with reference to the principle of proportionality. As regards the disposal and sale of property in common ownership, the rights of some owners in connection with the possession, usage and disposal of the property cannot be considered above the rights of others. The possibility of exercising the right to property has to be equal for all parties.

Summary:

I. The Court of Appeal of Ganja city requested an interpretation from the Constitutional Court of a number of provisions of Articles 220.6 and 221 of the Civil Code with reference to Articles 13 and 29 of the Constitution and Article 1 Protocol 1 ECHR concerning the right to property.

By a decision of the Agstafa Region Court each of the five heirs of the late F. Mehdiyev was allocated a one-fifth part and ownership rights of 0.12 hectare backyard land and an individual dwelling house located at Dag Kesemen village in Agstafa Region. Four of the

heirs filed a claim in court against the fifth heir, seeking a decision from the court to order the sale of the disputed house.

The Agstafa Region Court did not uphold the claim. One of the claimants brought an appeal against the judgment of the court of first instance, seeking cancellation of that court's decision and full satisfaction of the claim.

The appellant noted that Articles 220.3-220.5 of the Civil Code establish rules for the division of property in common ownership and for the apportionment of property shares.

The Court of Appeal of Ganja city sought interpretation from the Constitutional Court of two relevant provisions, as to their compatibility with Articles 13 and 29 of the Constitution and Article 1 Protocol 1 ECHR. First, a provision of Article 220.6 of the Civil Code, which states: "in the event of obvious inability to resolve the division of common property or the separation of a share from it according to Articles 220.3-220.5 of this Code, a court may take a decision on the sale of property at public auction and division of the sale proceeds among the owners of common ownership in proportion to their shares". Second, a provision of Article 221 of the mentioned Code, which states: "in the event participants cannot come to an agreement on the type of termination of their property rights, property shall be physically divided, and where such division is not possible without significant depreciation of the property's value it shall be sold at public auction or auction with the participation of just the owners".

II. The Constitutional Court *en banc* in its judgment observed that property is inviolable and protected by the state. Everyone has the right to own property. The law protects the right to property, including the right to private property. Everyone may have movable and immovable property. The right to property includes the right to possess, use and dispose of property individually or jointly with others.

According to the Civil Code, property may be in common ownership with the establishment of shares of each of the owners (shared ownership) or without the establishment of such shares (joint ownership).

In contrast to owners possessing the right of an entire private property, owners of shared property are not free in exercising their powers over the property.

The applicable civil legislation grants to the owner of shared property the right to divide or apportion that part belonging to him or her from the general property. This

right is one of the ways the right to dispose of a share in common ownership can be implemented.

The owner of shared property may demand the separation of his or her share in kind in a court order in the event the owners of the shared property cannot come to an agreement on procedures and conditions for the division of that property or the separation of a share from it. In the event that a separation of a share in kind is not permitted or where it is not possible without causing disproportionate damage to the property in common ownership, the separating owner has the right to receive compensation from the other owners for the value of his or her share.

Deprivation of the right to one's share of common property is possible only in exceptional cases. The issue of the existence of an essential interest in the use of the general property of an owner of common property in each case is resolved by the courts by research and through the assessment of evidence presented by the parties.

The Civil Code does not envisage the deprivation of the property right of an owner who does not claim separation of his or her share from the common property, by means of payment of compensation by the other owners against the will of that owner. Such an approach would contradict the principle of the inviolability of ownership rights.

The Constitutional Court attached importance to the setting of limits of possible restrictions on the right of ownership stipulated in the Constitution.

The restriction of the right to property is permitted under the observance of the following specified principles. The rights of some of the owners in connection with the possession, usage and disposal of the property cannot be considered above the rights of the others. The possibility of exercising the right to property has to be equal for all parties. In this regard, it is important to note that the judgment concerning the sale of property through a public auction was adopted with the purpose of ensuring the rights of the other owners.

The Constitutional Court held that the restriction of any right stipulated in the Constitution, including the right to property, should be executed with reference to the principle of proportionality.

In the absence of any opportunity for the other participants of payment of compensation or a refusal of payment of compensation, the issue concerning the sale of property through an auction based on a court judgment can be considered. At the same time, where it is impossible to apportion of a share in

kind and the owner refuses to accept monetary compensation for a share, this owner cannot demand the sale of the property through a public auction. One of the owners of a common property also has no right to demand a sale of the direct property through a public auction.

The Constitutional Court considered that according to Articles 220.6 and 221 of the Civil Code the decision of the court of first instance on the sale of the property from the public auction without the consent of all owners and the division of the money received from the sale between owners of the general property in proportion to their shares cannot be regarded as an unlawful restriction of the property right. The sale of property in common ownership through a public auction and the division of the money received from the sale between the owners in proportion to their shares on the basis of a court judgment are possible after the consecutive application of the provisions provided in Article 220.3-220.4 of the Civil Code.

Languages:

Azeri, English (translation by the Court).



Belarus

Constitutional Court

Important decisions

Identification: BLR-2014-2-003

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 12.06.2014 / **e)** J-928/2014 / **f)** On the conformity of Articles 29.1.7 and 303.1.1 of the Code of Criminal Procedure of the Republic of Belarus to the Constitution of the Republic of Belarus / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2014; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Deceased / Case, criminal, termination of proceedings / Honour and dignity, defence.

Headnotes:

The protection of personal dignity and honour extends after a person's life period, which obliges the government to establish legal guarantees to ensure judicial protection of this right. This right enables close relatives to demand the rehabilitation of the deceased in criminal proceedings. As such, provisions of the Code of Criminal Procedure – permitting authorities to refuse to institute criminal proceedings, to terminate preliminary investigation and to terminate criminal proceedings on non-rehabilitative grounds with respect to the deceased without consent of close relatives – are unconstitutional.

Summary:

I. Upon a proposal of the House of Representatives of the National Assembly, the Constitutional Court

reviewed the rules of the Code of Criminal Procedure (hereinafter, the "Code") regarding the termination of a criminal prosecution of a deceased on non-rehabilitative grounds. The National Assembly argued that the termination of a criminal case and possible legal consequences thereof considerably affect the honour and good name of a deceased as well as legitimate interests of his close relatives.

Specifically, under the Code, criminal proceedings with regard to a deceased may not be instituted and proceedings already instituted shall be terminated with exception of cases when the criminal proceedings shall be carried out with the view of rehabilitating the deceased.

II. The Constitutional Court considered the case in light of Articles 25.1, 26, 28 and 60 of the Constitution. These articles concern the state's protection of personal dignity, the presumption of innocence, and the right to protection against encroachments upon a person's dignity and honour. The articles also relate to the protection of a person's rights and freedoms by a competent, independent and impartial court as well as to provisions of international legal acts that safeguard a person's right to ascertain the reasonableness of criminal charges brought against him by a competent, independent and impartial court.

On this basis, the Constitutional Court examined the challenged provisions, specifically the refusal to institute criminal proceedings, the termination of preliminary investigation, and the termination of criminal proceedings by a judge in assigning a day for court session or at trial. It also reviewed current legislation that does not require consent of close relatives of a suspect or accused, who is now deceased, to conduct the mentioned criminal procedural actions.

The Constitutional Court concluded that the legislation does not uphold the rehabilitation of the deceased for the purpose of protecting his dignity and honour. It emphasised that the constitutional right to protection against encroachments upon a person's dignity and honour covers not only his life period. This right obliges the government to set up legal guarantees to ensure judicial protection of personal dignity and honour after the death and thereby includes a right of close relatives to demand the rehabilitation of the deceased in criminal proceedings with observance of the constitutional principle of exercising justice based on the adversarial nature of the trial and equality of the prosecution and the defence.

In this regard, the Constitutional Court found that there must be provisions set in the Code that address the right of close relatives to claim the criminal proceedings to be continued with the purpose of possible rehabilitation of a deceased. Additionally, the provisions must establish the legal status of these participants to criminal proceedings, including their rights and duties, as well as lay down specifics of the preliminary investigation and court hearing in case of the death of a suspect or accused.

The Constitutional Court recognised provisions of Articles 29.1.7, 250.1, 279.1, 303.1.1 of the Code of Criminal Procedure as not conforming to Articles 25.1, 26, 28 and 60 of the Constitution to the extent they entitle a prosecuting body in case of the death of a suspect or accused to refuse to institute criminal proceedings and to terminate proceedings already instituted without the consent of his close relatives.

Languages:

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



Identification: BLR-2014-2-004

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 20.06.2014 / **e)** D-931/2014 / **f)** On the conformity of the Law of the Republic of Belarus “On Making Alterations and Addenda to Certain Laws of the Republic of Belarus on Improvement of Economic Judicial Proceedings” to the Constitution of the Republic of Belarus / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2014; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

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.**

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

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:

Pre-trial, procedure / Evidence, admissibility / Proceedings, adversarial, nature.

Headnotes:

The procedures for parties to submit evidence in a case, participate in the open court session examination during the dispute settlement on the merits, to use electronic documents circulation and information technology in economic judicial proceedings are intended to ensure the constitutional principle of adversarial proceedings and equality of the parties.

The possibility to use the pre-trial dispute settlement to protect the rights, freedoms and legitimate interests serves as an additional legal remedy and does not limit the constitutional right to judicial protection, as well as limit the court's jurisdiction.

Summary:

The Constitutional Court, in carrying out its obligation to review laws adopted by Parliament before the President can sign them, considered the constitutionality of the Law on Making Alterations and Addenda to Certain Laws of the Republic of Belarus on Improvement of Economic Judicial Proceedings (hereinafter, the “Law”).

Article 1.34 and Article 1.62 of the Law make alterations and addenda to the Code of Economic Procedure (hereinafter, “CEP”). Besides reinforcing the principle of the adversarial nature of the proceedings, the articles raise the responsibility of the parties in a case to provide complete evidence and quality documents that are submitted to the court. The procedure to submit evidence obtained through modern communication technologies is also established.

In reviewing the Law, the Constitutional Court proceeded from the following: first, it considered the procedure for parties to submit evidence in support of their position with respect to all circumstances of the case, the parties' participation in their examination in open court session during the dispute settlement on the merits, and the use of electronic circulation of documents and information technology in economic judicial proceedings. The Court acknowledged that the above are aimed at ensuring the constitutional

principle of adversarial proceedings and equality of the parties (Article 115.1 of the Constitution). At the same time, they create proper conditions for a full and complete investigation of evidence relevant to correctly apply the legislation during the case settlement, for access to judicial protection of the rights of individuals and legal entities, and for their interests to be protected by law.

Second, the Law expands the jurisdiction of courts considering economic cases. The Constitutional Court drew attention to the provision of Article 266².3 of the CEP. This article stipulates that the complaint against the reply of the state body or organisation on applications of legal entities, individual entrepreneurs and individuals may be filed in the court considering economic cases no later than one month from the date of receipt by the applicant of the response of the superior body on the application (in the absence of a mandatory pre-trial procedure of appeal). The period can begin from the date of receipt by the applicant of the response of the organisation (individual entrepreneur). Alternatively, the period can begin from the date of expiration of one month from filing of the complaint against the reply on the application to the superior organisation, if the applicant has not received its answer.

When evaluating this provision, the Constitutional Court took into account Article 60.1 of the Constitution. This article states that every subject of a legal relationship, in the case his rights and freedoms are violated, may apply to the court for protection. The constitutional provision neither limits the admissibility of judicial protection to only after the pre-trial settlement of the dispute nor stipulates the inadmissibility of the administration of justice without its application. The possibility to use the pre-trial settlement of the dispute to protect the rights, freedoms and legitimate interests serves as an additional legal remedy and is not a limitation of the constitutional right to judicial protection, as well as not a limitation of the court's jurisdiction.

The Constitutional Court accordingly deemed the Law on Making Alterations and Addenda to Certain Laws of the Republic of Belarus on Improvement of Economic Judicial Proceedings constitutional.

Languages:

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



Belgium Constitutional Court

Important decisions

Identification: BEL-2014-2-003

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 08.05.2014 / **e)** 80/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.06.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality.**

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

5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach.**

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

Keywords of the alphabetical index:

Education, private / Education, school, choice / Education, compulsory / Education, home schooling / Education, parents' free choice / Education, quality / Child, best interests / Fundamental rights, conflicts / Education, freedom to organise, limit / Education, equality of children / Education, respect for fundamental rights / Education, schooling, compulsory.

Headnotes:

The freedom of education guaranteed by Article 24.1 of the Constitution secures the right to establish – and therefore to choose – schools founded on a given religious or non-religious philosophy. It also implies that private individuals may – without prior authorisation and subjection to compliance with fundamental rights and freedoms – organise and provide education in line with their own ideas in terms of both form and substance, for example by establishing schools the particular nature of which is to be found in their specific approach to teaching or education.

Freedom of education comprises parents' free choice of the form of education, and in particular the choice

of home education provided by the parents, or group home education provided in an establishment that is neither accredited, nor funded nor subsidised within the meaning of the decree of 19 July 2013. However, this free choice available to parents must be interpreted taking account, firstly, of the best interests of the child and his or her fundamental right to education, and secondly, of compliance with the compulsory schooling requirement.

The child's right to education may therefore restrict the parents' freedom of choice and the freedom of teachers with regard to the teaching they wish to provide to a child who is subject to compulsory schooling.

Summary:

I. The Constitutional Court received several applications to set aside a decree of the Flemish Community on home education lodged by either parents providing their child with home education, private Jewish schools which were neither accredited, subsidised nor financed by the Flemish Community, or parents of children attending those private schools.

The aim of the contested provisions was to improve the supervision, by the education inspectorate and examination panel, of the quality of the home education provided to children subject to compulsory schooling.

II. The Constitutional Court first of all examined the complaints regarding the freedom of education. It accepted that home education was one way of meeting the compulsory schooling requirement but held that parents who opted for this form of education could nonetheless not be exempt from complying, for their children, with this requirement and could not disregard their children's right to education. The need to ensure that the compulsory schooling requirement is satisfied may therefore lead the communities, which in Belgium have competence for educational matters, to introduce supervision mechanisms to verify that all children do in practice receive education of a standard that satisfies the compulsory schooling requirement, so as to guarantee their right to education.

The Court therefore considered that it had to verify whether the impugned provisions violated the pedagogical freedom which was implied by the freedom of education and whether they were disproportionate insofar as they went beyond what was necessary to achieve the public interest goals pursued, namely to ensure the quality and equivalence of education.

The Court held that it was compatible with the freedom of education for the children to have to take examinations at specified times before an examination panel since such examinations, far from violating the freedom of education, were a means of enabling parents and teachers to assess, and if necessary adapt, the level of education provided and the teaching tools used.

The Court further noted that the impugned provisions were not such as to impose a study programme for home schooling teachers. Accordingly, in view of the features specific to home teaching and the freedom of education, the assessment of the level of studies, carried out by the panel appointed by the Flemish Community, had to take into consideration the teaching methods and the ideological, philosophical or religious ideas of the parents or teachers, provided that such methods and ideas did not disregard the child's right to receive education with due regard for fundamental rights and freedoms and did not adversely affect either the quality of education or the level of studies to be attained.

The Court accepted that it was not unreasonable for the impugned provisions to take the view that failure at the examination by children schooled at home was an indication that there were shortcomings in the education they were given, and that it was in keeping with the objective of guaranteeing the right to education of all children subject to compulsory schooling and with their interests, to provide for a change in the type of education they received by enrolling them in a school or training centre stipulated in the decree.

Consequently, the Court held that there was no violation of the freedom of education.

It further considered that there was no violation of the right to education.

With regard to the principle of equality in education, the Court declared one of the complaints raised by the applicants regarding the lack of transitional measure to be well-founded. It held that the authors of decrees could, if they felt a change in policy was called for, decide to give them immediate effect and were therefore not required, in principle, to provide for a transitional arrangement. There could, however, be a violation of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) if the transitional arrangement or the lack of any such arrangement entailed a difference in treatment that could not reasonably be justified or if it was excessively detrimental to the principle of legitimate expectations. Such was the case where the legitimate expectations of a given category of the population suffered prejudice without there being a compelling

public interest reason to justify the absence of a transitional arrangement for their benefit.

The Court linked this principle of legitimate expectation to the principle of legal certainty. In the instant case, one of the provisions in the decree had disproportionate consequences, in the Court's view, and was unduly prejudicial to the legitimate expectations of certain children subject to compulsory schooling and their parents by the fact that the deadline for obtaining the secondary education certificate via the examination panel was less than a year, which did not leave sufficient time for the child and the teacher to prepare properly for the exam.

Accordingly, the Court cancelled one of the provisions of the decree which stipulated that the provision regarding this exam would enter into force on 1 September 2013. Moreover, it had already suspended this provision in its Judgment no. 37/2014 of 27 February 2014 (cf. www.const-court.be).

Furthermore, the Court rejected the arguments regarding the right to private life, freedom of worship and expression, freedom of association and the right to cultural and social development.

Cross-references:

- no. 107/2009, 09.07.2009, *Bulletin* 2009/2 [BEL-2009-2-007];
- no. 168/2009, 29.10.2009, *Bulletin* 2009/3 [BEL-2009-3-011].

Languages:

French, Dutch, German.



Identification: BEL-2014-2-004

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 12.06.2014 / **e)** 89/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.08.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.14 General Principles – ***Nullum crimen, nulla poena sine lege***.

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

Keywords of the alphabetical index:

Criminal law, offence, definition / Criminal law, organisation, terrorist, participation / Criminal law, punishment, individualised / Criminal law, offence, definition, moral aspect / Organised crime / Organised crime, fight / Terrorism.

Headnotes:

It is not contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) to categorise as a criminal offence the fact of “belonging, consciously and willingly” to a criminal organisation, even where the person concerned had no intention of committing an offence as part of this organisation or of being involved in the offence, whereas in order to classify as a criminal offence involvement with an association of criminals or the fact of belonging to a terrorist group, it was necessary to establish a closer link between the perpetrator and the crimes committed by the group.

Summary:

I. The Ghent Court of Appeal asked the Constitutional Court whether it was discriminatory to classify as a criminal offence the fact of belonging to a criminal organisation, even where the person concerned had no intention of committing an offence as part of that organisation or of being involved in that offence (Article 324ter of the Criminal Code), whereas mere participation was not sufficient for the prosecution of a terrorist organisation (Articles 139-141ter of the Criminal Code) or in the case of an association of criminals (Articles 322-324ter of the Criminal Code).

II. The Court observed first of all that a person who “participates” in the activities of a criminal organisation (Article 324ter of the Criminal Code, replaced by the Law of 10 August 2005) was already liable for criminal sanctions under the previous provisions if he or she “belonged” to a criminal organisation (former Article 324ter of the Criminal Code) and that the court *a quo* had held that it was necessary to assign to this “participation” the same scope as to “belonging” to that organisation. In connection with this previous classification of “belonging” as constituting a criminal offence, the Court had already held in its Judgments nos. 92/2005 of 11 May 2005 and 116/2005 of 30 June 2005, that this was sufficiently clear and therefore satisfied the principle of the requirement to comply with statute in criminal matters (Articles 12

and 14 of the Constitution – *nulla poena sine lege* – *nullum crimen sine lege*).

Article 324ter of the Criminal Code punishes anyone who “consciously and willingly is part of” a criminal organisation. Under paragraph 1 of Article 324bis, “a criminal organisation is a structured association of more than two persons, set up on a long-term basis, in order to commit, in a concerted manner, crimes and offences punishable by a prison sentence of three years, or a more serious penalty, in order to obtain, directly or indirectly, material benefit”.

With regard to the scope of Article 324ter of the Criminal Code, the Court drew on the preparatory documents relating to this article. It emerged from these documents that “it was the wish of the authors of the Code to also prosecute the members of a criminal organisation, such as the driver, the domestic and security staff of the leader of a criminal organisation and all those who were remunerated in one form or another by the criminal organisation forming a circle of social relationships of benefit to the organisation conferring upon it a legitimate social appearance and presence in society” and that the prosecuting authority must show that the person being prosecuted had a positive attitude, fully aware of all the implications.

It was therefore clear from the preparatory documents that paragraph 1 of Article 324ter of the Criminal Code categorised as a criminal offence the fact of belonging consciously and willingly to a criminal organisation as defined above, where the latter used certain methods to achieve its aims, even in respect of people who had not themselves committed or intended to commit an offence as part of this organisation, nor had the intention of being involved in that offence as accomplice or co-perpetrator.

The Court pointed out that in taking the view that it was necessary to penalise certain types of behaviour, it was in principle within the legislature’s power of discretion to determine the types of behaviour that warranted criminal punishment. However, there had to be reasonable justification for the choices it made.

The Court first of all made a comparison with the offences in the context of an association of criminals (Articles 322-324 of the Criminal Code) based on the preparatory documents. In an association of criminals, each member of that association had a personal intention to commit crimes or to be a member of that association. While in the case of such associations, the main objective was the personal enrichment of each individual member, criminal organisations had a hierarchical structure which meant that any enrichment was generally to the profit

of those at the head of the organisation, whereas ordinary members generally received a sort of salary (sometimes legal).

The Court concluded that, bearing in mind the purpose of the provision in question, which was to combat criminal organisations which in most cases had considerable financial resources and were almost invisibly interwoven into the fabric of society, the factors discussed in the preparatory documents give reasonable justification for the view that contrary to mere participation in an association of criminals, the very fact of merely belonging, consciously and willingly, to a criminal organisation should be punished in cases where that organisation used intimidation, threats, violence, fraud or corruption and used commercial or other entities to conceal or facilitate the commission of offences.

The Court acknowledged that in this regard the legislature had quite reasonably taken the view that the rules applicable to an association of criminals, including those relating to participation referred to in Articles 66 to 69 of the Criminal Code, had proven to be inadequate in the fight against criminal organisations.

Subsequently, when it compared the offences relating to criminal organisations and to terrorist organisations, the Court observed that both definitions of offences related to a structured association, having a certain degree of permanence, established to commit in a concerted way specific offences. Even though mere belonging to a terrorist group had not been made a criminal offence as was, in contrast, the case in respect of a criminal organisation, Article 140 of the Criminal Code stipulated that participation in any activity of a terrorist group was liable to criminal penalties if the person taking part had been aware that in so doing he or she was helping commit a crime or offence by the terrorist group.

The Court acknowledged that the legislature had quite reasonably taken the view that it was necessary to provide for the prosecution of individuals who – regardless of whether or not they intended to commit specific offences as part of an organisation or to be involved in those offences in one of the ways provided for in Articles 66 to 69 of the Criminal Code – were consciously and willingly part of that organisation, where the latter used intimidation, threats, violence, fraud or corruption or used commercial or other entities to conceal or facilitate the commission of offences.

According to the Court, such a legitimate measure did not cease to be justified simply because the legislature had not adopted the same approach to

defining as a criminal offence the participation of individuals in other acts or censurable organisations, and in particular involvement with a terrorist group. It had taken into account the fact that criminal organisations, given their aim of making a profit, generally carried out activities which were both legal and illegal, whereas terrorist organisations committed terrorist crimes within the meaning of Article 137 of the Criminal Code.

Furthermore, the Court held that the measure did not have disproportionate effects vis-à-vis the objective pursued by the legislature: the tenacity with which criminal organisations appeared or continued to operate, despite the range of criminal sanctions in place, including the provisions on punishable participation, and the fact that it was difficult – and indeed sometimes impossible – to identify those within the criminal organisation who intended to commit the organisation's crimes or be involved in them and those who merely provided equipment or services, whether legal or illegal, which could be used by the organisation, could reasonably justify the adoption by the legislature of the measure in question, provided it concerned individuals who, consciously and willingly, were part of a criminal organisation where the latter engaged in the activities referred to in paragraph 1 of Article 324ter of the Criminal Code and committed crimes or offences punishable by three years' imprisonment or a heavier penalty.

Nonetheless, the Court stressed that it had to be firmly established that the person in question knew that the criminal organisation used one of the methods referred to in Article 324ter of the Criminal Code (intimidation, threats, violence, fraud or corruption and used commercial or other entities to conceal or facilitate the commission of offences).

Subject to this, the Court concluded that classifying as a criminal offence the fact of belonging "consciously and willingly" to a criminal organisation was not contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). This specific interpretation was included in the operative part of the judgment.

Languages:

French, Dutch, German.



Identification: BEL-2014-2-005

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 30.06.2014 / **e)** 99/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.09.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

3.16 General Principles – **Proportionality.**

4.7.16.1 Institutions – Judicial bodies – Liability – **Liability of the State.**

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:

Liability, State, fault, court, last instance / Liability, State, qualified fault.

Headnotes:

Article 1382 of the Civil Code violates Articles 10 and 11 of the Constitution if it is interpreted as precluding the State from incurring liability for a fault committed, in the exercise of the judicial function, by a court ruling at last instance until the decision has been withdrawn or set aside, even though the fault is a patent violation of the applicable legal rules but, because of the limited remedies available, does not constitute a basis for annulling the decision.

Summary:

I. The Brussels Court of First Instance applied to the Constitutional Court for a preliminary ruling on the compatibility of Article 1382 of the Civil Code with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken together, if appropriate, with Articles 6 and 13 ECHR. Article 1382 of the Civil Code provides as follows: "Any act committed by a person which causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it".

The municipality of Schaerbeek, the plaintiff in the proceedings before the Court a quo, asked the Belgian State to make reparation for the damage it had allegedly suffered by reason of faults committed

by the Council of State, the highest administrative court, in hearing an appeal lodged by that municipality against a ruling of the Judicial Board of the Brussels-Capital Region, which had dismissed an action by the municipality contesting a municipal councillor's compliance with the eligibility conditions.

The Court *a quo* relied on the established case-law of the Court of Cassation according to which the State can only incur liability for a fault committed in the exercise of the judicial function if the impugned decision is withdrawn, amended or set aside by a final court decision for violation of an established legal rule. In other words, the impugned court decision must be erased through the implementation of a remedy, but this interpretation of Article 1382 of the Civil Code also implies that, in principle, no redress is possible for damage resulting from last-instance decisions like the judgments of the Council of State, which, with some exceptions, are not open to appeal.

The Court *a quo* asked whether, in this interpretation, Article 1382 of the Civil Code did not in fact give rise to discrimination between victims of a fault committed in the exercise of the judicial function. According to the Court, the application for a preliminary ruling actually concerns the issue of equality of treatment between two fundamentally different categories of persons, only one of which has a remedy that can be used to erase a prior judicial decision.

II. The Court ruled that the principle of legal certainty, which is inherent in the domestic legal order as well as in the legal order of the European Union and the European Convention on Human Rights, is a legitimate goal which is rightly pursued because it ensures that judicial decisions are not disputed indefinitely.

It was important, however, to strike a proper balance between legal certainty and the victim's right of access to a court to obtain redress.

Even if this right of access to a court was not absolute (the Court referred in this connection to the case-law of the European Court of Human Rights: Grand Chamber, 19 December 2005, *Roche v. United Kingdom*, §§ 119 ff.; 28 May 1985, *Ashingdane v. United Kingdom*, §§ 59 ff.; Grand Chamber, 14 December 2006, *Markovic v. Italy*, §§ 92 ff.), the Court considered that preventing the victim of a fault committed by a court of last instance in the exercise of the judicial function from raising the issue of the State's liability until the impugned decision has been annulled may have disproportionate effects in relation to the aim pursued.

However, for a proper balance to be struck between legal certainty and the right of access to a court, the State's liability must only come into play if the court of last instance has committed a patent violation of the applicable legal rules in the exercise of the judicial function.

The Court held, on the one hand, that Article 1382 of the Civil Code was contrary to Articles 10 and 11 of the Constitution if it was interpreted as precluding the State from incurring liability for a fault committed, in the exercise of the judicial function, by a court ruling at last instance until the decision had been withdrawn or set aside, even though the fault was a patent violation of the applicable legal rules but, because of the limited remedies available, did not constitute a basis for annulling the decision.

On the other hand, it held, after including Articles 6 and 13 ECHR in its review, together with the case-law of the European Court of Human Rights on the concept of "patent violation", that this provision was not contrary to Articles 10 and 11 of the Constitution if it was interpreted as not precluding the State from incurring liability for a fault committed, in the exercise of the judicial function, by a court ruling at last instance until the decision had been withdrawn or set aside, even though the fault was a patent violation of the applicable legal rules but, because of the limited remedies available, did not constitute a basis for annulling the decision.

Languages:

French, Dutch, German.



Identification: BEL-2014-2-006

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 17.07.2014 / **e)** 112/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette), 24.11.2014 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.
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:

Administrative sanction, classification / Sanction, individualisation, enforcement of sentence, suspended sentence / Sanction, suspension of sentence / Legislative gap.

Headnotes:

Subject to the condition that it may not take any manifestly unreasonable measure, or have the effect of depriving one category of persons of the right to a fair hearing before an impartial and independent tribunal, as guaranteed by Article 6.1 ECHR, it is for the legislature to determine whether it is desirable to compel courts to show severity when an offence is particularly detrimental to the general interest. This severity may, among other things, affect suspended sentences.

It is discriminatory that the labour court should be unable to give a suspended sentence when imposing a penalty for an offence of a criminal nature, when the defendant can be given a suspended sentence for the same offence in proceedings before a criminal court. However, the fact that the labour court is unable to give a suspended sentence does not violate the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Summary:

I. The Brussels Labour Court applied to the Constitutional Court for a preliminary ruling on a legislative provision under which employers who fail to comply with the legislative provisions relating to the solidarity contribution which is payable when they place at an employee's disposal a vehicle also intended to be used for other than strictly professional purposes, are liable for a lump-sum penalty payment equal to twice the amount of the unpaid contribution.

The Court *a quo* sought the court's opinion on the compatibility of this provision with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), combined or not with Article 6 ECHR and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), in that it does not give courts the option of suspending the penalty for non-payment of the solidarity contribution, whereas employers prosecuted for the same offence in a criminal court are entitled to the application of the Law of 29 June 1964 on suspended sentences and probation.

II. The Court noted that the solidarity contribution is justified by the fact that employers who place at an

employee's disposal a vehicle also intended to be used for purposes that are not strictly professional are providing a benefit to that employee. This benefit is exempt from the application of ordinary social security contributions since the private use of a company vehicle is not regarded as a form of remuneration.

After examining the *travaux préparatoires* of the law, the Court held that the lump-sum penalty payment was predominantly punitive in nature and must therefore be regarded as a criminal-law provision within the meaning of Article 6 ECHR.

The Court based its finding on the fact that this payment was not calculated in such a way as to provide lump-sum compensation for the unpaid contribution and the administrative costs involved in establishing the offence.

The Court noted that the system of sanctions in question might differ in several respects from the system of criminal sanctions provided for in the Social Criminal Code. Such differences might be relevant in justifying the application of specific rules in some fields, but this was not the case in the field which was the subject of the application for a preliminary ruling: whether given by a criminal court or by another court, such as a labour court, a suspended sentence could encourage the sentenced person to mend his ways in view of the threat to enforce the pecuniary sanction if he were to re-offend. The Court concluded, therefore, that the difference of treatment, in terms of entitlement to a suspended sentence, between an employer prosecuted in a criminal court and one who lodges an appeal with the labour court against the lump-sum penalty payment is not reasonably justified.

However, this discrimination is due to neither of the provisions at issue, but to the lack of any legislative provision allowing employers sentenced to a lump-sum penalty payment to benefit from a suspended sentence. It is for the legislature to determine the conditions under which a suspended sentence may be ordered in this field and the conditions under which a suspended sentence may be lifted, and the procedure for so doing.

On the other hand, the Court considers that the inability of the labour courts to grant a suspension of sentence can be justified in relation to the principle of equality and non-discrimination. Indeed, such a measure is not reconcilable with proceedings not conducted before a criminal court. The decision given by a labour court does not order a penalty but reviews the administrative decision by which a penalty is imposed.

In the operative part, the Court finds that the provisions at issue are not in breach of the Constitution, but also notes that the lack of a legislative provision allowing employers sentenced to a lump-sum penalty payment to benefit from a suspended sentence violates Articles 10 and 11 of the Constitution.

Cross-references:

- no. 40/97, 14.07.1997, *Bulletin* 1997/2 [BEL-1997-2-006];
- no. 77/2001, 07.06.2001, *Bulletin* 2001/2 [BEL-2001-2-006].

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2014-2-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 04.07.2014 / **e)** U 10/14 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Conflict of powers.

Headnotes:

Because the status of permanent residence is regulated by State law, the institutions of Bosnia and Herzegovina – not any of the bodies of the entity of *Republika Srpska* – possess exclusive jurisdiction on this matter.

Summary:

I. The applicants requested the Constitutional Court to review the Decision of the Government of *Republika Srpska* on the Verification on the Accuracy and Authenticity of Data during the Registration of the Permanent Residence in the Territory of the *Republika Srpska*. They contend that the decision failed to conform to the provisions of the Constitution of Bosnia and Herzegovina.

The request stemmed from the adoption of the decision by the entity of *Republika Srpska* (i.e. the Government of *Republika Srpska*). The decision was challenged because the issue of the permanent and temporary residence has been regulated by the Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina, passed by the Parliamentary Assembly of Bosnia and Herzegovina. In the applicants' view, therefore, the issue of

permanent and temporary residence falls within the exclusive jurisdiction of the institutions of Bosnia and Herzegovina, namely the Parliamentary Assembly of Bosnia and Herzegovina and not of the Entities.

II. The Constitutional Court considered whether a conflict of competences, relating to the different levels of government in Bosnia and Herzegovina that is responsible for adopting certain legal acts, may give rise to a dispute in terms of Article VI.3.a of the Constitution of Bosnia and Herzegovina, in respect of which the Constitutional Court has exclusive jurisdiction to decide.

In view of the text of the second line of Article VI.3.a of the Constitution, it is evident that the Constitutional Court has jurisdiction to decide a dispute in which it is claimed that a certain law is inconsistent with this Constitution. This applies when the authorised applicant claims that an unauthorised body issued the law and that it violates the constitutional provisions relating to the division of responsibilities. However, the specific issue is whether a constitutional dispute may arise if the authorised applicant claims that an unauthorised body adopted a bye-law, giving rise to the violation of the Constitution with respect to the division of responsibilities under the Constitution. This issue is raised primarily because bye-laws are not specified in the text of second line of Article VI.3.a of the Constitution. It only specifies "constitution or law".

Therefore, the issue relating to a conflict of responsibilities between different levels of government in Bosnia and Herzegovina as to the constitutional responsibility to pass (also) bye-laws may give rise to the constitutional dispute within the meaning of Article VI.3.a of the Constitution. The Constitutional Court considered the provision of Article VI.3 under which the Constitutional Court shall uphold this Constitution, the provision of the same Article reading, as relevant, "including but not limited to...", the provisions on the division of responsibilities under Article III of the Constitution, and the constitutional principle of the rule of law under Article I.2 of the Constitution.

The Constitutional Court finds that it may establish its jurisdiction to decide the constitutional dispute in which it is claimed that the authority passed the bye-law for the adoption of which it had no jurisdiction under the Constitution. In its view, the aforementioned constitutional provisions would be meaningless if the lower instances of government passed bye-laws that fall within the jurisdiction of the State level of government or, *vice versa*, if the State level of government passed laws and bye-laws that fall within the jurisdiction of the Entities or lower levels of government.

The Constitutional Court notes that the Parliamentary Assembly of Bosnia and Herzegovina, in accordance with its responsibilities under Article IV.4.a of the Constitution, passed the Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina. This law regulates the issue of both the permanent and temporary residence of the citizens of Bosnia and Herzegovina. It prescribes the method of registration and de-registration of permanent and temporary residence, records of permanent and temporary residence, right to facilitated re-registration of returnees and supervision of the State Ministry over the implementation of the relevant Law.

However, the Constitutional Court observes that the Government of the Entity *Republika Srpska* adopted the challenged decision determining the manner of verifying the accuracy and authenticity of data to be provided by the applicants during the registration of permanent residence in the territory of the *Republika Srpska*. Thus, the challenged decision prescribes additional evidence that the applicants must provide during the registration of their place of residence. Hence, the relevant decision prescribes the requirements for registration of residence in the territory of the *Republika Srpska* through the submission of additional pieces of evidence.

Having regard to the applicable Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina and correlating this Law with the challenged decision, the Constitutional Court observes that the challenged decision does not elaborate on the existing State law. Instead, it supplements the mentioned law by prescribing the additional conditions for the registration of permanent residence in the territory of the *Republika Srpska*. The Constitutional Court cannot accept the allegations stated in the reply of the Government of *Republika Srpska*, explaining that the challenged decision does not impose new criteria for the registration of permanent residence.

In this respect, the Constitutional Court points out that paragraph 2 of the challenged decision explicitly states that "during the procedure for the registration of permanent residence..., the applicants are to submit one of the following pieces of evidence...". This has not been prescribed by the provisions of Articles 5 and 6 of the State law, which the Government of the *Republika Srpska* refers to in its reply. Therefore, the subject-matter of the challenged decision is an issue that has been indisputably regulated by the provisions of the State law. It, therefore, follows that it does not constitute a bye-law but can be viewed as a law.

At the same time, the Constitutional Court observes that the State law does not contain conditions established by the challenged decision. In this respect, the Constitutional Court cannot accept the *Republika Srpska* Government's argument that the challenged decision relates only to the procedural issues or a small portion of the matter regulated by the State law, which is the reason why the challenged decision does not have the character of law. As already emphasised, in the opinion of the Constitutional Court, the challenged decision indisputably regulates a legal matter by prescribing conditions for the registration of permanent residence, which are not contained in the State law.

Therefore, the very fact that the issue of permanent and temporary residence of the citizens of Bosnia and Herzegovina has been regulated by the State law, which was passed by the Parliamentary Assembly of Bosnia and Herzegovina, suffices for the Constitutional Court to conclude that this particular issue is within the responsibility of the State and its institutions in terms of Article III.3.b of the Constitution. Having regard to the aforesaid, the entity of *Republika Srpska* cannot regulate the issue of permanent residence by way of the challenged decision, since this amounts to the *Republika Srpska* exceeding the framework of the existing State law. As such, it violates the constitutional principle of the responsibilities of the Entities under Article III.3.b of the Constitution as well as the constitutional principle of the rule of law under Article I.2 of the Constitution, which implies the harmonisation of legal regulations in the legal system according to their hierarchy in which the Constitution occupies the highest position.

The Constitutional Court emphasises that, if there was a need to introduce new conditions for the registration of permanent residence, it was necessary to do so by challenging the existing State law or by amending the existing State law through a procedure established under the law by a competent body, i.e. the Parliamentary Assembly of Bosnia and Herzegovina. The lack of a positive solution or a failure in that respect cannot justify the adoption of the challenged decision introducing new conditions not contained in the existing State law. Namely, the Constitutional Court indicates that the law is a general legal act of the state, which is adopted in a predetermined legislative procedure by its legislative body, whereas bye-laws are acts of lower legal force than the laws and they develop certain legal issues. The competence of bodies to adopt bye-laws is prescribed by law itself.

Link this to the context of this particular case, the Constitutional Court underscores that the existing State law, which regulates the issue of permanent

and temporary residence, was passed by the Parliamentary Assembly of Bosnia and Herzegovina and the issuance of bye-laws, in terms of implementing the law, is within the exclusive competence of the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina. Thus, the Entities have no authority to amend the State law by their respective bye-laws and laws by introducing new conditions for the registration of permanent residence.

Therefore, in view of the aforementioned, the Constitutional Court holds that the issue of permanent residence falls within the exclusive responsibility of the state of Bosnia and Herzegovina in terms of Article III.3.b of the Constitution. The reason is that the existing State law regulating the issue of permanent residence constitutes a decision of the institutions of Bosnia and Herzegovina. Consequently, it follows that the Government of the *Republika Srpska*, notwithstanding an authority of the Entity concerned, has no competence to regulate the issue of permanent residence by the challenged act. Therefore, the Constitutional Court concludes that the entity of the *Republika Srpska* has violated Article III.3.b of the Constitution in conjunction with Article I.2 of the Constitution by adopting the challenged decision.

III. A Separate Dissenting Opinion of Vice-President Miodrag Simović, joined by Judge Zlatko Knežević, shall make an annex to the decision.

Languages:

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



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2014-2-018

a) Brazil / **b)** Federal Supreme Court / **c)** Plenum / **d)** 23.03.1994 / **e)** 70.514 / **f)** Petition for a writ of *mandamus* / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 27.06.1997 / **h)**.

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.

4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel**.

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

5.2.1 Fundamental Rights – Equality – **Scope of application**.

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

Keywords of the alphabetical index:

Appeal, time limit / Criminal procedure / Defence counsel / Equality of arms.

Headnotes:

Due process has as its premise the principle of procedural equality. A law that permits the Offices of the Public Defenders double the time to bring appeals compared to the Offices of the Prosecutors, which are the adverse party in criminal cases, despite being unconstitutional, must continue in force, because the Offices of the Public Defenders have a deficient organisation and infrastructure, especially if compared to the Offices of the Prosecutors.

Summary:

I. This case concerned a petition for a writ of “*habeas corpus*” (which in the Brazilian system covers rights beyond the right to liberty) filed to declare the constitutionality of Article 1.5^o of Law 1.060/1950,

which doubled the time-period in which the Offices of the Public Defenders may bring an appeal, in both civil and criminal cases, and to annul a decision that judged an appeal filed by the Office of the Public Defenders untimely. The issue concerned the different time-limit for taking appeals applied to the Offices of the Prosecutors, given that it is the standard time-period in criminal cases, in which they act as the accusation party, and is only doubled in civil cases.

II. The Supreme Court, preliminarily, by majority vote, declared the law still constitutional (which means that the law is unconstitutional but the Court does not declare its nullity). On the merits, the Court, by majority, annulled the decision challenged and remanded the case to the second degree court. The Supreme Court decided that the constitutional principle of due process has as its premise the principle of procedural equality. However, the facts show that the Offices of the Public Defenders have deficient organisation and infrastructure, especially if compared to the Offices of the Prosecutors. Hence, the law, despite being unconstitutional, must not be considered null, until the Offices of the Public Defenders are organised in a way that allows them to litigate equally with the Offices of the Prosecutors.

III. In a separate opinion, a dissenting Justice defended the equality of time-limits in criminal procedure, whether it is to the prosecution or to the defence. Furthermore, he argued that the assessment of the sufficiency of the Offices of the Public Defenders would breach the national uniformity of Criminal Procedural Law, as some States could have better organised Offices of the Public Defenders, while others would not.

Cross-references:

- Article 1.5 of Law 1.060/1950.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-019

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 01.06.1994 / **e)** 956 / **f)** / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 20.04.2001 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Election, campaign, access to media / Media, legislation, election period.

Headnotes:

Freedom of expression of thought can be limited by a norm prohibiting the use of audio or video material in free electoral programmes transmitted by television, because electoral advertising should inform voters. Technical means used to ridicule or degrade an opponent would prevent the achievement of this objective. In addition, since these technical means are expensive, it could breach the equivalence of opportunities for candidates with different financial means.

Summary:

I. This case concerned a direct claim of unconstitutionality filed against Article 76.1 of Law 8713/1993, which prohibits the use of audio or video material that may degrade or ridicule a candidate in the free electoral programs transmitted by television. The plaintiff argued that the norm violates the freedom of creation and expression of thought, provided for in the Article 220 of the Constitution.

II. The Supreme Court, by majority, declined to hear the case. The Court stated that the objective of free electoral advertising, which is funded by taxpayers, is to inform voters about the ideas and the policy proposals of the candidates. In this sense, the use of audio or video material that may degrade or ridicule a candidate would prevent the achievement of this objective. In addition, since these artifices are expensive, it could breach the equivalence of opportunities for candidates with different financial

means, allowing the prevalence of economic power in the elections.

The Court emphasised that freedom of expression of thought can be limited, according to the cases established in the Constitution. Thus, Article 17.3 of the Constitution allows the establishment of restrictions for this type of expression of thought, by providing that free political advertising shall be made in accordance with the law.

III. In dissenting votes, the Justices stated that the restriction of the challenged law would prevent the transmission of electoral advertising in the most free, full and transparent way as possible, violating, thus, the freedom of expression of thought. The Justices also argued that the provision of Article 17.3 would be only instrumental, establishing the means by which the political parties could exercise their freedom of expression. Therefore, this device does not allow the restriction of the freedom.

Cross-references:

- Articles 17.3 and 220 of the Constitution;
- Article 76.1 of the Law 8.713/1993;
- The provisions mentioned in this claim are Articles 45.II and 55 of Law 9.504/1997.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2014-2-020

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 11.03.1999 / **e)** 546 / **f)** / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 14.04.2000 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Executive, powers to initiate legislation / Law, amendment / Rider, legislative / Time limit.

Headnotes:

A provision that sets a specific time-limit for the executive branch to submit a bill of its private initiative to the legislative branch violates the independence and the principle of the separation of powers. It is possible to amend those bills provided that the amendments do not increase expenses and that they relate to the main original theme of the bill.

Summary:

I. This case concerned a direct claim of unconstitutionality filed by the governor of the State of Rio Grande do Sul against Articles 4 and 5 of State Law 9265/1991, which provides for the monthly wages of public school teachers. Article 4 established a thirty-day period in which the governor should submit to the State Legislature a bill to set the wage policy for teachers. Article 5 established that strike days would be considered as days of actual work and teachers could not be punished because of them. The governor pointed out that these articles resulted from parliamentary amendments to the bill which was of his private initiative. He added that he had vetoed those provisions, but the State Legislature overruled the veto.

II. The Supreme Court granted the claim and, unanimously, declared Article 4 unconstitutional. The Court decided that it is the exclusive power of the Executive to assess the right moment to submit bills of its private initiative to the Legislature. Thus, to establish a time-limit for doing so violates the independence and the principle of the separation of powers (Article 2 of the Constitution).

By a majority of votes, the Court also declared Article 5 unconstitutional. The Court held that parliamentarians may amend bills of the executive branch's initiative, provided that the changes do not entail an increase of expenses and that they relate to the original subject of the bill. As to Article 5, parliamentarians had added a provision that set forth the statutory year of service and the right of teachers not to be punished for participating in strikes. Those subjects are not related to the main subject of the bill.

III. In separate opinions, dissenting Justices decided that amendments should only be related to the subject of the initial bill if they were matters of the executive branch's private initiative to start the

legislative process. Thus, when establishing that the absences due to strikes would not be punishable, Article 5 did not provide specifically about the legal regime of public teachers, which would be a matter for the executive branch's private initiative.

Cross-references:

- Article 2 of the Constitution;
- Articles 4 and 5 of the Rio Grande do Sul State Law 9265/1991.

Languages:

Portuguese, English (translation by the Court).

*Identification: BRA-2014-2-021*

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 17.05.2006 / **e)** 1127 / **f)** / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 11.06.2010 / **h)**.

Keywords of the systematic thesaurus:

4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar**.

Keywords of the alphabetical index:

Bar, member, immunity / Bar, public service, exercise / Lawyer, professional privilege / Lawyer, professional secrecy.

Headnotes:

Lawyers enjoy immunity against defamation charges for utterances made in relation to their cases. They are not immune against contempt of court.

Summary:

I. This case concerned a direct claim of unconstitutionality against rights conferred on lawyers and the Brazilian Bar Association (OAB, in the Portuguese acronym), established by Law 8906/1994. The claimant challenged the indispensability of lawyers in lawsuits; their professional immunity for crimes of disrespect or contempt of court, or defamation; the

inviolability of their workplace and their communications; and the need for the presence of an OAB representative in searches and seizures and in their detentions *in flagrante delicto* of crimes which are not subject to bail (hereinafter, 'non-bailable offences'). The claimant also challenged the need for the prior consent of the OAB regarding prisons facilities to its members; the possibility of oral arguments after the vote of the judge rapporteur (who makes the initial presentation and suggested resolution of the case to the Court); and the prohibition against arresting lawyers in cases of *flagrante delicto* of non-bailable offences committed in the performance of their professional duties. Moreover, the claimant challenged the incompatibility of the practice of law by members of the judiciary, the OAB's control over the role of lawyers in forums, and the power of the OAB to request documents of Courts.

II. The Supreme Court, by majority, partially granted the claim. Regarding the indispensability of lawyers in court proceedings, the Court found that Article 133 of the Constitution, which establishes that lawyers are indispensable to the administration of justice, is not absolute, as one can file suits on their behalf in Labour Courts, in *habeas corpus* applications and in criminal review. Regarding the immunity of lawyers, the Court decided that they enjoy immunity regarding defamation charges related to utterances in court, provided that such utterances are related to the case in which they act. However, as regards the crime of disrespect or contempt of court, the immunity is unconstitutional because it is inconsistent with the judge's authority to make procedural acts.

Regarding the inviolability of the workplace and communications, the Court decided that it does not cover the possibility of interception authorised by a judge as set out in Article 5.XII of the Constitution. Moreover, the Court held that the search and seizure orders against lawyers shall be valid only if the OAB is given prior notice with the requisite secrecy, in order that it may send a representative to monitor adherence to the law. The same procedure should occur in the issuance of arrest warrants *in flagrante delicto*.

On the need for the prior consent of the OAB regarding prison facilities for its members, the Court found the law unconstitutional. The Court stated that the administration of prisons is the State's prerogative. The Court stressed, however, that prisons should have decent facilities.

As to the possibility of oral arguments by lawyers after the vote of the judge rapporteur, the Court found that the provision violates the principle of adversarial proceedings. Such principle takes place between adversarial parties and not between the parties and

the judge. Moreover, the adversarial proceedings must be prior to the issuance of the court's decision.

Concerning the prohibition of arrest *in flagrante delicto* for non-bailable offences committed in the exercise of professional duties, the Court decided that this rule is not unconstitutional because it is in compliance with the principle of the presumption of innocence guaranteed by the Constitution. Regarding the OAB's control over the role of lawyers in forums, the Court decided that the rule is unconstitutional because public goods should be under the control of the Public Administration.

On the incompatibility of the practice of law by members of the judiciary, the Court decided that the rule does not extend to electoral judges, since the Constitution stipulates the integration of lawyers in the composition of the electoral courts. In addition, electoral judges do not exercise that judicial function exclusively, with the result that the prohibition would prevent them having the means to provide their livelihood, which would hinder access to that activity.

Finally, the Court held that the OAB has the prerogative to request documents from the judiciary, provided that it indicates grounds and that it bears the costs. The Court prohibited, however, the access to documents under seal.

Cross-references:

- Articles 5.XII and 133 of the Constitution;
- Law 8906/1994.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-022

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 12.06.2006 / **e)** 193.503 / **f)** / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 24.08.2007 / **h)**.

Keywords of the systematic thesaurus:

1.2.2.5 Constitutional Justice – Types of claim – Claim by a private body or individual – **Trade unions.**

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

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

Keywords of the alphabetical index:

Trade union, action, legitimate purpose / Trade union, representation.

Headnotes:

Trade unions may legitimately act on their own behalf as a procedural substitute of their members, in the defence of collective, common or homogeneous rights. As such, their performance is extraordinary and reaches the various stages of a lawsuit: from cognisance procedure to the execution of the decision, in the case of conviction.

Summary:

I. This case refers to an extraordinary appeal filed against a decision that did not accept the legitimacy of the power of a trade union to file, as a procedural substitute, cases that aim at applying a labour collective-bargaining agreement.

II. The Supreme Court, by majority vote, granted the extraordinary appeal. The Court highlighted that a trade union, within its ordinary powers, may represent its members, if it obtains their express permission. On the other hand, when Article 8.III of the Constitution states that a trade union is competent to defend employees' rights and their individual or collective interests, including judicial and administrative issues, it allows the union to act as a procedural substitute. Thus, the trade union acts in its own name to promote the defence of collective, common or homogeneous rights, regardless of the authorisation of its members. In this case, it only required links between the rights defended and the trade union's activity.

The Court stated that the trade unions' performance is extraordinary and that it covers several stages of the lawsuit: from the cognisance procedure to the execution of the decision, in the case of conviction. Such a prerogative contributes to procedural economy and a speedy trial, since it prevents every member from, individually, requesting the execution of the judgment. Moreover, this complies with the historical evolution of trade union activities, as it avoids the individual identification of the employees and their exposure to possible reprisals from their employers.

III. In separate opinions, which partially granted the appeal, dissenting Justices acknowledged the legitimacy of the trade union to act as a procedural substitute, but they restrained it to the cognisance procedure. Thus, the substitution would only be possible in order to obtain the recognition of certain collective rights to the category. Upon the execution of the sentence, it would be necessary to individualise the demand. As of that moment, the individual nature of the case would prevail over the collective, thus limiting the trade unions' action to procedural representation. As such, the trade union would only take part in the lawsuit after the cognisance procedure step if the member authorises the trade union to do so.

Cross-references:

- Article 8.III of the Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-023

a) Brazil / **b)** Federal Supreme Court / **c)** Plenum / **d)** 02.04.2007 / **e)** 3394 / **f)** Petition for a writ of *mandamus* / **g)** *Diário da Justiça Eletrônico* 152 (Official Gazette), 15.08.2008 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**
 5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**

Keywords of the alphabetical index:

DNA test / Legal assistance, free, right / Legislative initiative.

Headnotes:

The funding of DNA testing is a duty of the Federal State whenever the party benefits from legal aid, in order to implement the effective exercise of the right to free and thorough legal aid to those who are defined as poor by law. The law that establishes free DNA testing and that accredits a governmental agency to fulfil it does not violate the exclusive initiative of the local Head of the Executive Branch to draft laws about the creation of agencies of the local government.

Summary:

I. This case concerned a direct claim of unconstitutionality filed against Law 50/2004 of the State of Amazonas, which provided for free DNA testing to those who are defined as poor by law. The plaintiff alleged that the law was formally unconstitutional on the basis that it should have been drafted by the local Head of the executive branch and because it violated the competence of the Federal Government to enact procedural law.

II. The Supreme Court, by majority vote, partially granted the direct claim of unconstitutionality. The Court denied the claim concerning formal unconstitutionality due to the exclusive initiative of the local Head of the Executive Branch. The Court stated that the limitations to the power of legislative initiative are exhaustively established in Article 61 of the Constitution. Such limitations are related to the functioning of governmental agencies, mainly concerning civil servants and agencies of the Executive Branch. Thus, the Court understood that the law, as it accredits an agency to fulfil the norm, did not create or set rules about the structure of governmental agencies. Furthermore, if the Court established that any draft law that interfered with the governmental budget breached the exclusive initiative of the Head of the Executive to draft the budgetary law, the parliament would be banned from drafting laws of whatever matter.

The Court emphasised that the funding of forensic expert evidence is a duty of the Federal State when the party benefits from legal aid, in order to implement the effective exercise of the right to free and thorough legal aid to those who have insufficient funds (Article 5.LXXIV). Accordingly, the Court granted the claim concerning the provision that denied free DNA testing when the suspect loses the suit filed by the Prosecution Office, as it limited the right to thorough and free legal aid.

The Court also granted the claim regarding the provision establishing that the judge will definitively

decide about free DNA testing, as it not only violated the legislative competence of the Federal Government to legislate about procedural law but also impeded the later request for the aid.

III. In separate opinions, dissenting Justices stated that, though the law had a noble aim, it was formally unconstitutional, since it created new expenses to be borne by the Government, without providing the corresponding budgetary means.

Cross-references:

- Article 5.LXXIV of the Constitution;
- Law 50/2004 of the State of Amazonas.

Languages:

Portuguese, English (translation by the Court).

*Identification: BRA-2014-2-024*

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 12.09.2007 / **e)** 3853 / **f)** / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 20.04.2001 / **h)**.

Keywords of the systematic thesaurus:

1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**
4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**

Keywords of the alphabetical index:

Act, benefit, unlawful, deprivation / Benefit, governmental / Morality, democracy, protection / Public service, equality, principle.

Headnotes:

The constituent States of the federation have the duty to act responsibly in the management of public resources, in strict compliance with the Constitution. A lifetime monthly allowance, paid to former governors who terminated their term of office, violates the Constitution.

Summary:

I. This case concerned a direct claim of unconstitutionality filed against provisions of the General and Transitional Constitutional Provisions Act (hereinafter, "ADCGT", in the Portuguese acronym) of the Constitution of the State of Mato Grosso do Sul, which established a lifetime monthly allowance for former state governors, equal to that received by the head of the State Executive Branch. It also established for the spouse of former governors the right to receive half of that amount in the event of the governor's death. The claimant argued that, as governors leave office, they no longer exercise any function on behalf of the public entity and any pecuniary reward would be considered a retirement for free. The claimant argued furthermore that the allowance was called a subsidy; however, it featured as a retirement pension or survivor's pension, which violates Articles 39.4, 195.5 and 201.1 of the Constitution.

II. The Supreme Court, by majority, granted the claim in order to declare unconstitutional articles 29-A, *caput*, and its paragraphs, of the Constitution of Mato Grosso do Sul's ADCGT. The Court held that, although the benefit had been called a subsidy, the provisions established a gratuitous lifetime monthly remuneration for those who had exercised the full term as governor, and in the event of their death, to their spouse. The Court stated that in a republic public offices are temporary and their occupants are transitional. Thus, there could not be an expansion of the term of office in this way. The Court emphasised that, regardless of the terminology used, the expenses for the allowance would be funded by the public budget, which violated the provisions of Article 195.5 of the Constitution, which provides that no benefit will be created without a corresponding source of funding. The Court stressed that the States have the duty to act responsibly in the management of public resources, in strict compliance with the Constitution.

The Court also found that there was a violation of the principles of equality and impartiality, since the citizens subject to the regular social security system were treated unequally, as well as those who hold public positions of a temporary nature by election or commission. Hence, the rule promotes a favour, a privilege or a personal income according to the condition of the beneficiary. Moreover, there was a violation of the principle of public morality, since there was no public interest involved in such rule.

Lastly, regarding the autonomy of the States, the Court held that their actions must be in compliance with constitutional rules and principles considering

that the Constitution does not provide a lifetime monthly allowance to former presidents.

III. In separate opinions, concurring Justices granted the claim on other grounds. They decided the provisions were formally unconstitutional since the law was enacted without the participation of the Executive Branch.

In a separate dissenting opinion, a Justice denied the claim on grounds that the legal nature of the allowance was of a special pension as it was not either a retirement or a survivor's pension. The Justice stated also that there is no provision of the Constitution that forbids the grant of a special pension to former presidents or governors.

Cross-references:

- Articles 39.4, 195.5 and 201.1 of the Constitution;
- Temporary Constitutional Provisions Act of the Constitution of the State of Mato Grosso do Sul.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-025

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 14.04.2008 / **e)** 223 / **f)** / **g)** *Diário da Justiça Eletrônico* 070 (Official Gazette), 09.04.2014 / **h)**.

Keywords of the systematic thesaurus:

4.6.10.1.2 Institutions – Executive bodies – Liability – Legal liability – **Civil liability**.
 5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person**.
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Public policy, non-implementation, liability of the State / Public safety, interest / Public safety, protection / Security of the person / Violence, risk.

Headnotes:

Public safety and health care are constitutional obligations of the Government. The Federal State can be liable for the lack or failure to implement public policies that guarantee the effectiveness of these fundamental rights.

Summary:

I. This case concerned an internal interlocutory appeal filed against a decision that ordered the suspension of an interlocutory relief, in order to release a State from the obligation to pay the expenses of the appellant's surgery, a victim of robbery and attack on the street, which had resulted in his suffering quadriplegia and dependance on artificial respiration. The appellant argued that the State was obliged to pay the costs of an experimental surgery and the fees of the professional appointed by him, in the absence of which the State would have failed in its constitutional duty to promote effective public safety actions.

II. The Supreme Court, by majority, granted the appeal. The Court recognised the strict civil liability of the State of Pernambuco (Article 37.6 of the Constitution) for a lack or failure in service due to its omission in the constitutional duty to maintain public safety, in view of the high crime rate. Consequently, the Court established a relation between the omission of the state agents and the damage suffered by the appellant. It was argued that health care actions and services are benefits of public relevance and therefore place a constitutional obligation on the Government (Article 196 of the Constitution), including the Member States of the Federation. It was asserted that the inertia of the Government to implement public policies to guarantee the effectiveness of fundamental rights was unacceptable, since its margin of discretion is minimal. It was held that, in the case of a governmental omission, judicial intervention in order to put into practice public policies is legitimate and does not violate the principle of the separation of powers. The Court highlighted that, applying the method of the balance of interests and values in conflict, the intent of the members of the constitutional assembly in prioritising the right to life and health, which are fundamental rights of the person, prevails.

III. In a separate opinion, a dissenting Justice argued that although public safety is a duty of the government, strict civil liability to the State does not arise from any damage resulting from crime. The dissenting Justice added that, when the payment and transfer of the necessary funds for the surgery was requested through interlocutory relief, there was a damage to the public order because the provisional

execution against the government, without the issuing of official judgment, is not acceptable according to Articles 100 of the Constitution and Article 2-B of Law 9494/97. Furthermore, the judge contended that there was damage to the administrative order, by the fact that the Government was enforced to cover the cost of experimental surgery, which was not provided for in the list of procedures of the National Supplementary Health Agency with a high surgical risk for quadriplegic patients. This was done without the introduction of an administrative procedure or medical evaluation that could assess the technical feasibility of the procedure or the clinical adequacy of the surgery for the patient.

Cross-references:

- Articles 37.6, 100, 196 of the Constitution;
- Article 2-B of the Law 9494/97.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2014-2-026

a) Brazil / **b)** Federal Supreme Court / **c)** Plenum / **d)** 05.08.2009 / **e)** 46 / **f)** **g)** *Diário da Justiça Eletrônico* 35 (Official Gazette), 26.02.2010 / **h)**.

Keywords of the systematic thesaurus:

4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**

Keywords of the alphabetical index:

Post, public service / Public service, definition / Public service, national / Monopoly, State.

Headnotes:

The State's control of the post service does not constitute a monopoly in violation of the constitutional principles of free enterprise and free competition given that the post service is not strictly an economic activity, but is also a public service.

Summary:

I. This case concerned a claim of non-compliance with a fundamental constitutional precept (i.e. a particular mechanism for challenging allegedly unconstitutional acts) filed against Law 6.538/1978, which establishes the exclusive control of post services by the *Empresa Brasileira de Correios e Telégrafos*. The plaintiff argued that this monopoly violates the constitutional principles of free enterprise and free competition. He also argued that the monopolies of the State are exhaustively enumerated in the Constitution and that the post service is not included.

II. The Supreme Court, by majority vote, denied the claim, on the grounds that the post service is not strictly an economic activity, but also a public service. The Court stated that the difference between strict economic activity, in which free competition and free enterprise are the standard, and public services derives from the wording of the Constitution. Accordingly, Article 20.X of the Constitution establishes that the Government will exclusively control the post service and the national airmail post; by contrast, in other activities, such as healthcare and education, Articles 199 and 209 of the Constitution set forth the principles of free enterprise and free competition.

The Court emphasised that it is not a case of state monopoly, as this concept only applies to cases of strict economic activity, which can be exploited by the private sector, but in which the state has the exclusive control. The post service is a public service, which is exploited under the regime of privilege, and it is characterised by the exclusiveness of exploitation, since it is different from strict economic activity.

III. In a separate opinion, a dissenting Justice granted the claim, on the grounds that the Constitution did not expressly establish the monopoly of the post service. He alleged that the State must have a subsidiary role, following changes in the Administrative Law, in order to increase the efficiency of the service and, thus, to serve the public interest.

In other separate opinions, concurring Justices partially granted the claim to state that only the post services of letters, postcards and bulk mail are under the monopoly of the Federal Government. Other services, like the delivery of invoices, printed matter and other kinds of parcels, are not within the monopoly.

Cross-references:

- Articles 20.X, 199 and 209 of the Constitution.

Languages:

Portuguese, English (translation by the Court).

*Identification: BRA-2014-2-027*

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 25.05.2011 / **e)** 599.628 / **f)** / **g)** *Diário da Justiça Eletrônico* 199 (Official Gazette), 17.10.2011 / **h)**.

Keywords of the systematic thesaurus:

4.10.8 Institutions – Public finances – **Public assets.**
4.15 Institutions – **Exercise of public functions by private bodies.**

Keywords of the alphabetical index:

Company, state owned, privilege / Competition, infringement, gravity / Competition, unfair / Public service.

Headnotes:

State-owned companies aim to make profits and act under the legal regime governing the private sector. The privileges of the government do not apply to such companies.

Summary:

I. This case concerned an extraordinary appeal filed against a decision that denied the claim of Eletronorte (*Centrais Elétricas do Norte do Brasil S/A*), a state owned company, to pay its debts through government certificates of judgment debt. The appellant contended that the challenged decision breached Article 100 of the Constitution, since it applied the rules of debt enforcement applicable to the private sector to a state-owned company, ignoring the fact that all the assets of the appellant are property of the Federal Government and that these assets are linked to the provision of an essential public service. The appellant also argued that it should be treated as a governmental agency.

II. The Supreme Court, by majority vote, denied the extraordinary appeal and held that the regime of certificates of judgment debt of the government, established in Article 100 of the Constitution, does not apply to Eletronorte. The Court emphasised that the main objective of state-owned companies is to make profits for their shareholders. Accordingly, such companies can freely trade shares in stock exchange markets and distribute a part of their profits to their employees. Hence, as the appellant company profits from the electrical energy sector, which is not under a governmental monopoly, it must be treated like other companies that are in the market, under the regime of free competition. The granting of constitutional privileges to state-owned companies, which cannot be extended to private-sector companies, would lead to an artificial imbalance in the regime of free competition.

The Court highlighted that the privilege granted to the government to pay its debts through certificates of judgment debt applies solely to the political entities, their agencies and governmental foundations, that is, legal entities under public law. Furthermore, the Court stated that the relevance of the services offered and their link to the public interest do not authorise the granting of the privileges to state-owned companies. Otherwise such privileges should be granted to activities like healthcare and education, among others. On the other hand, the Court emphasised that Eletronorte's assets cannot be seized, because they are linked to the provision of a public service.

III. In a separate opinion, a dissenting Justice argued that, whereas the appellant offers essential public services, in needy places, where other companies of the private sector of electricity have no interest in operating, it should not be under the same regime of private-sector companies, because the debt enforcement without the special regime of the certificate of judgment debt of the government would risk the continuous offer of the service.

Cross-references:

- Article 100 of the Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-028

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 24.08.2011 / **e)** 2650 / **f)** Petition for a writ of *mandamus* / **g)** *Diário da Justiça Eletrônico* 218 (Official Gazette), 17.11.2011 / **h)**.

Keywords of the systematic thesaurus:

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

4.8.5 Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries.**

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

Keywords of the alphabetical index:

Constitution, interpretation / Constitution, unity, principle / Referendum, compulsory Referendum, purpose, constitutional / Territory, ordering.

Headnotes:

The partition or territorial re-organisation of constituent states of the Federation must be preceded by a referendum that comprises both the population of the territory that will be partitioned, as well as the population of the territory that will be created.

Summary:

I. Article 18.3 of the Federal Constitution provides: “The states may merge into each other, subdivide or dismember to be annexed to others or to form new states or federal territories, subject to the approval of the population directly concerned, by means of a plebiscite, and of the National Congress, by means of a supplementary law.” This case concerned a direct claim of unconstitutionality filed against Article 7 of Law 9709/1998, which establishes that a referendum on the partition of the states of the federation must comprise both the population of the territory that will be created, as well as the population of the territory that will be partitioned. The applicant argued that the wording of the Constitution established that the population of both territories should be consulted only in cases concerning the partition of municipalities, given that Article 18.4 includes the expression “populations of municipalities concerned”. By contrast, in respect to the partition of states, the wording of the Constitution limited the plebiscite to “the population directly interested” (Article 18.3 of the Constitution). This wording therefore excludes the population of the territory remaining, given that it has only indirect interests.

II. The Supreme Court unanimously declared the constitutionality of Article 7 of Law 9709/1998. The Court stated that, though the wording in the Constitution is different in each case of the partition of federated entities, to construe such wording in different manners would mean the attribution of different meanings to similar situations. Hence, in compliance with the principle of the unity of the Constitution, the Court decided that the partition of whatever federated entity must occur after a plebiscite that comprises both the population of the territory that will be partitioned, as well as the population of the territory that will be created. The Court emphasised that both populations have direct interest in the dismemberment, because such a measure is not only a division of the territory and population, but it is also a division of the socio-cultural, economic and financial unity of the state. Thus, the will of the remaining territory must not be left unconsidered.

Cross-references:

- Article 18.3 and 18.4 of the Constitution;
- Article 7 of the Law 9709/1998.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-029

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 21.09.2011 / **e)** 594.296 / **f)** / **g)** *Diário da Justiça Eletrônico* 30 (Official Gazette), 13.02.2012 / **h)**.

Keywords of the systematic thesaurus:

3.11 General Principles – **Vested and/or acquired rights.**

4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**

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:

Acquired right, protection / Due process, procedural / Procedure, adversarial / Right to be heard.

Headnotes:

The Government may annul its administrative acts when they are considered unlawful. However, if these acts have conferred rights on a civil servant, an annulment depends on the establishment of an administrative procedure in which the Government provides for adversarial proceedings and the opportunity for the affected person to be heard.

Summary:

I. This case concerned an extraordinary appeal filed by the State of Minas Gerais against a decision that established the illegality of the annulment of an administrative act. The appellant argued that the right of a civil servant to count upon a certain length of service, with a consequent increase in monthly remuneration, had been recognised. Later, the State reviewed its act and ordered the refund of amounts improperly paid. The appellant stated that the Government acted according to the prerogative to cancel its own actions and does not need to follow an adversarial procedure and provide the opportunity to be heard.

II. The Supreme Court, unanimously, dismissed the appeal. The Court recognised the Government's power to review its acts when they are considered illegal. This power, however, is not absolute. If the act has conferred rights on the civil servant, its annulment depends on the establishment of an administrative procedure in which the Government gives the opportunity to be heard to the person affected and follows adversarial proceedings. In this case, administrative proceedings are essential, because the annulment may result in a financial loss to the civil servant. This measure complies with the constitutional principle of adversarial proceedings and the right to be heard (Article 5.LV of the Constitution) and to the guarantee that no one shall be deprived of his property without the due process of law (Article 5.LIV of the Constitution).

Cross-references:

- Articles 5.LIV and 5.LV of the Constitution;
- MS 24.268.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-030

a) Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 22.11.2011 / **e)** 1223 / **f)** / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 42, 28.02.2014 / **h)**.

Keywords of the systematic thesaurus:

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

5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals.**

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

Keywords of the alphabetical index:

Extradition, national, prohibition / Extraterritorial jurisdiction, criminal law, limits.

Headnotes:

A naturalised Brazilian cannot be extradited for crimes committed after naturalisation. The extraterritorial application of Brazilian criminal law, when there has already been a conviction abroad, entails violation of the “*ne bis in idem*” principle. Foreign criminal judgments can, as a general rule, be implemented in Brazil, for the purposes of civil liability or for the application of mandatory detention to those with diminished capacity under criminal law. Exceptionally, they may be approved for criminal purposes, when a treaty or convention so provides.

Summary:

I. This case concerned a request for extradition, as a result of conviction for the offence of rape in the requesting State. The fugitive argued that the granting of the request was impossible, because he was already a naturalised Brazilian when the offence occurred.

II. The Second Panel of the Supreme Court rejected the request for extradition, because the fugitive was already a naturalised Brazilian at the moment of the crime. The Court explained that the granting of naturalisation is an act of sovereignty, which derives from the discretionary exercise of political and

administrative power assigned to the Minister of Justice. The Court emphasised that the exact moment of the acquisition of nationality occurs with the solemn procedure of delivery of the certificate of naturalisation by the competent magistrate. The Court asserted that, according to the Constitution, naturalised Brazilians can only be extradited in cases of involvement in drug trafficking or in the case of common crimes committed before the act of naturalisation. In the present case, the crime was committed just after the granting of Brazilian nationality to the fugitive.

As an “*obiter dictum*”, it was stated that the fugitive could not be subjected to criminal prosecution in Brazil for the same facts that had led to the extradition request. The Court noted that there is provision for the extraterritorial validity of Brazilian criminal law in cases in which either a natural-born Brazilian or a naturalised citizen commits an offence abroad. Thus, though extradition is impracticable, in theory, a Brazilian can be punished in Brazil for a crime committed abroad, thus avoiding his impunity. However, in this case, Article 14.7 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits criminal prosecution against those who had previously been convicted or acquitted by the same facts (prohibition of “*ne bis in idem*”), is applicable. This legislative instrument prevails over Brazilian ordinary laws. Thus, the fugitive could not be subjected to criminal prosecution in Brazil for the same facts that led to his conviction in the requesting State.

Ultimately, the Court explained, also as “*obiter dictum*”, that foreign criminal judgments can, as a general rule, be implemented in Brazil to subject the convicted to civil liability or to subject him to mandatory detention, when the convicted person has diminished capacity under criminal law. Exceptionally, foreign criminal convictions may be executed in the national territory when a treaty or convention so provides.

Cross-references:

- Article 14.7 of the International Covenant on Civil and Political Rights of 1966.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-031

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 23.11.2011 / **e)** 4274 / **f)** / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 02.05.2012 / **h)**.

Keywords of the systematic thesaurus:

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

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

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

Keywords of the alphabetical index:

Drug, use / Drug, law / Demonstration / Freedom of expression, scope of protection.

Headnotes:

The criminalisation of conduct should not be mistaken for debate about criminalisation. If the debate were prohibited, criminal norms could be eternal. The crime of inducing, instigating or helping somebody to use an illegal drug cannot be interpreted to hinder the realisation of public demonstrations for the legalisation of drugs, otherwise the right to assembly and the freedom of expression could be breached.

Summary:

I. This case concerned a direct claim of unconstitutionality filed against Article 33.2 of Law 11343/2006, which provides that to induce, instigate or help somebody to use an illegal drug is a crime. The plaintiff argued that this provision was used to hinder demonstrations for the legalisation of drugs, violating the freedom of expression and the freedom of assembly.

II. The Supreme Court, unanimously, granted the claim to establish the constitutional interpretation of the challenged norm, excluding any interpretation that could give rise to the prohibition of demonstrations and public debates concerning the decriminalisation or the legalisation of illegal drugs or other substances that cause episodic or addicted torpidity.

The Court emphasised that the criminalisation of conduct should not be mistaken for debate about the criminalisation. If the debate were prohibited, criminal norms could be eternal. Accordingly, the prohibition of discussion concerning a public policy and respective demonstrations breaches the fundamental right to

assembly, as well as the freedom of thought and of expression and the right to information.

The Court added that the Constitution only requires that assemblies must have pacific aims and that they must be previously notified to the competent public official, in order to organise the event. Furthermore, other restrictions established in the Constitution could only be enforced in case of a State of defence or state of siege.

III. In a concurring vote, granting the claim under a different ground, a concurring Justice emphasised that the right to assembly has some objective limits, as it would be impossible to admit demonstrations for the decriminalisation of murder, for example. Hence, such limits should be analysed case by case, in the light of constitutional principles.

Cross-references:

- Article 33 of Law 11343/2006.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2014-2-032

a) Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 18.12.2012 / **e)** 104963 / **f)** / **g)** *Diário da Justiça Eletrônico* 075 (Official Gazette), 22.04.2014 / **h)**.

Keywords of the systematic thesaurus:

4.7.15.1.3 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Role of members of the Bar.**

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, ineffective / Defence counsel / Lawyer, representation of client.

Headnotes:

The simple claim of ineffective legal assistance is not enough to ground a formal annulment of criminal procedure, since the absolute nullity prescribed in the criminal procedure law refers to the absence of protection for the defendant's rights, not to occasional ineffective assistance.

Summary:

I. This case concerned a request for a writ of "*habeas corpus*" filed against a decision of the Superior Court of Justice that declared no violation of individual liberty when the defence, performed by a lawyer whose licence had been cancelled by the Brazilian Bar Association, did not cause any disadvantage to the parties. The Superior Court of Justice stated that the writ refers to a relative nullity and, despite the retroactivity of the effects of the cancellation to 21 February 1987, determined by the Bar Association, the nullity did not affect all the legal proceedings in which the lawyer had acted, otherwise there would be a violation of the principle of legal certainty. The petitioner alleged a violation of his individual liberty and the denial of an opportunity to be heard by the fact that the arrestee had been committed for trial by jury in manifestly null criminal proceedings. He argued that the arrestee was assisted by a lawyer who was disbarred and, consequently, had had his capacity to act as a lawyer cancelled.

II. The Second Panel of the Supreme Court, unanimously, denied the order. The Court stated that the nullity of the procedural acts by the ineffective assistance of counsel will only be declared if the actual disadvantage to the parties is proved, according to Article 563 of the Code of Criminal Procedure (*pas de nullité sans grief*), which was not so in the instant case. The Court asserted that the prerogatives related to the rights of the defence were fully exercised by the lawyer; hence the procedural acts were confirmed. The Court emphasised that the simple claim of ineffective assistance is not enough to ground the formal annulment of the criminal procedure, since the absolute nullity prescribed in the criminal procedure law refers to the absence of protection for the defendant's rights, not to occasional ineffective assistance.

Cross-references:

- Article 563 of the Code of Criminal Procedure.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2014-2-033

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 22.05.2013 / **e)** 550769 / **f)** / **g)** *Diário da Justiça Eletrônico* 066 (Official Gazette), 03.04.2014 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Freedom of enterprise, restriction / Health, risk / Licence, revocation / Tobacco, product / Tax, imposition / Tax, offence, sanction.

Headnotes:

A strict requirement of tax regularity to maintain the special licence for the manufacturing and trading of cigarettes is justified by the peculiar characteristics of the tobacco industry which, due to its extremely harmful effects on human health, is subjected to the extrafiscal function of the tax revenue. When the frequent non-payment of tax obligations is proven, such a requirement does not breach the principles of economic activity (Article 170 of the Constitution) and proportionality and the due process clause, nor does it constitute a political sanction.

Summary:

I. This case concerned an extraordinary appeal filed against a decision that deemed constitutional Article 2.II of Decree-law 1593/1977, which requires the granting of a special licence for the activity of tobacco companies (manufacturing and trading of cigarettes) concerning their tax regularity. The appellant alleged that this rule breached the constitutional right to freedom of work and the principles of economic activity (Article 170 of the Constitution) and proportionality and the due process clause. The appellant also argued that the enforcement of political sanctions as a coercive practice for the payment of taxes is unconstitutional.

II. The Supreme Court, by majority, denied the claim in order to declare the constitutionality of the provision which requires the granting of a special licence for the activity of tobacco companies concerning their tax regularity. The Court stated that such a provision did not breach the constitutional right to freedom of work nor the principles of economic activity (Article 170 of the Constitution) and proportionality and the due process clause. The Secretariat of the Federal Revenue of Brazil considered this practice a legitimate way to prevent the frequent non-payment of tax obligations, especially when companies attempt to obtain superior competitive advantage, thus violating the principle of free competition. This occurs due to the habitual infringement of tax obligations, which originates in an undue competitive advantage in comparison to other companies in the tobacco market. The Court also held that the strict requirement of tax regularity is justified by the specific characteristics of the tobacco industry which, due to its extremely harmful effects on human health, is subjected to the extrafiscal function of the tax revenue.

Even though the Court's case law does not admit political sanctions on tax matters, the Court decided that a norm will be considered a political sanction when it offends:

- a. the relevance of the value of the tax credits owed;
- b. the due process of law concerning the enforcement of penalties; and
- c. the due process of law regarding the validity of the tax credits owed, the non-payment of which implies the cancellation of the special licence.

These Court held that these circumstances had not been demonstrated in the present case.

III. In separate opinions, dissenting Justices argued that Decree-law 1593/1977 is unconstitutional because it imposed political sanctions, departing from the Court's understanding that indirect sanctions to enforce the fulfilment of tax obligation are not admitted.

Cross-references:

- Article 170 of the Constitution;
- Article 2.II of the Decree Law 1593/1977.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-034

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 26.09.2013 / **e)** 561836 / **f)** / **g)** *Diário da Justiça Eletrônico* 027 (Official Gazette), 10.02.2014 / **h)**.

Keywords of the systematic thesaurus:

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

4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**

Keywords of the alphabetical index:

Monetary policy / Civil servant, remuneration / Currency.

Headnotes:

The regulation of the monetary system is a matter of the Federal Government's exclusive competence and state law must comply with applicable federal law.

Summary:

I. This case concerned an extraordinary appeal filed against a decision which ordered a member state to restore 11.98% of the salary of a civil servant due to the conversion of her salary from "*cruzeiros reais*" into Real Units of Value, a preparatory measure for the implementation of the Real, the current currency. The State had adapted the civil servants' salaries according to the criteria described in State Law 6612/1994, which are different from those established in Federal Law 8880/1994. The State, as appellant, argued that only a state law introduced by the governor might increase the remuneration of civil servants. The State demanded a compensation between the percentage of 11.98 % and the ulterior increases in the civil servants' remuneration.

II. The Supreme Court, unanimously, partially granted the extraordinary appeal and, *incidenter tantum*, deemed State Law 6612/1994 unconstitutional. The Court stated that the regulation of the monetary system is a matter for the Federal Government's exclusive competence; therefore, the conversion of the civil servants' salaries from "*cruzeiros reais*" into Real Units of Value according to Law 8880/1994

did not violate the Constitution. Accordingly, any state law or municipal law concerning currency conversion will be held unconstitutional if their rules are not compatible with the criteria introduced by Law 8880/1994, especially as regards the remuneration of the civil servants. In addition, the Court held Law 8880/1994 was part of national legislation; therefore, it concerns all civil servants and not only workers at the federal level.

The Court held that the right to the percentage of 11.98 % does not represent an increase in the remuneration of civil servants, but actually the payment of an undue decrease incurred in the conversion of the currency. Accordingly, this percentage represented a measure to prevent loss of remuneration. If this percentage was a remuneration increase, it would be a matter within state competence. However, since it is merely a change in the monetary standard, it is a subject of the Federal Government's competence.

The Court also considered that a compensation of the due percentage (11.98%) with ulterior wage increases is not possible, since this practice does not adjust the original error occurred at the moment of the conversion of salaries into Real Units of Value.

Cross-references:

- Law 8880/1994;
- Law 6612/1994 of Rio Grande do Norte State.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2014-2-035

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 12.02.2014 / **e)** 3541 / **f)** / **g)** *Diário da Justiça Eletrônico* 057 (Official Gazette), 24.03.2014 / **h)**.

Keywords of the systematic thesaurus:

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

4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar.**

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

Keywords of the alphabetical index:

Conflict of interest / Civil service, ethics / Equality / Incompatibility of public offices / Lawyer, incompatibility / Police, officer.

Headnotes:

There is an absolute conflict of interest between the activities of practising law and being a police officer.

Summary:

I. This case refers to a direct claim of unconstitutionality filed by the Brazilian Confederation of Civil Police Officers Workers (“Cobrapol”, in the Portuguese acronym) against the prohibition of the practice of law by police officers, established in the Article 28.V of the Law 8906/1994 (Lawyers’ Statute). The plaintiff argued that the challenged norm breaches the principle of equality (Article 5 of the Constitution), as it provides a different regime for police officers as compared to other civil servants, who are allowed to be lawyers.

II. The Supreme Court, unanimously, denied the claim. The Court decided that lawmakers, when they adopted the challenged norm, intended to establish a clause of incompatibility of the simultaneous exercise of both activities, which is justified, as the practice of law by police officers would be detrimental to both activities. This situation would allow, for example, the direct meddling of civil police officers in the inquisitorial step of criminal prosecutions (police investigations), which is a substantially important part of the procedure. Furthermore, the Court deemed ethically unacceptable that a prisoner could hire the counsel of a police officer who was a member of the body that performed the imprisonment. The same situation would occur in tax law, corporate law, administrative law or labour law, in which there are many acts that are defined as crimes. Thus, the Court emphasised that the prohibition is only applicable to the simultaneous exercise of both duties, as there is an absolute conflict of interests between these activities.

Finally, the Court emphasised that the list of professional activities that are incompatible with the practice of law, established in the Lawyers’ Statute, is broad and includes other groups of political agents and civil servants. Accordingly, the Court decided that the

differentiation criterion is compatible with the constitutional principle of equality, under the inherent particularities of the exercise of the police activity and the practice of law.

Cross-references:

- Article 28.V of the Law 8906/1994;
- Article 5 of the Constitution.

Languages:

Portuguese, English (translation by the Court).



Bulgaria

Constitutional Court

Statistical data

1 May 2014 – 31 August 2014

Total number of decisions: 6

Important decisions

Identification: BUL-2014-2-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 17.07.2014 / **e)** 10/2014 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 61, 25.07.2014 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

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

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated.**

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

Keywords of the alphabetical index:

Incapacity, legal protection / Fundamental rights, limitation, proportionality.

Headnotes:

The Constitution allows a person to be placed under guardianship and be declared incapable. This restrictive measure, which prevents the person concerned from performing legal acts him or herself, is justified only in so far as its objective is either to protect that person from his or her own acts or to protect the rights of third parties or of society.

In pursuance of the law in force, the placement of guardianship and status of legal incapacity are accompanied by additional restrictions, which are disproportionate to the rights of the persons protected and contrary to the State's constitutional obligation to provide greater care to such persons.

The Constitutional Court did not declare unconstitutional the two legislative provisions referred to it. Nevertheless, the judges unanimously ruled that national law must be significantly amended in order to satisfy all the requirements of the Convention on the Rights of Persons with Disabilities.

Summary:

I. The Constitution stipulates that persons suffering from a physical or mental disability shall benefit from particular protection by the State and by society. Where persons with mental disabilities are concerned, that protection also entails measures to prevent them from performing legal acts that would adversely affect their own interests.

In this context, a special place is reserved for legal protection measures. Legal protection enables the legal acts of persons suffering from a mental disability to be restricted insofar as, on account of their mental state, there is no more effective means of protecting their interests. That mechanism also protects both the rights of third persons who might be adversely affected by the acts of persons with a mental disability and the certainty of economic life.

The only consequences for which the Constitution provides for persons placed under guardianship concern their active and passive voting rights.

II. In pursuance of the Persons and Families Act, anyone unable alone to provide for his or her own interests as a result of diminished mental or psychological faculties is placed under guardianship and declared incapable. This concerns the legal status of that person, who, on account of his or her mental or psychological state, is unable to exercise his or her rights and obligations. As far as their legal position is concerned, those persons declared incapable are treated as minors, given that they cannot bring legal proceedings but are represented by their guardians.

It is placement under guardianship that results in legal incapacity. Guardianship is imposed by the Court at the request of the spouse or close family of the person concerned, of the public prosecutor or of third persons who can demonstrate an interest in taking such action.

When deciding on guardianship, the Court takes into account two kinds of evidence. The first is medical evidence, which indicates the causes of the mental disorder. The second is legal evidence, which is offered to prove that the person is not in a position to look after his or her own interests. Thus the decision issued by the Court is based not only on an assessment of the seriousness of the deficiency, but also on an assessment of its duration.

At the same time, the Court is not obligated to request a psychiatric expert's opinion. In principle, it issues its ruling after hearing the person concerned and if that is not enough, after collecting other evidence and hearing experts.

Although the Court decides based on an estimate of the duration of the mental disorder, the law does not provide for a mechanism whereby the state of health of the protected person is regularly reviewed. In other words, in the event his or her situation improves following treatment, or for any other reason, and maintenance of the guardianship no longer seems necessary, it is not possible to restore that person's rights. Furthermore, the protected person cannot request termination of the guardianship, as that right is granted to his or her close family, guardianship body or public prosecutor.

The law does not expressly govern the legal status of persons declared incapable. Those persons are treated as minors, for the care provided by a biological parent to his or her child is artificially equated with the care provided to an incapable person by a guardian appointed by the mayor of the municipality.

The absence of detailed legislation governing the legal status of adults declared incapable entails the restriction of those rights, as the exercise of which would risk their interests or that of third persons or of society. It also entails the restriction of several other rights, including those enshrined in the Constitution and exercised through the performance of legal acts.

The legislation in force, however, does not comply with the requirements of the Convention on the Rights of Persons with Disabilities. According to the Convention, the restrictive measures must be proportional to the circumstances of the person concerned, applied for the shortest time possible and subject to regular review by an independent body.

The impugned provisions are not in themselves contrary to the Constitution. However, they must be restrictively interpreted, in pursuance of the constitutional requirement for greater protection of the rights of persons with mental disabilities. Such

protection can be introduced only if the restrictions necessarily deriving from guardianship do not in an unjustified manner adversely affect the fundamental rights which those persons enjoy in pursuance of the Constitution. Legal incapacity would thus be considered a situation in which there must be a guarantee of measures preventing protected persons from performing legal acts which would adversely affect their own interests, those of third persons or those of society.

The imperfect nature of the legislation governing the system applied to the consequences of legal incapacity is not due solely to the two impugned provisions. In other words, non-application of those provisions would not be enough to bring the legislation now in force into conformity with the Convention on the Rights of Persons with Disabilities. Protection of the rights of persons with mental disabilities comes within the remit of the National Assembly, which must take responsibility for drafting and adopting appropriate legislation.

An immediate declaration that the provisions concerned are unconstitutional would bring no solution to the issues relating to the rights of persons declared incapable. Its only effect would be to introduce major deficiencies into the legal system applied to those persons, to repeal the special protective measures granted to them by the legislation in pursuance of the Constitution and to deprive the institution of guardianship of its meaning.

Languages:

Bulgarian.



Canada Supreme Court

Important decisions

Identification: CAN-2014-2-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 14.05.2014 / **e)** 34884 / **f)** Canada (Citizenship and Immigration) v. Harkat / **g)** *Canada Supreme Court Reports* (Official Digest), [2014] 2 S.C.R. 33 / **h)** <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13643/index.do>; 458 *National Reporter* 67; 24 *Immigration Law Report* (4th) 1; 10 *Criminal Reports* (7th) 225; [2014] S.C.J. no. 37 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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.**

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

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

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

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

Keywords of the alphabetical index:

Immigration, inadmissibility, removal / Terrorism / National security.

Headnotes:

The security certificate scheme set out in the Immigration and Refugee Protection Act (hereinafter, “IRPA”) complies with the Constitution, in particular with the guarantee at Section 7 of the Canadian Charter of Rights and Freedoms against unjustifiable

intrusions on life, liberty, and security of the person. The provisions of the scheme, which prevent the person named in the certificate from seeing some of the evidence and information tendered against him because its public disclosure would harm national security and which prevent the named person from personally participating in all of the hearings, are constitutional. They do not violate the named person's right to know and meet the case against him, or the right to have a decision made on the facts and the law. The IRPA scheme provides sufficient disclosure to the named person to be constitutionally compliant.

Summary:

I. The appellant is alleged to have come to Canada for the purpose of engaging in terrorism. A security certificate was issued against him pursuant to the scheme set out in the IRPA. According to that certificate, the appellant was inadmissible to Canada on national security grounds. The certificate was referred to the Federal Court for a determination as to its reasonableness. The appellant challenged the constitutionality of the scheme. The Federal Court found the security certificate scheme under the IRPA to be constitutional, and concluded that the certificate was reasonable. On appeal, the Federal Court of Appeal upheld the constitutionality of the scheme. According to the IRPA scheme, the named person must be given summaries of the information and evidence which allows him to be reasonably informed of the case against him but the summaries must not include anything that would be injurious to national security or endanger the safety of any person if disclosed. Since some of the hearings are held in camera and *ex parte* in order to permit the presentation of information and evidence the public disclosure of which could be injurious to national security or endanger the safety of a person, special advocates are appointed to protect the interests of the named person in those hearings. Strict communication rules apply to special advocates: after they are provided with the confidential information and evidence, they may communicate with another person about the proceeding only if authorised. The usual rules of evidence do not apply to the proceedings. The judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate.

II. The alleged defects of the IRPA scheme must be assessed in light of the scheme's overall design and of the two central principles that guide the scheme:

1. the Federal Court judge who reviews the reasonableness of the certificate (the "designated judge") is intended to play a gatekeeper role, is vested with

broad discretion and must ensure not only that the record supports the reasonableness of the finding of inadmissibility but also that the overall process is fair; and

2. participation of special advocates is intended to be a substantial substitute for personal participation by the named person in closed hearings. However, the scheme remains an imperfect substitute for full disclosure in an open court, and the designated judge has an ongoing responsibility to assess the overall fairness of the process and to grant remedies under Section 24.1 of the Charter where appropriate.

The designated judge has a statutory duty to ensure that the named person is reasonably informed of the case against him or her. A named person is "reasonably informed" if he or she has personally received sufficient disclosure to be able to give meaningful guidance and information to his or her special advocates which will allow them to challenge the information and evidence presented in the closed hearings. The level of disclosure required for a named person to be reasonably informed is case-specific. Ultimately, the designated judge is the arbiter of whether this standard has been met.

Only information and evidence that raises a serious risk of injury to national security or danger to the safety of a person can be withheld from the named person. The designated judge must ensure that only information or evidence which would injure national security or endanger the safety of a person is withheld from the named person. Systematic over-claiming would infringe the named person's right to a fair process or undermine the integrity of the judicial system, requiring a remedy under Section 24.1 of the Charter.

The IRPA scheme's approach to disclosure, which fails to provide for a balancing of countervailing interests, does not render the scheme unconstitutional. Section 7 of the Charter does not require a balancing approach to disclosure, rather, it requires a fair process. Parliament's choice to adopt a categorical prohibition against disclosure of sensitive information, as opposed to a balancing approach, does not as such constitute a breach of the right to a fair process.

The communications restrictions imposed on special advocates do not render the scheme unconstitutional. They are not absolute and can be lifted with judicial authorisation. The judicial authorisation process gives the designated judge a sufficiently broad discretion to allow all communications that are necessary for the special advocates to perform their duties. This broad discretion averts unfairness as the designated judge can ensure that the special advocates function as

closely as possible to ordinary counsel in a public hearing. The designated judge should take a liberal approach in authorising communications and only refuse authorisation where it has been demonstrated, on a balance of probabilities, that there is a real risk of injurious disclosure. In addition, the named person and his public counsel can send an unlimited amount of one-way communications to the special advocates at any time throughout the proceedings.

The admission of hearsay evidence or the denial of the opportunity for special advocates to cross-examine sources do not render the IRPA scheme unconstitutional. The IRPA scheme achieves the purpose of excluding unreliable evidence by alternative means to the rule against hearsay evidence and the right to cross-examine witnesses: it provides the designated judge with broad discretion to exclude evidence that is not “reliable and appropriate”, which allows the judge to exclude not only evidence that he or she finds, after a searching review, to be unreliable, but also evidence whose probative value is outweighed by its prejudicial effect against the named person.

In the present case, the process was fair and the designated judge committed no reviewable error in finding that the certificate was reasonable.

Languages:

English, French (translation by the Court).



Identification: CAN-2014-2-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 13.06.2014 / **e)** 34644 / **f)** R. v. Spencer / **g)** *Canada Supreme Court Reports* (Official Digest), 2014 SCC 43, [2014] x S.C.R. xxx / **h)** <http://scc.lexum.org/en/index.html>; 458 *National Reporter* 24; [2014] 8 *Western Weekly Reports* 209; 11 *Criminal Reports* (7th) 52; [2014] S.C.J. no. 43 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Child pornography / Search and seizure of home computer, police / Constitutional right, violation / Evidence, obtained unlawfully, admission.

Headnotes:

Under Section 8 of the Canadian Charter of Rights and Freedoms, “[e]veryone has the right to be secure against unreasonable search or seizure.” There is a reasonable expectation of privacy in the subscriber information associated with the Internet Protocol (hereinafter, “IP”) address of a computer. The disclosure of this information will often amount to the identification of a user carrying out intimate or sensitive activities online, usually on the understanding that these activities would remain anonymous. A request by a police officer that an Internet Service Provider (hereinafter, “ISP”) voluntarily disclose such information amounts to a search. A search is unreasonable if it is not authorised by law as in this case: the police do not gain a new search power through the combination of a declaratory provision of the Criminal Code and a statutory provision enacted to promote the protection of personal information. While the electronic files containing child pornography were obtained in a manner that infringed the accused’s rights guaranteed by Section 8 of the Charter, the admission of this evidence would not bring the administration of justice into disrepute and it should therefore not be excluded under Section 24.2 of the Charter.

Summary:

I. The police identified the IP address of a computer that someone had been using to access and store child pornography through an internet file sharing programme. They then obtained from the ISP, without prior judicial authorisation, the subscriber information associated with that IP address. The request was purportedly made pursuant to Section 7.3.c.1.ii of the Personal Information Protection and Electronic Documents Act (hereinafter, “PIPEDA”), which permits disclosure to a government institution that has requested the disclosure for the purpose of law enforcement and has stated its “lawful authority” for the request. This led them to the accused. With this

information in hand, the police obtained a warrant to search the home where the accused lived and seize his computer. He was charged with possessing child pornography and making child pornography available over the internet contrary to Section 163.1.4 and 163.1.3 of the Criminal Code. At trial, the accused sought to exclude the evidence found on his computer on the basis that the police actions in obtaining his address from the ISP without prior judicial authorisation amounted to an unreasonable search contrary to Section 8 of the Charter. The trial judge convicted the accused of the possession offence, but acquitted him of the making available charge. The Court of Appeal upheld the conviction, however set aside the acquittal on the second charge and ordered a new trial.

II. In a unanimous decision, the Supreme Court dismissed the appeal filed by the accused.

The Court held that the existence of a reasonable expectation of privacy is assessed by considering and weighing a large number of interrelated factors. The two relevant circumstances in this case were the nature of the privacy interest at stake and the statutory and contractual frameworks governing the ISP's disclosure of subscriber information.

First, the Court found that the nature of the privacy interest engaged by the state conduct turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. Particularly important in the context of internet usage is the understanding of privacy as anonymity. Some degree of anonymity is a feature of much internet activity and depending on the totality of the circumstances, anonymity may be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure. The Court held that, in this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest. As for the contractual and regulatory frameworks governing the ISP's disclosure of subscriber information, the Court found that they overlap and the relevant provisions provide little assistance in evaluating the reasonableness of the accused's expectation of privacy. It would be reasonable for an internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat PIPEDA's general prohibition on the disclosure of personal information without consent. Here, the request by the police had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. The relevant contractual provisions support the existence

of a reasonable expectation of privacy. Therefore, in the totality of the circumstances of this case, the Court concluded that the accused had a reasonable expectation of privacy in the information provided to the police by the ISP and, therefore, obtaining that information was a search within the meaning of Section 8 of the Charter.

The Court then stated that whether the search was lawful is dependent on whether the search was authorised by law. Neither Section 487.014.1 of the Criminal Code, nor PIPEDA creates any police search and seizure powers. Without the subscriber information obtained by the police, the warrant could not have been obtained. It follows that if that information is excluded from consideration because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant and the search of the residence was therefore unlawful and violated the Charter. However, in the Court's view, the police were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. While the impact of the Charter infringing conduct on the Charter protected interests of the accused weighed in favour of excluding the evidence, the offences here were serious. Society has an interest in the adjudication of the case, and all the more so for a crime which implicates the safety of children. Balancing these factors, the Court held that the exclusion of the evidence would bring the administration of justice into disrepute.

Languages:

English, French (translation by the Court).



Identification: CAN-2014-2-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 31.07.2014 / **e)** 35049 / **f)** R. v. Hart / **g)** *Canada Supreme Court Reports* (Official Digest), 2014 SCC 52, [2014] 2 S.C.R. 544 / **h)** <http://scc.lexum.org/en/index.html>; [2014] S.C.J. no. 52 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

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

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

Keywords of the alphabetical index:

Evidence, admissibility, probative value, prejudicial effect / Police, undercover operation, abuse of process.

Headnotes:

A confession elicited during an undercover Mr Big operation will be excluded where its prejudicial effect outweighs its probative value, or where it is the product of an abuse of process.

Summary:

I. The accused's twin daughters drowned. The police immediately suspected that the accused was responsible for their deaths. However, they lacked the evidence needed to charge him. As a result, undercover officers began a "Mr Big" operation by recruiting the accused into a fictitious criminal organization. At the time, the accused was unemployed and socially isolated. After he was recruited into the organisation, the accused worked with the undercover officers and was quickly befriended by them. According to one of the undercover officers, during the operation, the accused made a bald statement in which he confessed to having drowned his daughters. The operation culminated with a meeting akin to a job interview between the accused and Mr Big, the man purportedly at the helm of the criminal organisation. During their meeting, Mr Big interrogated the accused about the death of his daughters, seeking a confession from him. After initially denying responsibility, the accused confessed to drowning them. He later went to the scene of the drowning with an undercover officer and explained how he had pushed his daughters into the water. He was arrested shortly thereafter. At trial, the accused's confessions were admitted into evidence and he was convicted of two counts of first degree murder. A majority of the Court of Appeal concluded that the Mr Big operation had breached the accused's right to silence under Section 7 of the Canadian Charter of Rights and Freedoms. The majority excluded two of the accused's confessions, the one to Mr Big and the one to the undercover officer at the scene of the drowning. However, the majority concluded that the accused's bald confession was admissible and ordered a new trial.

II. A majority of the Supreme Court recognised a new common law rule of evidence. Under this rule, where the state recruits an accused into a fictitious criminal organisation and seeks to elicit a confession from him, any confession made by the accused during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value is a function of its reliability. Its prejudicial effect stems from the harmful character evidence that necessarily accompanies its admission. The trial judge must also determine whether the police conduct amounted to an abuse of process.

According to the majority, the probative value of the accused's confessions in this case did not outweigh their prejudicial effect. At the time the operation began, the accused was unemployed and socially isolated. The operation had a transformative effect on his life, lifting him out of poverty and providing him with illusory friendships. These financial and social inducements provided the accused with an overwhelming incentive to confess – either truthfully or falsely. Nor did the confessions themselves contain any markers of reliability that were capable of restoring faith in their reliability. The confessions contained internal contradictions, and there was no confirmatory evidence capable of verifying any of the details contained within the confessions. When the circumstances in which the accused's confessions were made were considered alongside their internal inconsistencies and the lack of any confirmatory evidence, their reliability was left in serious doubt. On the other hand, these confessions – like all Mr Big confessions – carried with them an obvious potential for prejudice. The jury heard extensive evidence that for months the accused devoted himself to trying to join a criminal organisation and that he repeatedly participated in what he thought were criminal acts. The potential for prejudice in these circumstances was significant.

On balance, the majority concluded, the Crown had not met its onus. The probative value of the accused's confessions did not outweigh their prejudicial effect and they must be excluded. Accordingly, the majority determined that it was unnecessary to decide whether the police conduct amounted to an abuse of process.

III. In a concurring opinion, one judge held that the common law rule proposed by the majority failed to consistently take into account broader concerns that arise when state agents generate a confession at a cost to human dignity, personal autonomy and the

administration of justice. However, the principle against self-incrimination under Section 7 of the Charter provides comprehensive and flexible protection in such circumstances. Four factors are considered for determining whether the principle against self-incrimination has been violated by the production or use of a suspect's statements: adversarial relationship; coercion; reliability; and abuse of state power. The onus is on the accused to establish a *prima facie* breach of the principle against self-incrimination and then, the burden will shift to the Crown to establish that there is no breach.

As concerns the first factor, the concurring judge held that the relationship between the accused and the state was adversarial. As in any Mr Big operation, the police deliberately set out to obtain a confession from him. As for the second factor, coercion is primarily concerned with the autonomy and dignity of the suspect. The court should consider: the magnitude and duration of the operation; any explicit or implied threats used; any financial, social or emotional inducements applied; and the characteristics of the suspect. In this case, the trial judge concentrated on the lack of violent coercion during the operation, but did not consider the effect of the financial and social inducements on the accused. These inducements were significant by anyone's measure, but must be viewed as more seriously infringing the accused's autonomy interests, given his extreme poverty and social isolation as well as his lack of education. The reliability enquiry focuses on the trustworthiness of any statement obtained. In this case, the accused's final confession was uncorroborated and contained inconsistencies with the other known facts of the case. The accused's bald confession carried many of the same reliability concerns. Under the final factor, the police conduct was egregious and this factor especially weighs in favour of exclusion. This was not the usual undercover investigation where police join an existing criminal organisation to witness criminals in action. This case is more akin to entrapment.

Therefore, the concurring judge concluded that the four factors pointed to a Section 7 Charter violation and that both the risk of a miscarriage of justice and the abusive police conduct called for exclusion under Section 24.2.

Languages:

English, French (translation by the Court).



Chile Constitutional Court

Important decisions

Identification: CHI-2014-2-005

a) Chile / **b)** Constitutional Court / **c)** / **d)** 09.07.2014 / **e)** 2656-2014 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.2.1.7 Constitutional Justice – Types of claim – Claim by a public body – **Public Prosecutor or Attorney-General.**

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

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

Keywords of the alphabetical index:

Due process / Protection, judicial / Public prosecutor, powers / Witness, anonymous.

Headnotes:

The Guarantee Judge is competent to determine whether witnesses with identity protection are allowed at trial; not the Public Prosecutor.

Summary:

I. The issue here is whether a Public Prosecutor or a Guarantee Judge (responsible for the protection of the rights of the people involved in the case, particularly those of the accused) is competent to determine if witness protection, with reservation of their identities, is allowed in a trial. In this particular case, the defence of the accused challenged before the Guarantee Judge a resolution of the Public Prosecutor that invoked the witnesses' anonymity.

II. The Constitutional Tribunal declared that in this case the competence to determine the admissibility of witnesses, whose identity remains secret during trial, belongs to the Guarantee Judge and not to the Public Prosecutor. This is so because the judge is the one

who guarantees the right to due process established in the Constitution. It must be noted that the secret identity of a witness, although admissible, is a mechanism that might infringe fundamental rights during a trial, and the judge is competent and obliged to assure those rights are not breached.

Languages:

Spanish.



Identification: CHI-2014-2-006

a) Chile / **b)** Constitutional Court / **c)** / **d)** 12.08.2014 / **e)** 2625-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law.**

Keywords of the alphabetical index:

Access to courts, right / Decision, administrative, judicial review / Police, administrative control / Due process.

Headnotes:

Although the law states that administrative decisions of the Police Evaluation Committee are not subject to appeal or review, this refers solely to appeal or review within the hierarchy of administrative organs and does not preclude appeal or review by the courts.

Summary:

I. The plaintiff, a police officer, had been removed from the police force for poor performance. He challenged that decision of the Police Evaluation Committee before the Court of Appeal and during that process he filed an inapplicability action to the

Constitutional Tribunal against the legal provision, which states that all decisions of police evaluation committee are neither appealable nor reviewable by other state organs, since the police institution is sovereign in its decisions and qualifications. The plaintiff contended that this norm is unconstitutional as it breaches his right to equal treatment before the law, due process and infringes the publicity principle that governs all state organs.

II. The Constitutional Tribunal declared that the application of the challenged norm is not unconstitutional in this concrete case. In its reasoning the Tribunal held that the term “sovereign” implies that the decisions of the Committee are not reviewable or appealable by other organs of the administration, meaning that an administrative procedure is final when this Committee has made its decision. Thus, sovereignty means that the Committee is independent, in a hierarchical point of view, to other organs of the administration. This does not mean, however, that the administrative decision in this case is not reviewable by judicial jurisdiction. As a matter of fact, in this particular case plaintiff has challenged the Committee’s decision at the Court of Appeal, which shows that the decision is open to a review by the judiciary, and thus the procedural rights of plaintiff are safeguarded.

Languages:

Spanish.



Identification: CHI-2014-2-007

a) Chile / **b)** Constitutional Court / **c)** / **d)** 14.08.2014 / **e)** 2614-2014 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

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

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

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



Keywords of the alphabetical index:

Bye-law / Legality / Tax authority, power / Tax exemption / Tax, regulation, competence.

Headnotes:

A bye-law, made by an administrative organ, which regulates complementarily a tax exemption granted by law, does not infringe the legality principle in taxation given that taxation law cannot regulate all details of the legal relations between the Internal Tax Service and taxpayers.

Summary:

I. A judge, in the course of reviewing a taxation trial, challenged the constitutionality of a norm of Tax Code that establishes a tax exemption. To claim this exemption, tax contributors were obliged to inform Internal Tax Service (hereinafter, “ITS”) about their operations, in order to be included in the exemption items. The ITS dictated a bye-law that establishes the date schedule for complying with the duty to inform.

The judge argued that the faculty granted to the ITS to dictate a bye-law in which date limits are established for claiming tax exemption, is unconstitutional because it breaches the legality principle in taxation matters. He claims that this bye-law regulates issues that should be established in taxation law and not in a decree.

II. The Constitutional Tribunal, by majority, rejected the judge’s argument and held that there is no breach of the legality principle in this case. Thus, the Tribunal stated that the legality principle does not imply that law has to regulate completely and every detail the juridical relations involved, but the general description of essential elements that establishes the general basis of a regulation. In taxation regulations an exemption must not be seen as general constitutional guarantee, so it is not unconstitutional that the ITS regulates the manner in which a tax exemption may be claimed.

Languages:

Spanish.

Identification: CHI-2014-2-008

a) Chile / **b)** Constitutional Court / **c)** / **d)** 21.08.2014 / **e)** 2530-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.14 General Principles – ***Nullum crimen, nulla poena sine lege.***

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

Keywords of the alphabetical index:

Certainty of the law / Criminal act, definition / Guilt, principle / Presumption, legal.

Headnotes:

The expression “non-authorized person” contained in a penal provision does not infringe the principle of prior legal definition of criminal offences. In addition, use of the expression “shall be punished” in reference to a criminal offence does not constitute a legal presumption that an offence has been committed, as the criminal intention of a defendant must still be proven.

Summary:

I. The plaintiff had been accused of a military felony for disclosing information to non-authorized person. He alleged that the norm that describes the crime is unconstitutional because it infringes two constitutional principles, namely *nullum crimen, nulla poena sine lege* and the prohibition on the legal presumption of a criminal offence. The plaintiff argued that the expression “not authorised person” is vague and may lead to an arbitrary interpretation of the criminal judge. Meanwhile the expression “shall be punished” constitutes a legal presumption of a criminal offence, since the norm assumes a criminal act, without the possibility to prove otherwise.

II. The Constitutional Tribunal rejected both allegations. Firstly, it stated that the expression “non-authorized person” is not vague. Although it opens the possibility for the judge to have a margin of appreciation, within the various possible interpretations it is possible to find one that favours the plaintiff.

Thus this expression may not be considered a path to arbitrary decisions, since the *nullum crimen, nulla poena sine lege* principle does not mean that all cases and conducts must be clearly foreseen in the law.

Secondly, regarding the expression “shall be punished”, the Tribunal held that this does not imply a legal presumption of criminal responsibility, because the criminal intention of the agent must be proven, and therefore it is not possible to prematurely declare the criminal responsibility of the plaintiff.

Languages:

Spanish.



Croatia Constitutional Court

Important decisions

Identification: CRO-2014-2-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.07.2014 / **e)** U-I-885-2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 89/14 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.18 General Principles – **General interest.**
 3.22 General Principles – **Prohibition of arbitrariness.**
 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.**
 5.3.13.12 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the decision.**
 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:

Appeal, point of law, interest of the law / Judgment, reason, obligation / Supreme Court, law, uniform application.

Headnotes:

Dissimilar, normative solutions requiring the Supreme Court to elaborate reasons for dismissing a request for an extraordinary revision in its rulings but not if the dismissal stemmed from a finding that the request was “inadmissible” (question of law is not relevant for ensuring a uniform application of law and the equality of all in its application) are unconstitutional.

Summary:

I. Upon a natural person's proposal, the Constitutional Court initiated proceedings to review Article 392b.4 of the Civil Procedure Act (hereinafter, the "Act") and to repeal it by the decision. The proponent alleged that Article 392b of the Act does not conform to Articles 14.2 and 29.1 of the Constitution, asserting that each "decision on the revision" must contain a statement of reasons.

A revision is an extraordinary, devolutive, independent, limited, two-sided, and non-suspensive remedy. It may be lodged by litigants due to a violation of law, against judgments by second instance courts rendered upon appeals against first instance courts, and against rulings by second instance courts whereby the proceedings before the Court are concluded as a final decision (*res judicata*).

This is a well-established, legal concept in the Croatian legal order and decided by the country's highest court. Pursuant to Article 116.1 of the Constitution, the highest court is the Supreme Court. It possesses the fundamental, constitutional task to ensure the uniform application of law and the equality of all in its application.

There are two types of revision with significantly different requirements for their admissibility and procedures to decide on the revision. An "ordinary" revision may be lodged only for essential violations of civil procedure rules and for erroneous application of substantive law. An "extraordinary" revision, however, may be lodged and a challenged judgment may be examined only for a question of substantive or procedural law for which it is "admissible". It is admissible if the request raises a question relevant to ensure a uniform application of law and the equality of all in its application.

Pursuant to the provisions of the Act, when the Supreme Court decides on an ordinary revision, it is the "classic" cassation court, and the decision on revision has effects *inter partes*. In contrast, an extraordinary revision is regulated as a remedy with the primary task of ensuring a uniform application of the law and the equality of all in its application. Accordingly, the concept of extraordinary revision is always connected to issues of public/general interest.

Article 392b of the Act prescribes the procedure to be followed by the revision chamber of the Supreme Court when it decides on an extraordinary revision.

Pursuant to Article 392b.1 of the Act, the revision chamber of the Supreme Court shall dismiss an incomplete (meaning, it cannot be established based

on the request or is not signed) and an inadmissible request for extraordinary revision. The Supreme Court shall also dismiss it if it is untimely, if the first instance court had failed to do so. In these cases, the ruling of the revision chamber of the Supreme Court must contain a statement of reasons.

Article 392b.2-3 also prescribes that the revision chamber of the Supreme Court may dismiss a request for an extraordinary revision as inadmissible in two legally different situations. The first situation is when a request for an extraordinary revision is incomplete because it fails to meet the formal requirements for a decision to be made. The second situation is when a request for an extraordinary revision is complete, but the revision chamber of the Supreme Court assesses that the question of law for which it was lodged is not relevant for ensuring a uniform application of law and the equality of all in its application.

However, in contrast to cases given in Article 392b.1 of the Act whereby a ruling to dismiss a request for revision must contain a statement of reasons, the cases referred in Article 392b.2-3, pursuant to Article 392b.4 of the Act, do not. That is, the revision chamber of the Supreme Court does not need to state the reasons for dismissing as inadmissible the request for an extraordinary revision. If an elaboration of the reasons would be purposeful, the chamber can do so but is not required.

II. After considering the challenged Article 392b.4 and 392b.1-3 of the Act, the Constitutional Court determined that such difference embodied in the normative solutions were unconstitutional. That is, the legal provision that empowered the Supreme Court not to state reasons for its decision to dismiss a request for an extraordinary revision is unacceptable. The Constitutional Court did not see any objective and relevant reason for the dissimilarities: namely, the obligation to provide a statement of reasons for a ruling dismissing a request for an extraordinary revision for the reasons prescribed in Article 392b.1 of the Act, but no such obligation in the case of the dismissal of a request for an extraordinary revision referred to in Article 392b.1-3.

Moreover, in the case referred to in Article 392b.3 of the Act, the Constitutional Court found that constitutional rights were at stake. This includes the right of a party to a reasoned decision for the dismissal of a remedy that the person is legally entitled to and who may have met all the formal requirements for the request for the extraordinary revision. Because this right was denied, the entire public – not to mention the whole system of regular and specialised courts, including the Constitutional Court – is deprived not only of the possibility of

knowing or gaining insight into the highest court's opinions in creating a national jurisprudence but also for the provision of guidance for the national judicial mechanism. In other words, the manner in which the Supreme Court builds the uniformity of a national judicial space and ensures the equality of citizens within the meaning of Article 116.1 of the Constitution can be best seen through its decision on whether a question of law is relevant for ensuring a uniform application of law and the equality of all in its application.

It was precisely for these reasons that sufficient and relevant reasons for its decision must be stated in the ruling whereby the Supreme Court dismissed a request for an extraordinary revision as inadmissible.

The Constitutional Court, moreover, held that the scope and appropriateness of the statement of reasons may vary depending on the specific question. However, the statutory power to state or not state any reason (although the matter in question is of general/public interest) emphasises a profound inconsistency between Article 392b.4 of the Act and Article 116.1 of the Constitution. Such a statutory provision negates the very essence and purpose of the constitutional task of the Supreme Court prescribed in Article 116.1 of the Constitution.

The Constitutional Court also noted that Article 392b.4 of the Act and its application may create the public impression that the Supreme Court can act arbitrarily. This view may arise if it dismisses a request for an extraordinary revision as inadmissible upon finding that the lodged question of law is not relevant for ensuring a uniform application of law and the equality of all in its application, without giving reasons for its dismissal. The requirements connected with the "appearance" of the proper functioning of courts – inherent not only in the right to a fair trial but also in the proper functioning of judicial power – do not allow the possibility of dismissing a request for an extraordinary revision without stating the reasons for such a judicial decision.

Cross-references:

- Ruling no. U-I-4365/2008, 26.03.2013.

European Court of Human Rights:

- *Bulfracht Ltd. v. Croatia*, no. 53261/08, 21.06.2011.

Languages:

Croatian, English.



Identification: CRO-2014-2-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 18.07.2014 / **e)** U-I-897-2014 / **f)** / **g)** *Narodne novine* (Official Gazette), 99/14 / **h)** CODICES (Croatian, English).

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.**

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:

Legislature, interference with justice.

Headnotes:

Through laws, the legislature can establish reasons to nullify legal affairs abstractly and generally. Such authority, however, cannot be used to interfere with a particular contractual relationship lawfully entered into before the adoption of these new laws. The interference, embodied in transitional legal provisions and enacted by the arbitrary use of legislative powers, cannot unilaterally nullify that relationship. As opposed to the Court with pending litigation, the legislature does not have the authority to impose a law on a particular case, such that it assumes the function of a court judgment and decides on the outcome of a dispute. This is contrary to the principle of the separation of powers, certainty of the law and the rule of law.

Summary:

I. Proposed by the Society of Friends of Dubrovnik Antiques from Dubrovnik (hereinafter, the "applicant"), the Constitutional Court initiated proceedings to review Article 36 of the Act on Amendments to the Act on the Rehabilitation of Dubrovnik's Endangered Architectural Heritage (hereinafter, the "Act of 2014") and subsequently repeal it by the decision.

The aim of the Act on the Rehabilitation of Dubrovnik's Endangered Architectural Heritage in 1986 was to rehabilitate the endangered architectural

heritage. The Act was amended a few times, and the last amendment was made in 2014.

The legal relationship between the City of Dubrovnik (former Municipality of Dubrovnik) and the applicant was formed with the establishment of the 1969 contract (hereinafter, the "Contract"). The applicant was entrusted with the "maintenance and use of the complex of the City Walls of Dubrovnik". This Contract was amended by the 1984 Annex. The second Contract on the Maintenance and Use of the City Walls was concluded in 1998 and was amended by the 2009 Annex. By the 2009 Annex, the City of Dubrovnik entrusted the applicant, *inter alia*, with handling the entry of the right of management, governance of the City Walls and the right of usufruct in the land register, which it did. Its right of use was entered in the land registry. The manner of the distribution of revenue (divided in equal parts between the City and the proponent) from the sale of tickets was also amended.

The City of Dubrovnik instituted a civil dispute before the Municipal Court in Dubrovnik against the applicant. The City of Dubrovnik argued that the entry in the land registry of the applicant's above-mentioned rights was unlawful and demanded the deletion of the cadastral situation resulting from the entry of the usufructuary right in that land registry file. The claim was rejected by the first instance judgment in 2012.

The applicant claimed, *inter alia*, that the conclusion of the 2009 Annex caused a dispute concerning the enforcement of rights and obligations in the Annex "... resulting from the desire of the current mayor for the early termination of the existing Contract in order to be able to collect all the funds from sales of tickets for the City Walls..." Moreover, it alleged that the legislature interfered with the judiciary because of the pending dispute between the City of Dubrovnik and the applicant in relation to the registered usufructuary right of the City Walls for the benefit of the applicant.

Pursuant to the disputed Article 36 of the Act of 2014, the governing and management of the City Walls of Dubrovnik, as a generally used public good, shall be taken over by the City of Dubrovnik. Also, the rights of third persons on any basis (e.g., contract) that used, managed or governed the city walls in any other way shall be terminated. Moreover, from the date of its entry into force, all legal affairs concluded with a view to managing, using and governing the City Walls of Dubrovnik shall be null and void.

The only exceptions shall be the leasing agreements for business premises and spaces on the City Walls concluded by the applicant with third persons, which

shall remain in force, with the lessor being the City of Dubrovnik instead of the applicant. Other paragraphs of the disputed Article (paragraphs 4 to 9) prescribe the manner of implementation of paragraphs 1 and 2 and regulate the relations between the former contracting parties after the termination of their contractual relation. This was proclaimed null and void and without any legal effect (entry into possession, enforcement, transfer of cash to the applicant's accounts, entry into the land registry, etc.).

II. The Constitutional Court, firstly, noted that the legislature has been generally authorised, pursuant to Article 52 of the Constitution, to appoint a person to govern and manage the Dubrovnik City Walls, as a cultural good. The legislature in the Act of 2014 appointed the City of Dubrovnik in the framework of transitional legal provisions (Article 36.1 of the Act of 2014), which the applicant claimed was established in a manner that was unconstitutional.

In these Constitutional Court proceedings, the question was whether the legislature intervened in the existing civil law obligations between the City of Dubrovnik and the applicant in a constitutionally acceptable (permissible) manner.

Namely, the applicant had governed and managed the Dubrovnik City Walls continuously since 1969 without any problems in accordance with the contract and its amendments until the adoption of the disputed Article 36 of the Act of 2014.

The wording of the disputed Article 36.1-2 of the Act of 2014 represented a declaration of nullity of all legal affairs concluded in relation to the management, use and govern of the City Walls (except for one leasing agreement).

The finding of nullity of a contract concluded between two legal persons (here, between an association and a local self-government unit) has been, as a rule and in accordance with the relevant provisions of the Civil Obligations Act, under the competence of the Court. The Parliament, as a body that did not participate in these relations, has not been authorised to intervene in that contractual relationship. It was also not authorised to modify it in a way that unilaterally, instead of a court, nullified "all legal contracts concluded for the purpose to management, use or govern of the Dubrovnik City Walls". As such, the Constitutional Court held that through direct legislative intervention, the legislature had interfered with the judiciary and unilaterally terminated the existing contractual relationship. By this, it had violated the principle of the separation of powers.

If any of the parties in a contractual relationship is unsatisfied with this relationship, it must resolve the disputes and problems through negotiations with the other contractual party. If the negotiations are unsuccessful, it must file a case with the competent court. Equality and a fair balance between the parties may be established only in a dispute concerning civil rights and obligations. In disputes concerning opposing rights and interests, equality means that every party must be given a reasonable opportunity to state its claims under conditions that do not place it in a less favourable position than the opposing party (the principle of equality of arms).

The Constitutional Court has emphasised that the principle of the rule of law prohibits the legislature from interfering with the judiciary in order to influence a court decision. On the contrary, the legislature by Article 36.8 of the Act of 2014 directly affected the outcome of a particular court proceedings, stipulating: "The land registry court shall *ex officio* delete the entry of the usufructuary right to the benefit of the Society of Friends of Dubrovnik Antiques, Dubrovnik, *Gundulićeva Poljana* no. 2, entered in cadastral unit no. 2642/1, land registration bodies VI, l.r.f 4.3, c.m. Dubrovnik.". By this, the ruled on the dispute instead of the Court and removed from the applicant any possibility for the judicial protection of its rights.

Consequently, the Constitutional Court found that the disputed Article 36 of the Act of 2014 is, in whole, contrary to requirements arising from the rule of law as the highest value of the Constitutional Order (Article 3 of the Constitution), the principle of separation of powers (Article 4 of the Constitution), and right to a fair trial guaranteed in Article 29 of the Constitution. The disputed Article did not comply with the requirements of legal security of an objective legal order and with the principle of legal certainty of the position of parties in legal affairs and contractual relations.

As such, the Constitutional Court did not review whether Article 36 of the Act of 2014 conformed to other provisions of the Constitution invoked by the proponent.

Cross-references:

- Ruling no. U-I-6077/2011, 22.01.2013;
- Ruling no. U-I-5612/2011 *et al.*, 23.01.2013.

European Court of Human Rights:

- *Stran Greek Refineries v. Greece*, no. 13427/87, 09.12.1994, Series A301-B.

Languages:

Croatian, English.



Identification: CRO-2014-2-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 18.07.2014 / **e)** U-I-4039-2009 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 100/14 / **h)** CODICES (Croatian, English).

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.**
 4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**
 4.7.4.1 Institutions – Judicial bodies – Organisation – **Members.**

Keywords of the alphabetical index:

Judge, remuneration, change / Judicial power, financial independence / Judicial power, independence / Law, unclear / Legislature, delegation.

Headnotes:

The legislature delegated its constitutional power to determine the basis for judicial salaries to the government, enabling the latter to freely regulate this issue through decisions. Granting the political executive (the government) the competence to directly influence the determination of judicial salaries means *a priori* that relations between the two branches of state power (executive power, that is the political executive, and judicial power) are laid on foundations that are objectively unacceptable in a democratic society. The principles of the separation of powers and the rule of law, in light of the Constitution, require that the judiciary be independent.

Requirements of legal security and the rule of law demand that the legal norm should be accessible and predictable, such that people understand their real and specific rights and obligations, so they can act accordingly.

Summary:

I. The Constitutional Court, on the proposal of a few natural persons and the Association of Croatian Judges (hereinafter, the “applicant”), initiated proceedings to review the constitutionality of Articles 4.2 and 8.2 of the Act on Salaries of Judges and Other Judicial Officials (hereinafter, the “Act”) and repealed them by the decision.

The Court, however, did not review Article 8.1.4 of the Act, finding the applicant’s objections irrelevant.

II. The Constitutional Court reviewed the challenged Articles of the Act.

Article 4.2 of the Act

Article 4.2 of the Act provides that the government, by means of a decision, determines the basis to calculate salaries of judges and other judicial officials. This authority, according to the applicant, effectively allows the government to render decisions on their salary amounts. By independently, at its own discretion without the participation of judges and state attorneys in the decision-making process, deciding on the amount of their salaries, the government is essentially weakening the constitutional guarantee of independence of judicial officials and the justice system as a whole.

In assessing the constitutionality of the challenged provision, the Constitutional Court started from Article 3 of the Constitution (part relating to the rule of law), Article 4 of the Constitution (principle of separation of powers) and Article 115.2 of the Constitution (judicial power shall be autonomous and independent).

The Court concluded that the real reason for the enactment of the challenged provision was the need to reduce the salaries of judicial officials.

The Constitutional Court noted that the manner of determining judges’ salaries, together with the regulation of certain allowances pertaining to them and their pensions, ensures their material independence, which is inherent to guaranteeing their overall individual independence. Therefore, special rules apply for the regulation of salaries and other material allowances pertaining to them, which distinguish this regulation from all others.

Parliament is authorised, pursuant to Article 2.4.1 of the Constitution, to independently regulate economic, legal and political relations. This includes introducing regulations pertaining to the salaries of judges and

other judicial officials. In doing so, the legislature must respect the requirements imposed upon it by the Constitution, especially those stemming from the principle of the rule of law and those that protect certain constitutional values. When it comes to the guarantees of the material independence of judges, the legislature must especially respect the fundamental constitutional principle of the separation of powers. This principle is an element of the rule of law, which, although it does not have an independent value, serves directly to prevent the possibility of authority and political power to be concentrated into (only) one body.

In determining the basis to calculate judicial salaries, the legislature neglected the fundamental postulates stemming from the principle of separation of powers, namely the constitutional requirement of judicial independence, particularly as it applies to the relations between the judiciary and political executive. That is, the legislature delegated its constitutional power to determine the basis for judicial salaries by the challenged provision to the government, freely regulating this issue through its decisions.

To grant the executive (the government) the competence to directly influence the determination of judicial salaries means *a priori* that relations between the two branches of state power (executive power, that is the political executive, and judicial power) are laid on foundations which are objectively unacceptable in a democratic society based on the principle of the separation of powers and the rule of law. This is in light of the constitutional requirement that the judiciary must be independent.

Accordingly, the requirement stems from the Constitution that the legislature must regulate all elements of judicial salaries. The law must be enacted in a democratic parliamentary procedure, in a manner that respects the judiciary as a proper, qualified and impartial administration of justice. As such, all elements of judicial salaries must be commensurate with the dignity of a judge’s profession and with his or her burden of responsibility.

Pursuant to the above, the Constitutional Court found that Article 4.2 of the Act was not in conformity with Articles 3, 4 and 115.2 of the Constitution.

Article 8.2 of the Act

Article 8.2 of the Act provides that legislation that applies to other state budget beneficiaries also applies to the reimbursement of material expenses to which judicial officials are entitled.

The applicant contended that the disputed provision is unclear since there are different beneficiaries of the state budget.

In assessing the constitutionality of the challenged provision, the Constitutional Court started with Article 3 of the Constitution (part relating to the rule of law). The Court noted that the conformity of a legal norm with the rule of law is not only assessed according to the consequences regarding which a conclusion could be reached – by an interpretation of the legal norm itself – that they will *de facto* occur or not occur. It is primarily assessed according to the requirements for a legal norm in a democratic society based on the rule of law to be sufficiently precise and specific, predictable and accessible, and to lead to the realisation of the principle of legal security and legal certainty and ensure respect for protected constitutional values and goods.

The disputed provision does not specify which legislation on the reimbursement of material expenses of the legislation that applies to different groups of the state budget would apply to judicial officials (and that are civil servants and employees, officials and employees in public service, members of the Croatian Parliament and state officials). As such, the Constitutional Court held that it is undisputedly a deficient legal rule open to different interpretations, and thereby also a rule that opens the possibility for (unnecessary) disputes.

Pursuant to the above, the Constitutional Court declared that Article 8.2 of the Act was not in conformity with Article 3 of the Constitution.

Cross-references:

- Decision and Ruling no. U-I-659/1994 *et al.*, 15.03.2000, *Bulletin* 2000/1 [CRO-2000-1-010];
- Decision no. U-I-722/2009 *et al.*, 06.04.2011, *Bulletin* 2011/1 [CRO-2011-1-003].

Languages:

Croatian, English.



Identification: CRO-2014-2-009

a) Croatia / b) Constitutional Court / c) / d) 18.07.2014 / e) U-X-288/2008 *et al.* / f) / g) *Narodne novine* (Official Gazette), 93/14 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Law, provision, application, suspension / Salary supplement, suspension, legislative practice, multi-year / Suspension, temporary, act / Suspensive effect, legislation.

Headnotes:

The legislative practice of repeatedly initiating the same legislative process with an identical solution, which avoids legislative exceptions from a prescribed rule whereby a property right is recognised for the addressees of the legal rule, gives rise not only to an unacceptable legislative system to delay commitments, but also to an unconstitutional practice in a democratic state based on the rule of law.

Summary:

I. The Trade Union of State and Local Government Servants and Employees filed with the Constitutional Court a proposal to institute proceedings to review whether the 2007 Regulation on the Supplement to the Act on Salaries of Judges and Other Judicial Officials conformed to Articles 3, 89.1 and 89.3 of the Constitution.

One natural person also lodged proposals for the Constitutional Court to initiate proceedings to review whether the following adhered to Articles 3, 14 and 90 of the Constitution:

- Articles 2 and 3 of the 2011 Act on the Supplements to the Act on Salaries of Judges and Other Judicial Officials;
- Article 1 of the 2011 Regulation on the Supplement to the Act on Salaries of Judges and Other Judicial Officials;

- Article 1 of the January 2012 Act on the Supplement to the Act on Salaries of Judges and Other Judicial Officials; and
- Article 1 of the December 2012 Act on the Supplement to the Act on Salaries of Judges and Other Judicial Officials.

II. The Constitutional Court analysed the constitutionality and legality of the challenged legislative actions pursuant to Article 125.5 of the Constitution, as well as with Article 104 of the Constitutional Act on the Constitutional Court.

Specifically, the Act on Salaries of Judges and Other Judicial Officials (hereinafter, the "Act") entered into force on 1 February 1999. Article 5 of the Act recognises the right to a salary supplement for individual categories of judicial officials as of 1 February 1999. Judicial officials include the deputy court president, or a deputy head of another judicial body, or a judge who performs the tasks of division president, or a head of division, presidents of county commercial, municipal and misdemeanour courts, and county and municipal state attorneys.

The Act, however, has been postponed for the last 14 years, each year anew, by a law or regulation of the Government rendered on the basis of statutory authority.

Only two exceptions to this rule exist. First, since the entry into force of the Act on 1 February 1999 until 31 December 1999, a postponement of the application of Article 5 of the Act was not foreseen. Second, in 2005, no law or regulation was adopted to prescribe that Article 5 of the Act shall not apply in 2005.

The Constitutional Court did not examine whether the addressees of Article 5 of the Act had realised their statutory right in 1999 and 2005, which had applied to them. This fact, however, would not impact it anyway.

The Constitutional Court noted that the same legislative process was repeatedly initiated and the legislative solutions were the same as well. They were sufficiently frequent and mutually connected so that they did not merely represent legislative exceptions from a prescribed rule whereby a property right was recognised for the addressees of the legal rule. This constituted a deliberate pattern of legislative activity and an unacceptable legislative system of avoiding commitments.

The Constitutional Court pointed out that the legislative practice of a repeated multiyear derogation of recognised rights was not acceptable in a democratic

state based on the rule of law, and informed the Parliament of the noticed unconstitutionality.

Languages:

Croatian, English.



Identification: CRO-2014-2-010

a) Croatia / b) Constitutional Court / c) / d) 12.08.2014 / e) U-I-5735-2014 / f) / g) *Narodne novine* (Official Gazette), 103/14 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Powers, balance, shifting / Highest state officials, residential facilities, use / Highest state officials, protection and security / Venice Commission, opinion.

Headnotes:

The Constitution stipulates neither the general dominance of one branch of power over the others or two branches over the third branch nor the dominance of one of the highest-ranking representatives over another. The President of the state, the President of Parliament, the President of the Government of the state, the President of the Constitutional Court and the President of the Supreme Court are the top five state officials. Their duties are not subject to degrees in terms of their significance.

Practical consequences of the performance of certain state duties may lead to the need for a differentiated way of regulating the manner of protection of the highest-ranking officials of the five constitutive bodies of the state. However, they are not and may not be a reason to deviate from the constitutional framework and undermine the basic principle of the separation of powers on which the Croatian constitutional state is based. Normative solutions must respect the organic constitution of the state, and within it they may be adjusted to the

specific nature of individual state duties, reflecting the real needs for their protection and security.

If the Government permits the presidents of the state, the Parliament and the Government the possibility to stay in residential facilities for private purposes, it must offer the same to the presidents of the Supreme Court and the Constitutional Court under the same conditions. This is a matter of principle, and no longer an assessment of political purposefulness.

Summary:

I. Pursuant to Article 38.2 of the Constitutional Act on the Constitutional Court, the Constitutional Court instituted proceedings to review the constitutionality of Article 14 of the Act on the Obligations and Rights of State Officials (hereinafter, the "AORSO"); Articles 11.1, 12.1.1-2, 15.2, and 16.1.1-2 of the Regulation on protected persons, facilities and spaces and on the protection and security thereof (hereinafter, "Regulation/13"); and point II.1 of the Decision on the use of residential facilities owned by the Republic of Croatia of 26 July 2012, adopted by the Government (hereinafter, "Decision/12").

Regulation/13 defines protected persons, facilities and spaces subject to counter intelligence protection and other measures and actions under the competence of security-intelligence agencies for the purpose of the timely gathering of data on potential threats to their security from foreign intelligence services, terrorist or other similar activities.

Unlike the Regulation (hereinafter, "Regulation/03"), which was in force until Regulation/13 replaced it, Regulation/13 does not include in the group of protected persons in the first category (but in the second one) the highest-ranking members of the judicial branch and the constitutional system. Hence, as of 2013, the group includes only holders of the highest-ranking state-political functions.

Article 14 of the AORSO provides that during the term of their mandate, the President of the state, the President of the Parliament and the President of the Government of the state are entitled to state-owned accommodation and residential facilities.

Point II.1 of the Decision/12 provided that residential facilities may be used by the President of the state, the President of the Parliament and the President of the Government of the state. Compared to Decision (Decision/04), which was in force until Decision/12 replaced it, Decision/12 does not include the highest-ranking members of the judicial branch and the constitutional system. As of 2012,

the group includes only holders of the highest-ranking state-political functions.

II. The Court held these acts are constitutionally and legally relevant. The reason is that they recognise and validate the relationship between the legislature (Parliament) and the political executive branch (Government), as authorised regulators of the constitutional principle of the separation of powers, other branches of government and the constitutional judicature. In that sense, the matter involves legal rules and acts of general/public interest.

Considering the "residential facilities" referred to in Article 14 AORSO and point I of Decision/12 are the same "representative facilities" referred to in Article 16.1.4 of Regulation/13, the Constitutional Court reviewed Article 14 AORSO, Regulation/13 and Decision/12 in one proceeding, grouping them according to subject matter.

The matter in this constitutional proceeding has been regulated under Article 4 (principle of separation of powers), Article 116 (constitutional position of the Supreme Court and the rules on the appointment of its President) in conjunction with Article 115.2 (autonomy and independence of judicial power), and Article 125 of the Constitution together with Article 2.1 and 2.2 of the Constitutional Act on the Constitutional Court (hereinafter, "CACC").

The organisation of the legislative, executive and judicial branches of power is regulated in a special Chapter IV of the Constitution entitled "Organisation of Government", as follows:

1. Croatian Parliament (Articles 70-93);
2. President of the Republic of Croatia (Articles 94-106);
3. Government of the Republic of Croatia (Articles 107-114); and
4. Judicial Power (Articles 115-121).

Article 60 of the 2000 Change to the Constitution introduced a new heading 5 entitled "Public Prosecution Service" in Chapter IV of the Constitution, where in Article 121.a, paragraph 1, the Public Prosecution Service is defined as "an autonomous and independent judicial body".

The bodies of state power (legislative, executive and judicial) are regulated in Chapter IV of the Constitution. The competence of the Constitutional Court, the selection of constitutional judges and other issues relating to the constitutional judicature, however, are regulated in a special Chapter V of the Constitution. According to the Opinion of the Venice Commission no. 598/2010 of 20 October 2010

(§25-27), that does not affect the judicial character of the Constitutional Court and the fact that it is a State Authority.

No explanation exists for the pronounced change of approach in the subject-matter of regulation in Regulation 13 in relation to Regulation 03, and in Decision 12 in relation to Decision 04, and Article 14 of the AORSO. As such, the Constitutional Court found that such normative solutions are paradoxical, disrupting the separation of powers outlined in the Constitution. The Court held that the above-mentioned provisions of Regulation 13, the AORSO and Decision 12 did not conform to Article 4 of the Constitution and the basic organisation of state authority (Chapter IV of the Constitution) and the constitutional judicature (Chapter V of the Constitution).

Finally, the Court found that as of the year 2000, the Public Prosecution Service has a special place in Chapter IV of the Constitution (a separate Section 5). Thus, in the formal sense, it has a position equal to other bodies of state administration regulated in special Sections 1, 2, 3 and 4 of Chapter IV of the Constitution. Therefore, despite the fact that the Public Prosecution Service in the constitutional and legal doctrine is not regulated as a constitutional body that is constitutive of the statehood of the community, the positions expressed in this decision must be appropriately acknowledged for the Prosecutor General of the Republic of Croatia.

Cross-references:

- Decision and Ruling no. U-I-659/1994 *et al.*, 15.03.2000, *Bulletin* 2000/1 [CRO-2000-1-010].

Languages:

Croatian, English.



Identification: CRO-2014-2-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.08.2014 / **e)** U-VII-4640-2014 / **f)** / **g)** *Narodne novine* (Official Gazette), 104/14 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.3.4 Institutions – Languages – **Minority language(s).**

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

5.3.40 Fundamental Rights – Civil and political rights – **Linguistic freedom.**

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

Keywords of the alphabetical index:

Minority, state administration and judicial buildings, bilingual panel / Minority, language, local units, official use.

Headnotes:

The individual right of members of national minorities to freely use their own language and script, which the Constitution considers to represent the very essence of the identity of the national minorities in the state, requires tolerance and understanding from the nation, reinforcement of the value of the Constitution, and the limitation of permitted behaviour towards minorities, as set by the Constitution.

The proposal to increase the threshold for the official use of the language and script extends to all national minorities in the state, and in terms of territory covers all municipalities and towns on the state territory. Such a general intervention of national dimensions in the threshold already achieved for the official use of languages and scripts, which form the very essence of the identity of the national minorities in the state, must have a clear and rational basis, and an objective justification. This means that any increase in the threshold must have a clearly expressed, legitimate aim in the public/general interest, and it must be necessary in a democratic society, which is strictly proportionate to the legitimate aim it is seeking to achieve. In other words, there must be an urgent social need to raise the existing threshold.

Summary:

I. The Parliament sent the Constitutional Court a question for a national referendum, which was initiated by the Citizens' Initiative "Headquarters for the Defence of Croatian Vukovar". The referendum proposed to amend a law on the official use of the language and script of national minorities. Under the current law – Article 12.1 of the Constitutional Act on the Rights of National Minorities (hereinafter,

“CARNM”) – national minorities can use their language and script in areas of a municipality or town where the members comprise at least one third of the population.

Proposing to tighten the language requirements, the referendum question was whether the language rights should only apply where members of a specific national minority accounted for at least one half of the population (i.e. raising the threshold for the official use of languages and scripts).

The call for the referendum was rendered pursuant to Article 81 of the Constitution and Article 95 of the Constitutional Act on the Constitutional Court (hereinafter, “CACC”). Article 95 of the CACC provides that at the request of the Parliament, the Constitutional Court shall, in the case when ten percent of the total number of voters in the state request a call for a referendum, establish (within a term of 30 days after it received the request) whether the referendum question is constitutional and whether the requirements in Article 87.1-3 of the Constitution to call a referendum have been met.

II. After reviewing the case, the Constitutional Court firstly found that the requirements in Article 87.1 and 87.3 of the Constitution have been met. That is, the question was within Parliament’s scope of work and that a sufficient number of voters’ signatures was collected to call a national referendum.

Thereafter, the Constitutional Court emphasised the Preamble to the Constitution, which expressly lists the citizens, including members of 22 national minorities who together with the people “establish the Croatian state”. It also noted the requirements stemming from the regulatory part of the Constitution (Articles 12 and 15.4 of the Constitution).

The Constitutional Court held that for a general increase in the threshold on the entire territory of the state, within the meaning of Article 12.1 CARNM, as proposed in the referendum question, there must be relevant or sufficient reasons deriving from recognised and precisely defined urgent social needs stemming from a democratic society based on the rule of law and on the protection of human rights. The proposed amendment of Article 12.1 CARNM had no clear, rational basis. Due to the lack of a legitimate aim, the Court determined that it was objectively unjustified. As such, the proposed amendment of Article 12.1 CARNM was not in conformity with the Constitution.

The Constitutional Court emphasised that it has understood the problems of life and the deep individual and collective trauma of the citizens of

Vukovar. The Court acknowledged that the tension dated back to the Greater Serbia aggression on the Town of Vukovar undertaken in the war to capture Croatian territory and from the serious crimes committed against its inhabitants.

However, the request to call a referendum with the message that the Cyrillic script is “seen as a symbol of suffering” in the Town of Vukovar, is a deeply disturbing act. It essentially attacks a script, which is a universal achievement of mankind, which defines the very identity of the Croatian constitutional state. The underlying message seems irrationality, which should be cautioned against. The Constitutional Court believes that the Organising Committee, people of Vukovar, and those who signed the initiative, are sincerely devoted to the ideals embodied in the Constitution, and that they would never accept actions which would violate the Constitution however hard it may be to accept the implications which sometimes stem from its requirements.

After reviewing the relevant legislation and documents, the Constitutional Court concluded that the existing legal framework (Article 8 of the CARNM and Article 6 of the Act on the Official Use of Language and Script of National Minorities, hereinafter, “Act”) is sufficiently flexible in prescribing the manner in which the rules on the official use of the language and script of national minorities should be applied, in order to satisfy the special circumstances in each individual local community.

Pursuant to Article 35.4-5 of the CACC, the Constitutional Court ordered:

- The Town Council of the Town of Vukovar is obliged within one year from the day this decision is published, pursuant to Article 6 of the Act, to expressly prescribe and regulate in the Statute of the Town of Vukovar for the entire area, or for a particular part or particular parts of the area of the Town of Vukovar, the individual rights of members of national minorities to the official use of their language and script and the public law obligation of bodies of state and public authority of those listed in the Acts that they believe correspond to the life situation and the actual circumstances in the Town of Vukovar, in a scope which does not threaten the very essence of those rights. At the same time, they should balance the respect for the needs of the majority of the Croatian population arising from the still present consequences of the Greater Serbian aggression at the beginning of the 1990s with the need for the just and fair treatment of the Serb national minority in the area of the Town of Vukovar.

- The Government is obliged within one year from the day this decision is published to send amendments and supplements for parliamentary procedure in which an appropriate legal mechanism will be defined for cases where the representative bodies of units of local self-government do not implement their obligations under the Act or obstruct its implementation.
- Lastly, for the period until the adoption of the Amendments and Supplements to the Act, the competent state bodies will not implement that act in the area of the Town of Vukovar by using coercive measures.

Cross-references:

- Decision no. U-I-774/2000, 20.12.2000, *Bulletin* 2000/3 [CRO-2000-3-018];
- Decision no. U-I-3597/2010 *et al.*, 29.07.2011;
- Ruling no. U-I-3789/2003 *et al.*, 08.12.2010, *Bulletin* 2010/3 [CRO-2010-3-016];
- Ruling no. U-VIIR-164/2014, 13.01.2014;
- Decision no. U-III-3368/2013, 04.03.2014;
- Report no. U-X-2271/2002, 12.12.2002.

European Court of Human Rights:

- *Gorzelik and Others v. Poland*, no. 44158/98 [GC], 17.02.2004, *Reports of Judgments and Decisions* 2004-I.

Languages:

Croatian, English.



Cyprus Supreme Court

Important decisions

Identification: CYP-2014-2-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 14.06.2013 / **e)** / **f)** Administrative Recourse 397/2012 and 480/2012 / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
3.17 General Principles – **Weighing of interests.**
4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

Keywords of the alphabetical index:

Austerity measures / Judge, salary, independence / Doctrine, necessity.

Headnotes:

The law that imposed salary reductions on judges as part of the country's austerity measures was neither a tax law nor generally applicable without discrimination and therefore amounted to an adverse reduction of the judges' remuneration.

Summary:

I. The applicants (district court and other first instance judges of the Judicial Service of the Republic of Cyprus) requested the Cypriot Supreme Court to review the provisions of the Special Contribution Officials, Employees and Pensioners of the State and Public Sector Law, and of the Retirement Benefits for Government Employees and the Employees of the Public Sector including Local Government Authorities (General Application Provisions) Laws. The applicants argued the administrative actions that reduced judges' salaries were null and void because the legal provisions on which the actions were based were contrary to the provisions of Article 158.3 of the Constitution.

Referring to the Constitution and relevant case-law, the applicants contended that judges' compensation could only be reduced by a general tax law affecting all taxpayers in the country without discrimination. The challenged Law, however, did not qualify as such. The attorney general argued that, even if the challenged Law is held unconstitutional, it should be saved based on the Doctrine of Necessity, in view of the dramatic financial situation in which the country finds itself.

II. The Supreme Court considered the applicants and the attorney general's arguments. It noted that the legislative power that passed the challenged Law did not invoke such a necessity in order to justify its promulgation. Nevertheless, in order to successfully invoke the Doctrine of Necessity, in accordance with well-established case-law, there must be an absolute necessity to safeguard the continuation of the effective functioning of the State.

The Supreme Court disagreed with the attorney general's argument such need existed, that is to include a relatively small number of persons (the Judges) to share the burden caused by the country's adverse financial situation. This need is not more important than the need to safeguard the independence and impartiality of the Judiciary, which is the obvious purpose of the provisions of Article 158.3 of the Constitution, and a matter of supreme importance in terms of public interest.

It was held that Article 158.3 of the Constitution is so clear that there is no doubt as to its interpretation. Clear beyond any reasonable doubt, the challenged Law is neither a tax law nor generally applicable without discrimination. Therefore, it amounts to an impermissible, adverse reduction of the judges' compensation (remuneration), and in contravention to the clear provisions of Article 158.3 of the Constitution.

Languages:

Greek.



Czech Republic Constitutional Court

Statistical data

1 May 2014 – 31 August 2014

- Judgments of the Plenary Court: 7
- Judgments of panels: 75
- Other decisions of the Plenary Court: 3
- Other decisions of panels: 1 305
- Other procedural decisions: 29
- Total: 1 419

Important decisions

Identification: CZE-2014-2-005

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 26.05.2014 / **e)** I. ÚS 2482/13 / **f)** Joint custody / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

- 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:

Child, best interests / Child, custody, parental / Child, paternal rights / Child, personal hearing / Child, right to care.

Headnotes:

It is in a child's best interests to be in the care of both parents, and if all statutory conditions have been met (i.e. both parents are equally capable and willing to care for the children's health and their physical, emotional, intellectual and moral development, and if the children have an equally strong emotional relationship with both parents), then placing children in joint custody is the rule, not the exception.

Summary:

I. The applicant, a father of two minor children (aged 11 and 9), filed a petition for a change of custody, whereby he sought to have the minor children placed in the joint custody of both parents, and also sought a reduction in the alimony that he is to pay. The Court at first instance rejected his petition. The appeals court thereafter ruled to increase the alimony and reduced the applicant's contact with the minors. In his constitutional complaint, the applicant sought the annulment of the decisions of the general courts, as he claimed that they were not supported by the evidence and that the facts had not been correctly determined. He considered the appeal court's decision to be surprising. He argued that the general courts did not act in the best interest of the children. The applicant also objected that he had been disadvantaged because of his gender.

II. The general courts decided not to place the minor children in the joint custody of both parents. However, the Constitutional Court's held that they had not ruled in the best interests of the child, and insufficiently protected the applicant's right to respect for his family life and his parental right to raise and care for his children. Although the applicant met all the criteria relevant for deciding who would receive custody of the child, to the same degree as the minor children's mother (as he is the minor children's biological parent, has a strong emotional relationship with them, and maintains regular, close contact with them, and is able to provide for their development and all their needs), the general courts did not begin from the premise that it is the child's interest to be in the custody of both parents, and so far had not tried, if it was not in direct conflict with the minor children's interests, to achieve that state of affairs.

The Court observed that the general courts had ruled out joint custody due to the disagreement between the parents without examining in detail the reasons for the disagreement, and thus actually applied the disagreement of the parents solely to the disadvantage of the applicant. In so doing they acted inconsistently with the best interests of the child, whereby they violated Article 3.1 of the Convention on the Rights of the Child, and also violated the applicant's right to family life protected by Article 10.2 of the Charter of Fundamental Rights and Freedoms and Article 8 ECHR, as well as his right to care for and bring up his children under Article 32.4 of the Charter.

The Constitutional Court stated that it is in the best interests of the child to be in the care of both parents, and if all statutory conditions have been met, then placing children in joint custody is the rule, not the

exception. The burden of proof must correspond to this. If the applicant proves that he has met the statutory conditions, then the prerequisites for placing minor children in joint custody have been met. The burden of claim and proof is thus transferred to the secondary party (the mother) and the general court, which must deny that the abovementioned conditions have been met, or present and prove fundamental reasons that rule out joint custody. However, the general courts acted in the precisely opposite manner, as they presumed that the status quo (placing the minor children in the mother's custody) is the *prima facie* suitable solution, and that it is up to the applicant to refute this.

Insofar as the preceding court decisions cited the young age of the minor children in connection with the impossibility of placing them in the joint custody of both parents, the applicant quite reasonably and legitimately expected that removal of this obstacle would lead to a change in the conditions for raising the minor children. Thus, if this change was later considered to be insufficient, this seriously undermined the principle of the foreseeability of court decisions. Insofar as the general courts' decisions cited a higher age as a key condition for placing the minor children in joint custody, then after the applicant's children reached a higher age, the general courts must cite very serious reasons why the fulfilment of this previously cited (and only) condition is not sufficient. The interest of the minor children in a stable home environment is not, in and of itself, such a serious reason, because that would deny the purpose of the statutory framework and the entire institution of joint custody, as it is interpreted by the Constitutional Court and the European Court of Human Rights.

The Constitutional Court found the applicant's objection as regards insufficient determination of the minor children's opinion to be unfounded. Although the minor children's opinion was determined only through their guardian, and the general courts did not explain in detail in their decisions why they did not interview the minor children themselves, nonetheless, in view of the minor children's young age, combined with the fact that their opinion was duly determined otherwise, did not consider this procedure to be unconstitutional.

The Constitutional Court considered the applicant's objections concerning insufficient determination of the facts to be unfounded.

For the foregoing reasons, the Constitutional Court granted the constitutional complaint and annulled the contested decisions of the general courts.

III. The judge rapporteur in the case was Kateřina Šimáčková. No judge filed a dissenting opinion.

Languages:

Czech.



Identification: CZE-2014-2-006

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 11.06.2014 / e) I. ÚS 4503/12 / f) The punishment of expulsion for an indefinite period of time / g) <http://nalus.usoud.cz> / h) CODICES (Czech, English).

Keywords of the systematic thesaurus:

3.14 General Principles – **Nullum crimen, nulla poena sine lege.**

3.16 General Principles – **Proportionality.**

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

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**

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

Keywords of the alphabetical index:

Expulsion, foreigner, procedure, criminal / Punishment, disproportionate.

Headnotes:

If a general court imposes the strictest legally permitted degree of the punishment of expulsion, i.e. expulsion for an indefinite period of time, it must duly review, with regard to the statutory conditions provided in the relevant provision of the Criminal Code. In particular, the court must convincingly justify, why, in view of all the circumstances of the case, the crime committed, the person of the offender and his circumstances, it is not sufficient to impose a milder criminal sanction, that is, expulsion for a definition period of one to ten years (the principle of proportionality and the *ultima ratio* principle). Otherwise, it will violate the applicant's constitutionally guaranteed right to a fair trial under

Article 36.1 of the Charter of Fundamental Rights and Freedoms, as well as the principle *nulla poena sine lege* stated in Article 39 of the Charter.

Summary:

I. The contested Municipal Court decision found the applicant guilty of an especially serious robbery offence, as well as offences of violation of domestic freedom and of counterfeiting and altering a public document. He was given an aggregate sentence of six years and six months in prison, expulsion from the Czech Republic for an indefinite period of time, and forfeiture of property. The applicant's appeal was rejected by the contested High Court decision; his subsequent appeal on a point of law was then denied by the contested Supreme Court decision. In his constitutional complaint the applicant objected that the punishment of expulsion for an indefinite period of time was unconstitutional, and also objected that there had been shortcomings in the presentation of evidence, or extreme inconsistency between the evidence presented and the factual findings, which affected the proceedings before the general courts.

II. The Constitutional Court considered that the punishment of expulsion can be imposed for a period of one to ten years, or for an indefinite period. When applying the punishment in a particular case, the general court must weigh, taking into account the principle of *ultima ratio*, four basic criteria:

1. the proportionality of the punishment with respect to the nature and gravity of the crime committed, taking into account the relative gravity of the crime in the framework of crimes in the particular part of the Criminal Code;
2. the offender's individual prognosis, or potential for correction;
3. the offender's circumstances, that is, the strength of his social, cultural and family ties in the host country and in the country to which he is to be expelled, as well as the interests and well-being of the offender's children; and
4. the prognosis for the risk of danger to the safety of people, property or another general interest.

If the Court does not properly make and justify these deliberations, it also violates Article 39 of the Charter, which forbids the imposition of punishment in a manner other than as specified by the law.

The Constitutional Court emphasised that in imposing the punishment of expulsion for an indefinite period of time, the general court must review not only the prognosis for the offender's correction, which should approach the impossibility, or a very high improbability, of correction, but must also properly take into

account the security risk of the offender staying in the Czech Republic, i.e. it must find that even the maximum ten year stay outside the Czech Republic does not reduce the concern that after the end of that period, upon possibly returning to the Czech Republic, the offender might again endanger the interests of society through his criminal activity. The punishment of expulsion for an indefinite period of time can be imposed only in the most serious cases, where it cannot be reasonably expected that the convicted person, even after several years, would cease to be a security threat to the Czech Republic. A decision to impose the punishment of expulsion for an indefinite period of time, the reasoning of which does not contain such deliberations, or contains only a formalistic reference to social interests, without appropriately weighing the proportionality of the imposed punishment to all relevant circumstances of the case and without taking into account the *ultima ratio* principle when imposing and determining the level of the punishment, violates the sentenced person's right to a fair trial guaranteed by Article 36.1 of the Charter of Fundamental Rights and Freedoms and to the foreseeability, proportionality and legality of punishment guaranteed by Article 39 of the Charter.

That was the case in the adjudicated matter, as the general courts, in imposing the punishment of expulsion for an indefinite period of time, erred, when they did not appropriately review, with regard to the statutory conditions set forth in § 80 of the Criminal Code, and, especially, did not convincingly justify why, in view of all the circumstances of the case and the offender's circumstances, the courts chose the level of punishment that they did. Therefore, the Constitutional Court annulled the verdict imposing on the applicant the punishment of expulsion from the Czech Republic for an indefinite period of time under, § 80.1 of the Criminal Code, contained in the decision of the Municipal Court in Prague, verdict II, the decision of the High Court in Prague, and the part of the decision of the Supreme Court concerning the applicant. The remainder of the constitutional complaint was rejected as a clearly unjustified petition.

III. The judge rapporteur in the case was Kateřina Šimáčková.

Judge Ivana Janů filed a dissenting opinion to the verdict and the reasoning of the judgment. She argued that the Constitutional Court should not have reviewed the applicant's objections to the punishment of expulsion at all, because they were not admissible, due to failure to exhaust remedies. And, if they were reviewed, they should have been found obviously unfounded.

The Judge contended that she could see no reason why the state should tolerate on its territory citizens of foreign states who commit crimes. Especially in the case of serious or repeated crime, expulsion for an indefinite period may be completely appropriate. She argued that, in this case, there were no reasons against the appropriateness of imposing such a sentence, due to which expulsion would be ruled out. Thus, in her opinion the majority (of the judges) decided to ignore the principle of subsidiarity and took an activist approach to its review of whether the verdict on the punishment was adequately justified and to its annulment, even though available remedies had not been materially exhausted, and even though the imposed punishment, in view of the factual circumstances, did not even appear in any way inappropriate.

Languages:

Czech.



Identification: CZE-2014-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 10.07.2014 / **e)** Pl. ÚS 28/13 / **f)** Judges' Salaries – setting the base salary at a 2.75 multiple of the average monthly salary / **g)** <http://nalus.usoud.cz/> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

1.6.5.3 Constitutional Justice – Effects – Temporal effect – **Limitation on retrospective effect.**
 3.9 General Principles – **Rule of law.**
 4.5.6 Institutions – Legislative bodies – **Law-making procedure.**
 4.7 Institutions – **Judicial bodies.**

Keywords of the alphabetical index:

Judge, remuneration, change / Judge, remuneration, guarantee / Judge, remuneration, reduction / Judge, salary, judicial independence / Legislative procedure.

Headnotes:

The right of judges to remuneration for their work takes precedence over the interest in proper

legislative procedure, including observation of the rules for publication of legal regulations, if a derogatory intervention concerning a contested legal regulation were to lead to even greater interference in judicial independence and would thus prevent effective protection of constitutionality.

Intervention in the material security of judges, guaranteed by law, may not be an expression of legislative arbitrariness, but must be based on the proportionality principle, justified by exceptional circumstances, e.g. by the state being in a duly documented burdensome financial situation, and even if that condition is met, the different functions of judges and representatives of the legislative and executive branches, especially state administration, must be taken into account. Moreover, in order for the legislature to impose salary restrictions, it should obtain the relevant opinion from representatives of the judicial branch.

Summary:

I. The plenum of the Constitutional Court granted a petition from the Brno Municipal Court seeking annulment of the words “a 2.75 multiple” in § 3.3 of Act no. 236/1995, on the Salary and other Benefits Connected with the Office of State Authorities and Certain State Bodies and Judges and European Parliament Representatives (hereinafter, the “Salaries Act”), as amended by Act no. 11/201, which concerns judges of district, regional, and high courts, the Supreme Court, and the Supreme Administrative Court.

The Brno Municipal Court first objected that the legal framework for calculating the salaries of judges in the general courts was unconstitutional; under this framework, the base salary is a 2.75 multiple of the average nominal monthly wage of natural persons in the non-entrepreneurial sphere, according to the published data from the Czech Statistical Office for the next to last calendar year. Second, the petitioner contested defects in the legislative process (specifically, failure to fulfil the conditions for declaring a state of legislative emergency) and objected to the impermissible retroactivity of Act no. 11/2013, which was published on 17 January 2013, but went into effect on 1 January 2013.

II. The majority of the Constitutional Court considered that it was already clear from its previous decision, in which the Court had reviewed the reduction of the base salary from a 3 times multiple to a 2.5 multiple, that in view of the long-term legislative freeze and *de facto* reduction of the salaries of general court judges, that it is necessary to return the legislative framework of judges' base salary to the original 3 times multiple.

Thus, in these circumstances, the legislature's discretion was limited, even though the Constitutional Court stated that the judicial branch does not exist outside the economic reality of the state and this relationship is not a constitutionally untouchable value. However, the Court stated that there must be very strong arguments for interfering with it, which, however, it did not find in that case, where it did not accept the reduction of the base salary of judges to a 2.75 multiple on the grounds of an unspecified excessive burden on the state budget. On the contrary, the Constitutional Court's judgment documents that the salaries of judges were subject to a considerable real decline in value (evidently unlike any other group of employees paid out of the state budget) as a result of intervention in the years 2002-2010, when there were no austerity measures in the area of remuneration in the public sphere that would be manifested in the data on average salaries in the non-entrepreneurial sphere. According to publicly available data from the Czech Statistical Office, the average gross monthly salary in the non-entrepreneurial sphere in the years 2000-2013 (adjusted numbers) did not decline in even one year, even during the years designated as a crisis period.

Based on the foregoing, the Constitutional Court concluded that the base salary of judges, reduced since 2013 from a three times multiple to a 2.75 multiple, i.e. by 8.3%, falls outside the moderate growth of the average salary in the non-entrepreneurial sphere (adjusted numbers) according to data from the Czech Statistical Office in the same period, and is not at all in correlation to the approximately 4.6% growth of the median average salary of the highest state officials between the years 2012 and 2013. The Constitutional Court also pointed out that, in addition, judges' salaries are set as fixed amounts, and, unlike those of state officials, they cannot be increased by awarding any bonuses. The considerable limitation on any possibility of acquiring other income also distinguished judges, because of their office, from other constitutional officials. Therefore, the Court stated that the contested legislative framework is disproportionate interference in the material securing of judicial independence.

The Constitutional Court also found as unconstitutional the manner in which Act no. 11/2013 was adopted, and generally criticised the fact that the judicial branch, represented by two supreme courts, is not consulted by political representatives when they intervene in the remuneration of judges. Furthermore, the Constitutional Court also held that Article II of Act no. 11/2013, which stated that the reduced base salary is to be applied to judges' salaries for the first time in January 2013, is unconstitutional. As this Act was not promulgated in the Collection of Laws until

17 January 2013, in the Constitutional Court's opinion setting the effective date of the Act on 1 January 2013 constituted impermissible true retroactivity. Nonetheless, although the Constitutional Court found the foregoing provision and the legislature's actions to be unconstitutional, it did not annul it, as that would lead to even greater interference in the constitutionally protected value of judicial independence, that is, it would remove the legal basis for the material provision for judges in the month of January 2013.

Finally, the Constitutional Court explained that its conclusions would apply only *pro futuro*, and that they therefore cannot be applied in lawsuits that have been conducted by judges against the state in the general courts since January 2013, even in the case from which the present petition seeking annulment of the legislative framework originated. The Constitutional Court did this in view of the fact that retroactive payment of these amounts would be an unforeseen intervention in the state budget, which would necessarily lead to increased tension between the society and judges. Therefore, in this regard the Constitutional Court appealed to judges, as a group that should represent the true elite of society, to exercise a higher degree of generosity and helpfulness.

The Constitutional Court accordingly found that the contested part of the provision is inconsistent with Article 1.1 in connection with Article 82.1 of the Constitution, and annulled it as of 31 December 2014. The Constitutional Court rejected the part of the petition concerning annulment of Article II of Act no. 11/2013 Coll., which amends the Salaries Act, as amended by later regulations, and certain other acts.

III. The judge rapporteur in the case was Miroslava Tomková.

A dissenting opinion to the decision of the majority was filed by Judges Jan Musil, Vladimír Sládeček and Radovan Suchánek. In their opinion it could not be considered arbitrary that the government justified the proposed coefficient of 2.75 with reference to the then-existing economic situation and the resources of the state budget. In their view, the judgment of the majority overlooked the salary situation in relation to the representatives of the legislative and executive branch, and compared judges' salaries basically solely with the salaries of state officials – the administration. They argued that it was not correct that the judgment abandoned the direct connection with the salary level of the representatives of individual branches of the state power, which occurs through the annulment of the “2.75 multiple” only “as regards judges” of the general courts. They further contended that it is misleading that the judgment interpreted the contested provision (the 2.75 multiple)

as a salary restriction, when in fact the nominal and real income of judges since 2012 has been consistently and significantly growing even with the application of that 2.75 multiple. They considered that the difference of 0.25 in the multiple (i.e. between the current 2.75 multiple and the desired 3 times multiple), which makes a difference of slightly under CZK 5,800 in the base salary for the year 2013, does not reach constitutional dimensions in terms of violating judicial independence.

The Judges argued that, if judges are to be a social “elite,” they consider it unworthy of the dignity of their position and indicative of a lack of solidarity with the “rest” of society, for judges, given their monthly incomes, which far exceed the incomes of most citizens (measured by average salary), and which must rightly seem vertiginous to “ordinary mortals,” to file lawsuits seeking the payment of additional amounts, despite the fact that their incomes have been growing – unlike the incomes of other state representatives – at a significantly higher rate since 2011. In their opinion, the call by the majority of the Court, in this situation, for the judges to receive even more, so that they can join the ranks of an “upper middle class” seems inappropriate.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2014-2-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 14.05.2013 / **e)** 3-4-1-7-13 / **f)** / **g)** 16.05.2013, 42, www.riigikohus.ee/?id=11&tekst=RK/3-4-1-7-13; www.riigikohus.ee/?id=1450 (in English) / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security.**

Keywords of the alphabetical index:

Parental benefit / Fiscal, equality / Social welfare.

Headnotes:

Social policy provides for parental benefit as a matter of equal treatment. The state has assumed this responsibility because payment of the benefit is not a state obligation under the Constitution. As such, the legislator's political purpose must be taken into account.

An adverse effect unplanned or unforeseen by the legislator does not automatically mean that the effect is unconstitutional.

The political purpose of the parental benefit is, among other things, to support work and family life balance. Social tax is levied, above all, on employment income. Conflict with this purpose occurs when a person's attempt to balance work and family life actually decreases their total income.

One of the purposes of distinguishing between specific and abstract constitutional review is the preclusion of *actio popularis*, not merely the protection of the constitutional rights of one person.

Summary:

I. The case concerns a person who was granted, at the time, the maximum parental benefit of 2 257 euros. Of his income, 307 euros was subject to social tax (hereinafter, "income") in two months during the period of parental benefit payments. Under § 3.7 of the Parental Benefit Act (hereinafter, the "PBA"), if the recipient of the benefit receives income subject to social tax (except income from self-employment), which exceeds the benefit rate (278 euros during the time of the case) during the calendar month of the benefit payment, the benefit amount will be equal to the sum of the benefit and the amount of income exceeding the rate of the benefit. A quotient of 1.2 from which the amount of income exceeding the rate of the benefit is deducted.

The Social Insurance Board decided that excessive parental benefit in the amount of ca 602 euros must be recovered from the person. The person lodged a claim with the administrative court, which held it unconstitutional. The case was sent to the constitutional review chamber of the Supreme Court (hereinafter, the "Court").

II. After applying § 3.7 of the PBA, the person's parental benefit for this month was 1 876 euros. Thus, his total income amounted to 2 183 euros. This is a smaller sum than the parental benefit initially granted.

The administrative court declared the contested first sentence of § 3.7 of the PBA unconstitutional to the extent that it concerns only those who receive the parental benefit at the maximum rate. In fact, the receipt of additional income decreased the total income not only of the persons granted maximum parental benefit but also other recipients of the parental benefit who received different amounts of parental benefit and additional income.

The Court found that comparable groups with exact characteristics of the person are too narrow. Such determination would make the judicial constitutional review proceedings ineffective when the right to receive a specific sum of money or payment obligation has been contested. An assessment was made whether recipients of the parental benefit whose total revenue following the receipt of additional income decreases compared with the parental benefit granted to them were being treated unequally without reason. This was compared to recipients of the parental benefit whose total income following the receipt of additional income remained the same or increases in comparison with the parental benefit granted to them.

The legitimate purpose of the recalculation of the parental benefit is to save public funds.

Upon weighing its reasonableness, the intensity of the effect on the one hand and the importance of the purpose on the other must be taken into account. The effect must be considered rather intense. As a rule, the main income of people is pay from work. A person is materially and morally affected by a situation when their total income decreases as a result of working, i.e. an activity usually conducted so as to increase their income.

The importance of the purpose, i.e. saving money, can be assessed based on how big the achieved saving is. The amount of money saved was from 2-103 euros or 0.1-4.8 % by different sums and on different periods. Thus, the amount of money saved was not high in total or in terms of the percentage in 2010, and it was not high at the time of the decision.

The broader impact of different treatment has been taken into account. If legislation grants a person a higher income when the person does not work than when the person works, it ends up favouring the non-working situation. Favoursing such a situation is not sustainable and the Legislature has obviously not established such a social policy purpose. Support focussed on raising children is related to the purpose of preserving the country, as set out in the Preamble of the Constitution. At the same time, it is possible to promote the raising of children only at the expense of taxpayers, i.e. working people. The attainment of the purpose is impeded when the person's total income decreases due to working.

In some cases, the formula established in the PBA produced a very large difference in a person's total income due to only a minor difference in income. The parental benefit is designed, above all, to enable a parent to focus on raising a child. Constitutionally, it is not required that the state pay a working parent (in general, employment income is subject to social tax) just as high as a parental benefit (support that promotes focusing on a child) as to a parent who does not work and is presumably fully focused on raising the child. Thus, the support may be reduced. Given that this is a social policy that the state has assumed responsibility on its own, it is not constitutionally required that, on the whole, a higher income be ensured for a person who earns additional income and presumably focuses less on raising a child.

Following the above, the contested provision was declared unconstitutional and repealed to the extent that the parental benefit payable to a person is reduced in such a manner that their total income is less than the parental benefit initially granted to them.

Supplementary information:

The implementation of the decision needed no action by Parliament. Nevertheless, a new formula was enforced from 1 January 2014, avoiding the earlier "error".

Cross-references:

Legal norms referred to:

- Preamble and Article 12 of the Constitution;
- § 3.7 of the Parental Benefit Act.

Supreme Court:

- no. 3-4-1-12-10, 07.06.2011;
- no. 3-4-1-23-11, 27.12.2011.

Languages:

Estonian, English (translation by the Court).



Identification: EST-2014-2-002

a) Estonia / **b)** Supreme Court / **c)** *en banc* / **d)** 09.12.2013 / **e)** 3-4-1-2-13 / **f)** / **g)** 12.12.2013, 14; www.riigikohus.ee/?id=11&tekst=RK/3-4-1-2-13 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**
- 5.2 Fundamental Rights – **Equality.**
- 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.**

Keywords of the alphabetical index:

Freedom of enterprise / Pharmacy, establishment / Pharmacy, limit, geographical.

Headnotes:

Freedom of competition, which forms a part of the freedom to conduct business, protects not only other undertakings' freedom to conduct a business, but also that of the consumer.

The right of state interference, including restriction on competition, is in conformity with the freedom to conduct business only when engagement in a certain type of entrepreneurial activity would be impossible merely under market conditions.

When an undertaking gains the right to run a pharmacy or pharmacies in a favourable place and this entails an obligation to run a pharmacy in a place of low demand, the restriction on the freedom to conduct a business is less than the prohibition to not run a pharmacy at all.

Summary:

I. Since 2006, § 421 of the Medicinal Products Act (hereinafter, the "Law") foresaw restrictions on the freedom of establishment of pharmacies. According to the provision, a new pharmacy must not be established if there were fewer than 3 000 inhabitants in a city per pharmacy. In an urban area outside of cities, a pharmacy must not be established closer than 1 kilometre to an already existing pharmacy. The measures were taken to combat the closure of pharmacies in rural areas. The Chancellor of Justice filed a request for a constitutional review of the restrictions, claiming they conflict with Article 31 of the Constitution (freedom to conduct a business).

II. The provision on pharmacy service is within the protection zone of the freedom to conduct a business provided for in § 31 of the Constitution. Demographic and geographical restrictions to issue an activity licence of a pharmacy directly infringe on the freedom to conduct a business. It also infringes on the interests of consumers at least through the fact that the provisions hinder establishing pharmacies in the quantity and at the places desired by undertakings so that it could be easier for the consumer to buy medicinal products. The impact of the restriction on the freedom of establishment on wholesalers was also acknowledged. Although the restrictions on freedom of establishment of a new pharmacy, apply equally to everyone, the undertakings that established their pharmacies before the restrictions on the freedom of establishment were imposed gained an advantage. The fundamental right of equality to establish pharmacies has been infringed.

a. Ensuring the availability of the pharmacy service in areas of high demand.

Established by the contested provisions, the purpose of restricting the freedom to conduct a business is to ensure pharmacy service is available in the whole state. Availability means the opportunity to access pharmacy service in a geographically close location.

If there is high demand for a product or a service and the entry into the market has not been hindered, there is presumably always somebody in the market who provides the product or the service. As such, an interested consumer can use the service or buy the product. Provided that the entry into the market is not hindered, there are always providers of pharmacy service in regions of high demand.

The demand for pharmacy service on the Estonian market as a whole is sufficient. To be more exact, the demand therefore has been constantly increasing. The increased demand and sales preclude a situation where, due to a changing state of the market, pharmacies would have found themselves today in a situation where the provision of the service would be economically possible or practical only if a very large quantity of people consumed the service and in order to ensure that, the state should interfere. The restrictions on the freedom of establishment are not appropriate for ensuring the availability of the pharmacy service in areas of high demand.

b. Ensuring the availability of the pharmacy service in areas of low demand.

In 2005, there were 162 rural pharmacies and in 2013, only 127. It cannot be concluded from the decrease in the number of rural pharmacies that this is due to the restrictions on the freedom of establishment. The decrease in the number of pharmacies is rather due to the fact that the number of rural pharmacies has reached the limit that corresponds to the current demand in different places. In addition, local authorities' aid to rural pharmacies operating in their area does not support the claim that the decrease in the number of rural pharmacies has decelerated under the impact of restrictions on the freedom of establishment. It must also be noted that, unlike rural pharmacies, there is no decrease in the number of urban pharmacies.

The scarcity of pharmacists in Estonia has been an on-going issue. Despite that, the closure of rural pharmacies has been gradual. The Court *en banc* admitted that, after the restrictions on the freedom of establishment were abolished, new pharmacies could be established in cities. This would generate the need for additional qualified workforce. A lack of restrictions

on the freedom of establishment might give rise to a higher demand for pharmacists than before, which would result in the closing of more rural pharmacies.

Concerning the necessity of restricting the freedom of establishment, the Court found that better availability of a pharmacy service could be ensured by an obligation of pharmacy licence holders in regions of high demand to also provide pharmacy service in regions of low demand. It would also be possible to establish aid to pharmacies in regions of low demand. The aid could be granted either by the state or local authorities. Alternatively, an aid fund could be set up, into which pharmacies of regions of high demand could pay, a fixed fee or a percentage of their sales. Those are alternative measures that would have less of a restrictive impact on the freedom of conducting a business and would contribute more to achieving the purpose than the restrictions on the freedom of establishment would. Therefore, the restrictions on the freedom of establishment were declared unconstitutional.

The Court postponed the entry into force of this judgment by six months so that Parliament could provide for measures to ensure the availability of the pharmacy service in places of low demand.

III. There were two dissenting opinions from four judges.

Supplementary information:

As a consequence of this decision, the Parliament amended the Law and provided for temporary measures for one year. Those provisions were also contested by the Legal Chancellor (case no. 3-4-1-30-14).

Cross-references:

Supreme Court:

- no. 3-4-1-7-02, 15.07.2002, *Bulletin* 2002/2 [EST-2002-2-006];
- no. 3-4-1-6-00, 28.04.2000;
- no. 3-1-1-45-12, 13.11.2012;
- no. 3-4-1-1-02, 06.03.2002.

Languages:

Estonian, English (translation by the Court).



Identification: EST-2014-2-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 16.12.2013 / **e)** 3-4-1-27-13 / **f)** / **g)** 18.12.2013, 12; www.riigiteataja.ee/akt/118122013012 / **h)** www.riigikohus.ee/?id=11&tekst=RK/3-4-1-27-13; www.riigikohus.ee/?id=1495 (in English); CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
 3.9 General Principles – **Rule of law**.
 3.10 General Principles – **Certainty of the law**.
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Environment, protection / Expectation, legitimate / Enterprise, freedom / Democratic, legitimacy / *Vacatio legis*, principle / Regulation, retroactive effect.

Headnotes:

Freedom of entrepreneurial activity does not grant a person the right to require the use of national treasures or state assets in the interest of their entrepreneurial activity. Nevertheless, this freedom is infringed when a public authority creates conditions that make engaging in an entrepreneurial activity less favourable than under the legal framework that was in force earlier.

In light of the principle of legitimate expectation, it is important that people can rely on the fact that a law will not be made more unfavourable in respect of them. The principle does not only concern rights and freedoms, but also obligations.

The principle of legitimate expectation also extends to an adopted and published law, which is not yet applicable.

It is generally inadmissible to increase obligations through a legal instrument that is applicable retroactively. That is, there may be no legal consequences to actions that have already been performed in the past. Retroactive application is non-genuine if it establishes prospective legal consequences on an activity that has started in the past. Non-genuine retroactive application is admissible if the public interest in the amendment of the law overrides the legitimate expectation of people.

The principle of legitimate expectation is restricted by the principle of democracy. Political bodies based either directly or indirectly on the mandate of people are, in principle, entitled to update their previous choices, unless this causes excessive harm to those who have relied on the law in force.

Summary:

I. The Environmental Charges Act provides the minimum and maximum rates of the mineral resource extraction and water abstraction charges. The establishment of specific rates for the charges has been delegated to the Government. The Government adopted regulations that entered into force on 1 January 2010. The regulations provided, for the years from 2010 to 2015, different rates of the water abstraction charge and the extraction charge in terms of years.

II. The disputed regulations were amended by Government Regulation of 4 October 2012 (Amendment Regulation), which entered into force on 12 October 2012. The regulation amended rates of the charges as from 1 April 2013, 1 January 2014 and 1 January 2015.

Prior to the amendments, according to the Regulations, as from 2013 the rates of the charge for the extraction of all the mineral resources and water abstraction had to increase at most by about 5%, compared to the previous year. Following the amendment, as from 1 April 2013 the rates of the charge would increase by approximately 20 % a year, so on average by about 20%, 40% and 60% over the years compared to the charge rates established earlier for the same period.

The Chancellor of Justice filed a request with the Supreme Court.

III. The Court found that the increase in the contested charge rates infringed the freedom of entrepreneurial activity and the principle of legitimate expectation.

The Chamber agreed with the present case law. Furthermore, it found that the establishment of a provision with a regulation does not preclude the creation of legitimate expectation. The creation of legitimate expectation was also not precluded due to the fact that the case concerned an obligation. In the context of the principle of legitimate expectation, obligations mean that a person will have a legitimate expectation that their obligations will not increase. People who fulfilled all the prerequisites for their activities reasonably expect that they have a right in the future to the application of legislation that is favourable to them. Disappointment caused by an

amended law that is unfavourable to them does not necessarily constitute an infringement of their legitimate expectation.

The Chamber did not agree with the arguments that, following various non-binding documents and surveys, the undertakings had to understand that the charge rates established by regulations indicate only an increase in the charge rates and if necessary, the rates will be reassessed.

The principle of legitimate expectation also extends to an adopted and published law, which is not yet applicable. The principle of legitimate expectation does not mean only a restriction for the state authority. Rather, it allows for binding itself so that people are given a promise and certainty in respect of provisions that will enter into force in the future and they are thus directed to plan their activities in the long term, i.e. they are encouraged to invest.

The law allows an extraction permit to be issued for most mineral resources for up to thirty years. There were undertakings for which water abstraction permits and extraction permits, which extended to the effective period of the disputed provisions, had been issued.

The Chamber held that, in this case, the legitimate purpose was to make undertakings use natural resources economically and to increase the state budget revenue.

Fixed-term and termless legislation should still be understood differently when assessing the reasonableness of the infringement of legitimate expectation. In the event of rights granted and obligations restricted for a fixed term, the legitimate expectation of persons is more protected than in the event of termless legislation.

Despite the significant differences in percentage, the share of extraction charges in operating charges is low and thus the impact on sales revenue is not big.

The extraction of mineral resources is an investment-intensive field. During the long-term period of validity of permits, the final expenses of undertakings depend on many variables. Therefore, a possible extensive change in circumstances in the distant future is an inevitable risk. The near future can be forecast better. If any fixed-term legislation has been established for the first years, then the persistence thereof is an important criterion for undertakings when planning their activities.

The Court held that the only justifiable argument for increasing the charge rates was the fact that, compared to 2009, in 2012 the Government decided to give different weight to different aspects of environmental protection. Hence, as regards the field of regulation, the charge rates had been established for a short period and complied with the law. In the meantime no circumstances have changed unexpectedly or extensively. The purpose of making undertakings use natural resources economically and increasing state budget revenue does not override the infringement of the freedom of entrepreneurial activity in conjunction with the principle of legitimate expectation.

The charge rates were declared unconstitutional and repealed to the extent that they exceeded the current charge rates.

Supplementary information:

Legal norms referred to:

- Articles 5, 10, 11, 31 and 53 of the Constitution.

Cross-references:

- no. 3-4-1-2-13, 09.12.2013;
- no. III-4/A-5/94, 30.09.1994;
- no. 3-4-1-2-99, 17.09.1999;
- no. 3-4-1-6-98, 30.09.1998;
- no. 3-4-1-9-00, 06.10.2000;
- no. 3-4-1-20-04, 02.12.2004, *Bulletin* 2006/2 [EST-2006-2-005];
- no. 3-4-1-13-09, 19.01.2010;
- no. 3-4-1-24-11, 31.01.2012;
- no. 3-4-1-1-02, 06.03.2002;
- no. 3-3-2-1-07, 10.03.2008, *Bulletin* 2008/1 [EST-2008-1-004].

Languages:

Estonian, English (translation by the Court).



France Constitutional Council

Important decisions

Identification: FRA-2014-2-006

a) France / **b)** Constitutional Council / **c)** / **d)** 28.05.2014 / **e)** 2014-694 DC / **f)** Law prohibiting the growing of genetically modified maize varieties / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 03.06.2014, 9208 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Genetically modified maize / Precaution, principle.

Headnotes:

The complaint of infringement of European law is not a complaint of unconstitutionality.

The complaint of breach of the obligation to transpose European directives is dismissed since the object of the contested law is not to transpose such a directive.

The complaint that the standing prohibition on growing certain varieties of maize infringes on the precautionary principle laid down in Article 5 of the Environmental Charter is ineffective.

Summary:

I. In its decision no. 2014-694 DC of 28 May 2014, the Constitutional Council ruled on the law prohibiting the growing of genetically modified maize varieties. The case was referred to it by more than sixty members of parliament and more than sixty senators.

II. The Council deemed that this law was consistent with the Constitution, dismissing the various complaints raised by the applicants.

The Constitutional Council notably dismissed the complaint of infringement of European law. Consistent with a precedent, the complaint was found not unconstitutional. It also dismissed the complaint of breach of the obligation to transpose European directives since the object of the contested law is not to transpose such a directive.

Moreover, the Constitutional Council dismissed the complaint of infringement of the precautionary principle laid down in Article 5 of the Environmental Charter. The contested law, which places a standing prohibition on growing genetically modified maize, does not apply to this article which prescribes “provisional and proportionate measures to guard against the perpetration of damage” to the environment.

Languages:

French.



Identification: FRA-2014-2-007

a) France / **b)** Constitutional Council / **c)** / **d)** 13.06.2014 / **e)** 2014-403 QPC / **f)** M. Laurent L. [Lapse of the appeal of an absconding defendant] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 15.06.2014, 9972 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

Keywords of the alphabetical index:

Appeal, lapse.

Headnotes:

The fifth paragraph of Article 380-11 of the Code of Criminal Procedure providing that in the event of an appeal, where the defendant has absconded and not been traced before the opening, or in the course of the hearing, the presiding judge of the Assize Court

declares the appeal lapsed, interferes disproportionately with the right to an effective judicial remedy.

Summary:

I. The Court of Cassation on 11 April 2014 referred to the Constitutional Council a priority question of constitutionality raised by Mr Laurent L. The question concerned the conformity of the fifth paragraph of Article 380-11 of the Code of Criminal Procedure (hereinafter, “CPP”) to the rights and freedoms guaranteed by the Constitution.

II. The fifth paragraph of Article 380-11 of the CPP provides that in the event of an appeal, where the defendant has absconded and not been traced before the opening or in the course, of the hearing, the presiding judge of the Assize Court declares the appeal lapsed.

The Constitutional Council deemed this provision contrary to the Constitution.

The fifth paragraph of Article 380-11 of the CPP applies to a defendant who properly appealed his conviction by the Assize Court ruling at first instance. These provisions deny him the right to have the case reviewed by the Court, in which he at some stage of the proceedings evaded the obligation to appear. The provisions render the contested conviction immediately enforceable. The Constitutional Council held that these provisions interfered disproportionately with the right to an effective judicial remedy.

The Constitutional Council ruled that the repeal of the fifth paragraph of Article 380-11 of the CPP would take effect as from the publication of its decision. It is applicable to all cases that have not been decided at that date. Regarding the appeal of absconding defendants, as long as a new law has not come into force, they may be tried under the default procedure in criminal cases.

Languages:

French.



Identification: FRA-2014-2-008

a) France / **b)** Constitutional Council / **c)** / **d)** 06.08.2014 / **e)** 2014-698 DC / **f)** Corrective law on social security funding for 2014 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.08.2014, 13358 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.10 Institutions – **Public finances.**

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

Keywords of the alphabetical index:

Social security, wage-based contribution.

Headnotes:

Article 1 of the corrective law on social security funding (LFRSS) for 2014, which introduces a diminishing reduction of wage-based social security contributions, is contrary to the Constitution. The legislator has instituted a difference in treatment not based on a difference in situation, and disregarded the principle of equality between persons covered by the same social security scheme.

Summary:

I. In its decision no. 2014-698 DC of 6 August 2014, the Constitutional Council ruled on the corrective law on social security funding (LFRSS) for 2014. More than sixty members of parliament requested the Council to review the law, particularly Article 1, which it found unconstitutional.

II. The Constitutional Council found unconstitutional Article 1, which introduced a diminishing reduction of wage-based social security contributions.

The Constitutional Council recalled that wage-based contributions to old age insurance and health insurance payable by employees and agricultural employees were mandatory payments conferring entitlement to the benefits and advantages provided by the old age and health branches of the compulsory social security scheme for employees and the compulsory social security scheme for agricultural employees.

The Constitutional Council noted that the legislator had instituted a diminishing reduction of wage-based social security contributions for employees with remuneration between 1 and 1.3 times the SMIC

(growth-indexed minimum wage) while retaining for all employees the basis of these contributions together with the benefits and advantages to which these contributions conferred entitlement. Thus, under the impugned provisions, a single social security scheme would continue to finance the payment of the same benefits for all its members despite the non-payment by almost a third of them of the wage-based contributions conferring entitlement to the benefits provided by this scheme.

The Constitutional Council held that the legislator had instituted a difference in treatment not founded on a difference in situation and disregarded the principle of equality between persons covered by the same social security scheme.

Languages:

French.



Georgia

Constitutional Court

Important decisions

Identification: GEO-2014-2-006

a) Georgia / **b)** Constitutional Court / **c)** Plenary / **d)** 26.06.2012 / **e)** 3/1/512 / **f)** Citizen of Denmark, Heike Cronqvist v. Parliament of Georgia / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Land, agricultural / Foreigner, right to acquire property / Property ownership / Property, right / Property, seizure.

Headnotes:

In order for a person to practically exercise his or her property rights, it is not enough to grant him or her an abstract guarantee. He or she must also have access to a civil, private legislative order, which will allow for unobstructed exercise of property rights and therefore, contribute to developing civil trade. The constitutional guarantee of property rights includes the obligation to create a legislative framework to ensure the practical realisation of the property rights and to make it possible to accumulate assets through acquiring property.

Summary:

I. The applicant argued that a regulation obligating a foreign national to transfer the rights to inherited agricultural land plot within 6 months is a restriction of property rights, which in its essence equates to a seizure of property. The area, protected by Article 21 of the Constitution (right to property) applies to the citizens of Georgia and foreign nationals equally. The

applicant therefore argued that the disputed norm, in light of property rights, contradicts the regulation on equality of Georgian citizens and foreign nationals residing in Georgia.

The State, as respondent, contended that taking certain measures justified by a pressing social need does not automatically mean that it is directed only to avoiding inevitable negative consequences. The legislator may be motivated by the positive impact for the public or part of society.

In the respondent's opinion agricultural land has a particularly important meaning for land-poor agricultural countries. The respondent claimed that the main goal of such a prohibition on the acquisition of agricultural land by foreign nationals is rather to avoid purchase of cheap land by citizens of rich countries, which would negatively impact the economic security of the state, environmental protection and national security.

II. The Constitutional Court stated that for a person to practically exercise his or her property rights, it is not enough to grant him or her an abstract guarantee. The constitutional right to acquiring property places negative obligations on the state, not to obstruct a person in acquiring property and thereby ensure his or her own well-being. The right guaranteed by Article 21 of the Constitution belongs to everyone and the constitutional norm does not define an exclusive circle of subjects of this right, including by citizenship. Understanding that an individual is subject to property rights is related to the fact that he or she is a human being.

The Constitutional Court held that the economic character as well as quality of agricultural production does not depend on the citizenship of the resource producer. At the same time, new players on the agricultural market could contribute to economic growth and improvement rather than deteriorate the situation. Therefore, the Court considered that there is no logical link between prohibiting ownership of agricultural land for foreign nationals and the social need for improvement of the agricultural structure.

Furthermore, a foreign national has the possibility of exercising patronage over an agricultural land plot through a Georgian legal entity, established by him or her, as would be done through immediate ownership of the plot. Property rights based on the Constitution and legislation cover private and legal entities equally. Certain risks posed by ownership of agricultural property by foreign nationals remain the same in case of the legal entities established by foreign nationals. Based on this, restricting the right of foreign nationals to acquire agricultural land is not logical and is an inappropriate means for achieving the pursued aim.

According to the Constitutional Court, acquisition of private property by a person, as well as ownership and management thereof, is an expression of the individual autonomy of the person and is not in any way connected with state sovereignty. Irrespective of whatever plots of land on the state territory are owned by private owners, regulation of private property remains the exclusive competence of the state and therefore, it is able to include the essence and scope of any property within the framework of a constitutional regulation. There may be a specific plot of land, ownership of which, based on its strategic importance, may be a part of state security interest, however, overall agricultural land cannot be considered as such.

The Constitutional Court held that the function of the right to inheritance, which is foreseen under Article 21.1 of the Constitution, is to ensure that the basis of independently managed private property, as a part of individual life, is not lost with the death of the original owner. Rather, it is to provide the opportunity for the continuation of that life through rightful inheritance.

The Constitutional Court held that the disputed norm gives the foreign national an opportunity to inherit an agricultural plot of land. However, evaluation of normative regulations of the property rights after such rights have been acquired is beyond the scope protected by inheritance rights. On this basis, the obligations placed on the foreign national by the law of Georgia concerning "ownership of agricultural land" is not a restriction on the right to inheritance, but rather a restriction on owning and managing property, which falls under the scope of Article 21.1 and 21.2, and which contradicts them.

The procedure of seizing property represents a mechanism of forced execution of the foreign national's obligation. It is organically linked with the essence of the specific obligation and cannot be evaluated independently from it. The regulations set forth by the legislator for not meeting the determined obligations and whether such regulations are proportionate to restricting a constitutional right, largely depends on the nature of the obligation which is countered by the forced mechanism regulated by the legislator. Determination of the proportionality of the state response to not meeting the obligation is only possible with consideration of the essence and scope of the specific obligation.

Based on the aforementioned, the Constitutional Court declared unconstitutional the regulations, under which foreign nationals could only own agricultural property through inheriting it or by owning it previously as a Georgian citizen and which obliged

foreign nationals to transfer such property within 6 months. Hence, since the possibility of seizing property from the foreign national is not applicable, the execution and procedural parts related thereto are devoid of any normative basis and become inapplicable.

The Constitutional Court held that Article 47.1 of the Constitution gives resident aliens a guarantee that constitutional rights, regardless of their essence, will apply to them in the same way as they apply to Georgian citizens, unless the Constitution determines the right to be an exclusive right of Georgian citizens. Since giving various opportunities through the law does not mean that constitutional rights become unequal in application to Georgian citizens, or that any of the constitutional rights are taken away from the applicant, therefore the disputed norms cannot be assessed in connection with the aforementioned Article.

Languages:

Georgian, English.



Identification: GEO-2014-2-007

a) Georgia / **b)** Constitutional Court / **c)** The First Board / **d)** 24.10.2012 / **e)** N1/2/519 / **f)** Georgian Young Lawyers' Association and citizen of Georgia, Tamar Chugoshvili v. Parliament of Georgia / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.36.3 Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications**.

Keywords of the alphabetical index:

Internet / Protection, judicial / Private life, right / Secret surveillance, measure.

Headnotes:

'Urgent necessity' implies such cases in which, on the basis of the principle of proportionality, achievement of the public interest as foreseen by the Constitution, due to actually existing objective reasons, is impossible without the urgent and immediate restriction of private interests. Further, it should be very clear, obvious and definite that there is no other likely means to protect in a different way the public interest within the scope of the Constitution. 'Urgency' refers to the lack of time, which makes it impossible to obtain a judge's order for restricting the right and which requires urgent action.

Summary:

I. The claimant challenged the constitutionality of the words "of closed nature" in Article 7.2.1 of the law "On Operative-Investigation Activities" (hereinafter, the "Law"), in connection with the words "observation of internet communications" of the same Law, with respect to Article 20.1 of the Constitution.

In the Claimant's assertion, the disputed norm is vague – it can be read as having different meanings, among them a meaning contradicting the Constitution. The disputed norm may be interpreted in such a way as to allow secret observation on closed internet communication, without a judge's order, by applying different technical means. Accordingly, an operating officer, based on it, is enabled to secretly observe internet interactions in such a way that the participants to this communication were not informed of the surveillance. Stemming from this, as the disputed norm provides the possibility of secretly exercising observation on closed internet communication without a judge's order or/and the urgent necessity, they contradict Article 20.1 of the Constitution on the right to private life.

The State, as respondent, indicated that the term "observation" determined by the disputed norm refers only to observations of internet communications of an open nature. Simultaneously, the State argued that when the necessity to observe internet communication of a closed nature arises, it, in all cases, is conducted under the rule set forth in Article 7.2.h and implies the necessity of having a judge's order for conducting the measure.

II. The Constitutional Court held that individuals have the right to convey the information they want or consider necessary to only a specific person (persons), i.e. they have the right to choose the topics, interests and a circle of persons, with whom they want to communicate on given topics. The

internet is one of the means for such public or private communications. For this reason, if there is no protection of information and respective guarantee for the protection of a person's anonymity, this will bring into question the inviolability of private life, and would thereby impede or complicate communication in any sphere, which eventually would prevent the development of democratic processes.

The Constitutional Court emphasised that at the same time, the right to private life is not absolute. The right to inviolability of private life may be restricted in order to achieve legitimate aims that are necessary in a democratic society and are foreseen by the Constitution, besides, in adherence to the condition that the interference with the right, in order to achieve the legitimate aims, is necessary and proportional. The scope for the interference with the right established by the Constitution precisely serves to strike a balance between private and public interests. In particular, under the Constitution, restriction of private life shall be allowed by either a court decision or without it, solely in cases of urgent necessity provided for by law.

By joint consideration of the mentioned norms, the Constitutional Court established that the disputed norm envisions the possibility of observation of closed internet communications, and foresees the conduct of these operative investigation measures without a court decision. Despite the general aspirations of the legislator to make such instances of interference with the right subject to judicial control, the obligation of applying this position to the instances foreseen by the disputed norm neither derives from the disputed norm nor from the legislation in general.

The Constitutional Court noted that in an individual case the legislator may fail to express its will with sufficient precision, clarity and adequate specificity. Therefore, the text of this norm must be practically separated from the real opinions and desires of the legislator with regard to its content. The law should be understood and perceived in the way it is written. While enforcing the law, preference is given to the will of the law, as the views and general aims articulated in the legislative process, upon which draft laws are based and which are not reflected in the text of the law, may not serve as a justification for specific decisions by the law enforcer. He is obliged to be guided by the text of the norm, by the reality actually reflected, foreseen and not to be foreseen in it. Therefore, the only aspiration and aim of the legislator – to make the interference with the right to inviolability of private life subject to judicial control – may not have an influence on the text of the disputed norm unless it is reflected in the law.

According to the Constitution, restriction of the right to private life shall be permissible by a court decision or, exceptionally, without such decision in the case of urgent necessity provided for by law. The Constitutional Court held that as the disputed norm allows for the restriction of the right without a court decision, in order to decide on the constitutionality of the norm, the second formal ground – the issue of the existence of urgent necessity envisioned by the law – should be checked. “The urgent necessity provided for by the law” is substantially a state or condition which may exist or may not exist during the necessity to carry out this operative investigation measure. The content of that operative investigation measure, which is defined by the disputed norm, may not always be conditioned by urgent necessity. Therefore, there is no ground for any assertion that the disputed norm should be applied only in the cases of urgent necessity.

Stemming from all the aforementioned, as the disputed norm envisions the possibility to observe closed internet communications without a court order and under the circumstances where the grounds urgent necessity are absent, it contradicts Article 20.1 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2014-2-008

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 10.04.2013 / **e)** N2/1/524 / **f)** Citizen of Georgia, Giorgi Gachechiladze v. Parliament of Georgia / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Environment, protection / Environment, risk, information / Legislation, liability.

Headnotes:

In order to ensure an environment safe for human health, environmental protection may collide with the sphere regulating the freedom of entrepreneurship. To ascertain to what extent the State, for the purpose of the economic development of the country, can permit environmental impacts, is one of the most difficult legal problems for the practical realisation of the basic human right to live in a healthy environment, towards which it is impossible to develop a general and universal approach. In every specific case, it should be established through the confrontation of the interests, whether the impact of the environment in whatever form, amounts to a violation of the human right to live in a healthy and safe environment.

Summary:

I. The applicant challenged the constitutionality of Article 57.1 of the Law “On Environment Protection” (hereinafter, the “Law”) with respect to Article 37.3 and 37.4 of the Constitution and the constitutionality of Article 57.4 of the Law with respect to Article 37.5 of the Constitution.

The applicant argued that the agreement foreseen by Article 57.1 of the Law permitted any physical or legal person to inflict damage upon the environment and the possibility to escape from liability. The applicant contended that the existence of the institute of an agreement in the sphere of environmental protection was generally inadmissible and it contradicted the Constitution.

The applicant argued that the disputed Law violated not only the constitutional right to live in a healthy environment, but also the state’s obligation to ensure environmental protection and the rational use of natural resources.

The applicant claimed that the right of every individual to live in a healthy environment is guaranteed by Article 37.3 of the Constitution. However, on the basis of Article 57.4 of the Law, the State was not authorised to inspect the activities of persons involved in the sphere of the use of nature, thereby precluding the possibility of obtaining complete information. Consequently, the State considered as legal all actions that endangered the environment, which amounted to a violation of Article 37.3 and 37.4 of the Constitution.

The applicant indicated that on the ground of Article 57.4 of the Law, citizens were not able to effectively exercise the right to receive complete and objective information guaranteed in Article 37.5 of the Constitution.

The State, as respondent, admitted the constitutional claim and believed that an agreement envisaged by the disputed norms implied granting certain "indulgence" to a person so that any person was given the possibility to arbitrarily use natural resources and inflict damage upon the environment, which contradicted the basic right to live in a healthy environment guaranteed by Article 37 of the Constitution.

II. The Constitutional Court stated that the content, purpose and spirit of Article 37.3 and 37.4 of the Constitution are to establish a high standard for the right to a healthy environment and regards it as a basic human right. Stemming from these Article, the State is obliged to create a legal system that ensures the existence of a reasonable expectation by a person that in case of damage to the environment, adequate legal sanctions be applied against any person. The State must create such legal mechanisms that will perform a preventive function against actions aimed at damaging the environment.

The Constitutional Court declared that the Law did not restrict state bodies from concluding a disputed agreement on the release of a person from the responsibility both for infringements committed in the past and for actions perpetrated in the future. Simultaneously, the conclusion of an agreement on the release of a person from liability in the future had the effect of a factual abrogation towards him or her of the prohibitions established in the sphere of environmental protection and natural resources. The Constitutional Court asserted that in such cases an interested person loses his or her apprehension that the liability might be imposed upon him or her in return for the damaged inflicted upon the environment.

The Constitutional Court shared the argumentation that as a result of the conclusion of an agreement, the prohibitions prescribed by the legislation lost "restraining effect" with respect to the interested persons. Granting a person with a wide freedom to impact the environment comes into conflict with the positive obligation of the State to ensure environmental protection with the aim of preserving a healthy and safe environment for human beings.

The Constitutional Court observed that in the given case, "an agreement" was concluded in such a way that it was unknown what extent of the damage an

interested person had inflicted upon the environment and, moreover, it was impossible to speak about the existence of a reasonable balance under the conditions, when the damaged inflicted upon a healthy environment could possibly be immeasurably wide. Respectively, the reasonable balance struck between the restriction of the right established by the disputed norm and the positive result achieved by its adoption was disrupted and because of that Article 57.1 and 57.3 of the Law contradicted Article 37.3 and 37.4 of the Constitution.

As the Constitutional Court declared that within the scopes of Article 37.5 of the Constitution, the State is obliged to collect information concerning the state of the environment and those factors that exert an influence upon it. Article 37.5 of the Constitution extends its protection only to the accessibility of the information about the state of the environment, whereas the matters relating to contamination or any other damage inflicted upon the environment may be the subject of regulation of Article 37.3 and 37.4 of the Constitution.

The Constitutional Court noted that Article 57.4 of the Law should not be considered as prohibiting the use of any means to inspect a person. In this case, inspection of an action was restricted to the context of the imposition of civil or/and administrative liabilities. The disputed norm did not prohibit the inspection of a person with a view to receiving information about the state of the environment. Accordingly, the conduct of inspections of this nature was possible even under the conditions of the disputed norm, if such competence of a relevant administrative body was envisaged by the legislative norms regulating the relevant sphere.

On this basis, the Constitutional Court held that the Article 57.4 did not impede the practical exercise of those legislative mechanisms, which operated within the context of the collection of information on the state of the environment. Furthermore, the mentioned disputed norm did not at all regulate the issues on the receipt of information on the state of the environment by State bodies. Article 57.4 of the Law did not hinder the fulfilment of the positive obligations of the State existing in terms of acquiring information on the state of the environment and therefore did not violate Article 37.5 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2014-2-009

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 14.05.2013 / **e)** N2/2/516, 542 / **f)** Citizens of Georgia, Alexandre Baramidze, LashaTughushi, VakhtanKhmaldze and VakhtangMaisaia v. Parliament of Georgia / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.16 General Principles – **Proportionality.**
 3.18 General Principles – **General interest.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Criminal responsibility, establishment / Law, foreseeability / Information, collection and processing / Intelligence service / Security, state.

Headnotes:

Laws establishing criminal responsibility may open the possibility of being interpreted by the courts and the possibility of applying the law to a specific situation. Although it is impossible that a law could envisage each aspect of all future concrete cases or situations, the legislator while defining prohibited acts in criminal legislation is obliged to adopt a norm which reduces as much as possible the potential for courts to establish different legal consequences within the scope of their interpretative role.

Summary:

I. The applicants argued that on the basis of the challenged law, a person might be punished for action constituting an exercise of his or her freedom of expression guaranteed by the Constitution. The applicants asserted that the criminal act prohibited by the disputed law concerned the transfer of any type of information to any organisation, which is detrimental to the interests of Georgia, the vagueness of which could not comply with the criterion of foreseeability of the law, which is secured by Article 42.5 of the Constitution.

The applicants contended that in the conditions of the applicable wording, collection of the information was considered as an already completed crime, which prohibited a person from enjoying the freedom of expression guaranteed by the Article 24 of the Constitution.

The State, as respondent, shared the opinion that the term “other information” defined by the disputed norm failed to comply with the requirements of Article 42.5 of the Constitution. The respondent also agreed that the terms “a foreign organisation” and “to the detriment of the interests of Georgia” defined by the disputed norm were vague and needed to be brought in conformity with Articles 24 and 42.5 of the Constitution.

II. The Constitutional Court stated that the receipt and dissemination of information both at one’s own initiative and by commission of another person is protected by Article 24 of the Constitution and the restriction created by the impugned Law amounted to interference with the freedom of expression. The Constitutional Court expressly recognised that the aim of the challenged Law, in imposing a punishment for transfer of information when information was detrimental to Georgia and establishing measures against being an object of foreign intelligence surveillance, represented an important means for achieving the legitimate aim of state security.

The Constitutional Court noted that stemming from the requirements of the principle of proportionality, the restriction should not cause restriction of the right of a person of a higher degree, than is necessary for the existence of a democratic society. It should be scrutinised how necessary it is for the provision of the state security to restrict freedom of expression in this form, and to find out if there is a less restrictive means of achieving the same result.

The Constitutional Court considered that narrowing the content of the disputed Law would only reduce its efficiency and create additional opportunities for persons acting by commission of the intelligence of a foreign country. When the fact of co-operation with the intelligence of a foreign country poses the threat in itself to state security, transfer of harmless information to foreign intelligence services may cause considerable damage to state interests. Respectively, the disputed Law in the context of the prohibition of collection and transfer of information by commission of the intelligence of a foreign country represented a necessary means of achieving a legitimate aim.

The Constitutional Court concluded that the disputed norm in this part was formulated with sufficient clarity; it represented a proportionate means for restricting

the right and at the same time, did not have a “chilling effect” upon the realisation of the freedom of expression. Accordingly, Article 314.1 of the Code did not violate Article 24.1 and 24.4 of the Constitution.

As for the words “or foreign organisations”, the Constitutional Court stated that the restriction with regard to the collection and transfer of information by commission of a foreign organisation prescribed by the disputed norm was disproportionate and that the restriction had a “chilling effect” on the freedom of expression. Accordingly, the words “or foreign organisations” of Article 314.1 of the Code violated Article 24.1 and 24.4 of the Constitution.

The Constitutional Court noted that the argumentation provided by the applicant was directed not towards the issues of foreseeability of the norm, but towards the expediency of declaring collection and transfer of any information as punishable by law. Article 42.5 of the Constitution defines the criteria for the law establishing criminal responsibility and not the fact against which action it is permissible to impose liability. Since Article 42.5 of the Constitution does not regulate the issue of the constitutionality of expediency of the punishment for the collection and transfer of other information, it was impossible to assess the given issue with respect to the said constitutional norm. The Constitutional Court concluded that, within the context of co-operation with the foreign intelligence, there was no problem of foreseeability.

The Constitutional Court stated that adoption of a decision declaring an action as punishable is an exclusive authority of the legislator. Accordingly, Parliament should apply this authority so as to preclude the law enforcer, on the ground of judicial practice, from creating itself the scope of criminally punishable action. In the given case, in the context of defining the criminal punishment of the collection and transfer of information by the commission of a foreign organisation to the detriment of the interests of Georgia, the disputed Law could be interpreted so widely that it gave the possibility for the court applying the norm, at its own discretion, to define under the conditions of existence of normative restraints, the co-operation with which foreign organisation should be “detrimental to the interests of Georgia”. Accordingly, the Constitutional Court declared unconstitutional the words “or foreign organisation” of the Article 314.1 of the Code with respect to Article 42.5 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2014-2-010

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.07.2013 / **e)** N1/3/534 / **f)** Citizen of Georgia, Tristan Mamagulashvili v. Parliament of Georgia / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.

Keywords of the alphabetical index:

Discrimination, place of residence / Displaced person / Occupation, belligerent.

Headnotes:

Differentiated treatment, in itself, does not constitute discrimination. In separate cases, even in sufficiently similar legal relations, it is possible that differentiated treatment may be necessary and inevitable. This is frequently necessary. However, a law conferring the status of ‘internally displaced person (hereinafter, “IDP”) on some persons while denying that status to others in a substantively similar position constitutes differentiated treatment of a high intensity, necessitating strict scrutiny.

Summary:

I. The applicant argued that as a result of armed conflict in 2008, he was forced to leave his own place of permanent residence. The disputed law, by introducing the notion of an occupied territory, gave the preference to the group of persons who were forcefully displaced from the occupied territories, whereas, the persons who were forced to leave their places of residence from non-occupied territories, failed to fall within the scopes of application of the law “On the Occupied Territories” (hereinafter, the “Law”). The disputed laws clearly differentiated between two categories of persons on the ground of place of residence.

The State, as respondent, acknowledged the constitutional claim.

II. The Constitutional Court asserted that any differentiated treatment, in itself, does not constitute discrimination.

The Constitutional Court stated that discrimination amounting to an end in itself only constitutes unjustified discrimination. The Constitutional Court noted that the persons forcefully displaced from the occupied territories and the persons who were in an identical position as the applicants should be deemed to be persons equal in essence, according to the grounds for forceful displacement, based on their situation in terms of violation of their rights as well as according to threats, both experienced and anticipated by those persons. In particular, in the case of war and aggression, the fact of occupation of specific territories of Georgia, mass violation of human rights were the ground for their forceful displacement. Simultaneously, these persons faced substantially similar threats, on the basis of which they could not return to their places of permanent residence.

The Constitutional Court stated that the situation in the occupied territories and the situation in the territories where Georgian jurisdiction did not apply were substantially the same, because in both places people were forced to leave their dwelling houses as a result of the occupation and military aggression.

Georgian jurisdiction did not extend to these territories either, because here another state exercised effective control, with the result that Georgian law-enforcement bodies were deprived of the possibility to prevent or respond to specific offences and to ensure the effective protection of human rights and freedoms. The crossing of artificially drawn boundary lines posed an identical threat as the threat related to the crossing of boundary lines of the territories as defined by the Law, and consequently, the problems of such persons were similar. The difference between them was only the fact that the dwelling houses of a part of these persons were situated in the territories as defined by the Law. While the dwelling houses of the other part of these persons were situated in the territories adjacent to the occupied territories, which were not recognised as the occupied territories and which virtually fell within the occupation zone.

The Constitutional Court did not accept the applicants' argument that the ground for differentiation was "the place of residence". The purpose of the norm was to link IDP status with the fact of occupation of the territory. The differentiation caused by the norm was conditioned by the consequences of the factual occupation of specific territories of Georgia at a specific period of time.

For the purposes of assessing the discriminatory nature of differentiated treatment, the Constitutional Court established different criteria. With respect to Article 14 on non-discrimination, the Constitutional Court assessed the constitutionality of a norm based on a:

1. "Strict scrutiny test"; or
2. "Test of rational differentiation".

The preconditions and grounds for their application differ. The Constitutional Court applies the strict scrutiny test in cases of differentiation based on "classic, specific" signs and in such cases the law is assessed according to the principle of proportionality. The Constitutional Court determines the need for application of the strict test also according to the degree of intensity of differentiation. The criteria for assessing the intensity of differentiation will differ in each particular case, stemming from the nature of the differentiation and the sphere of regulation. However, in any case, it will be decisive as to what extent the persons being equal in essence were placed in significantly differentiated conditions. If the intensity of differentiation is high, the Court will apply the strict test, and in the event of low intensity, "the test of rational differentiation" will apply.

The Constitutional Court considered that the constitutionality of the norm should be assessed according to "the strict test", because the intensity of differentiation was high.

The Constitutional Court noted that recognition of the respective obligations by the State towards persons affected by the occupation of the territories and protection of these persons was a legitimate goal. To achieve it through the regulation selected by the legislator should be possible, the regulation should be oriented toward the protection and provision of a legitimate goal and a measure restricting the right should be a valid, acceptable means to achieve the goal.

The Constitutional Court asserted that the disputed Law might not be deemed a valid or permissible means of achieving the goal for failing to be an adequate means of achieving the goal, because it failed, from the beginning, to confer IDP status on a cohort of persons forcefully displaced as a result of the fact of occupation and gave rise to differentiation of persons being equal in essence.

The Constitutional Court concluded that the disputed norm gave rise to unjustified differentiation of persons being equal in essence and the Court underlined that the general issue was resolved by the recognition of the disputed word as unconstitutional. The Court

declared as invalidated not only the simple words, but also the Law, which had granted IDP status to only those persons forcefully displaced from the occupied territories as prescribed by the Law and excluded, due to the occupation of the territory granting of IDP status to other persons being equal in essence.

Languages:

Georgian, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2014-2-015

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 29.04.2014 / **e)** 2 BvR 1572/10 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2014, 2489-2491; CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law.**

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

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

4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction.**

Keywords of the alphabetical index:

Preliminary ruling, referral / Right to one's lawful judge / Standard of review.

Headnotes:

The Federal Constitutional Court only objects to the interpretation and application of provisions on jurisdiction if such interpretation and application are, under a reasonable appraisal of the fundamental ideas informing the Constitution, no longer com-prehensible and thus obviously untenable.

These principles also apply to the provision on European Union jurisdiction under Article 267.3 of the Treaty on the Functioning of the European Union (hereinafter, the "Treaty"). Thus, not every violation of the obligation to submit a case for a preliminary ruling violates the second sentence of Article 101.1 of the Basic Law at the same time.

Summary:

I. The constitutional complaint concerns a failure to submit a referral to the Court of Justice of the European Union (hereinafter, the “ECJ”) for a preliminary ruling.

The applicant operates a number of slaughterhouses and meat-cutting plants, selling cut and pre-wrapped meat from various German branches. It imports some of the products thus sold from Belgium. In 2008, German authorities found that some of the products had been incorrectly or not labelled at all in terms of their net quantity. Since this violated German law, the local court sentenced the applicant to pay a fine. The applicant filed a legal complaint, arguing that it could not be fined since the rules applied by the court violated European law. It claimed that requiring a statement of the net quantity of products was a measure having equivalent effect to a quantitative restriction on imports which is prohibited under Article 34 of the Treaty, and that there was no applicable exception under Article 36 of the Treaty. According to the applicant, the question of whether the relevant German provision violated EU law had to be answered by a referral to the ECJ. The Higher Regional Court dismissed the appeal as manifestly unfounded.

The constitutional complaint challenged the decisions of the Regional Court and the Higher Regional Court, claiming a violation of the right to one’s lawful judge.

II. The Federal Constitutional Court did not admit the constitutional complaint for decision. It found that the constitutional complaint was in part inadmissible and in any event unfounded. This decision was based on the following considerations:

The ECJ is the lawful judge within the meaning of the second sentence of Article 101.1 of the Basic Law. According to its jurisprudence, a national court of last instance is obliged to refer a case to the ECJ for a preliminary ruling if a question of EU law is raised in a pending case, unless the court has determined that the question is not relevant to the decision, that the relevant provision of EU law has already been interpreted by the court, or that the correct application of EU law is so obvious as to leave no room for any reasonable doubt.

The Federal Constitutional Court, however, only objects to the interpretation and application of provisions on the distribution of jurisdiction if the interpretation and application are, under a reasonable appraisal of the fundamental ideas informing the Constitution, no longer comprehensible and thus obviously untenable. These principles also apply to

the provision on the ECJ’s jurisdiction under Article 267.3 of the Treaty. Thus, not every violation of the obligation to submit a case for a preliminary ruling violates the second sentence of Article 101.1 of the Basic Law at the same time. The court that decides on a matter must therefore obtain sufficient knowledge about the substantive EU law. It must evaluate any relevant case-law of the ECJ and use it as orientation in its decisions.

Under the jurisprudence of the Federal Constitutional Court, it is not necessary to employ a stricter standard of review. Nor does EU law or the European Convention on Human Rights demand a standard of review that goes beyond ensuring that a decision was not made arbitrarily.

According to these standards, there was no violation of the second sentence of Article 101.1 of the Basic Law. The Higher Regional Court did not handle Article 267.3 of the Treaty in an unacceptable way. It had no doubts as to the correct solution and clearly did not consciously deviate in its decision from the ECJ’s case-law.

Languages:

German.

*Identification:* GER-2014-2-016

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 05.05.2014 / **e)** 2 BvR 1823/13 / **f)** / **g)** / **h)** *Neue Zeitschrift für Strafrecht Rechtsprechungs-Report Strafrecht* 2014, 259; CODICES (German).

Keywords of the systematic thesaurus:

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.**

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

Keywords of the alphabetical index:

Judicial review in summary proceedings / Judicial clarification of facts / Right to medical treatment, prisoners.

Headnotes:

1. Summary proceedings must be structured in a way which ensures that legal protection is not limited to the mere possibility of resorting to the courts, but leads to an effective review in both fact and law. If a violation of fundamental rights is at issue, a particularly thorough investigation is warranted.
2. Judicial review by the regular courts can only ensure compliance with applicable law and the effective protection of substantive rights, which are both required by the rule of law, if the review is based on sufficient clarification of the relevant facts.

Summary:

I. The applicant is currently serving a prison sentence. During his work in prison, he had got some wood particles in his left eye, which left the eye inflamed. He saw a prison doctor about this on the same day, who instructed him to immediately go to an eye clinic should the situation get worse. The applicant's urgent application to the Regional Court seeking immediate referral to an eye clinic was rejected, as was his complaint against this decision.

With his constitutional complaint, the applicant challenged the court's rejection of his urgent application. He put forward that this constituted a violation of Articles 3.1 and 19.4 of the Basic Law, § 58 of the Prison Act, and Article 3 ECHR. He claimed that the refusal of treatment by the prison and the Regional Court had led to the loss of his left eye; his vision there now amounted to only ten percent. The incident with his eye had occurred on 29 July 2013. Yet, he had not been sent to the hospital until 1 August 2013. In addition, he stated that his left eye had been damaged before (which was known to the court), which had made prompt treatment all the more urgent.

II. While the constitutional complaint was partially inadmissible, its remainder was admitted for decision. The Federal Constitutional Court held that the challenged decision of the Regional Court violated the applicant's right under Article 19.4 of the Basic Law in conjunction with the first sentence of

Article 2.2 of the Basic Law. This decision was based on the following considerations:

From the constitutional guarantee of effective legal protection follow requirements for the design and application of the relevant legal provisions on summary proceedings (*Eilrechtsschutz*). Such proceedings must be structured in a way which ensures that even in summary proceedings, legal protection is not limited to the mere possibility of resorting to the courts. Instead, the proceedings must lead to an effective review in both fact and law. If a violation of fundamental rights is at issue, a particularly thorough investigation is warranted. In addition, it should be noted that judicial review by the regular courts can only ensure compliance with applicable law and the effective protection of substantive rights, which are both required by the rule of law, if the review is based on sufficient clarification of the relevant facts. It can be necessary to clarify the factual basis of the necessary weighing of interests already during preliminary proceedings.

When applying these principles, the specific weight of the fundamental right to life and physical integrity (first sentence of Article 2.2 of the Basic Law) has to be considered. It is primarily for the doctor to assess medical needs. However, the guarantee of effective legal protection (Article 19.4 of the Basic Law) demands that decisions by the prison administration that are based on such assessments cannot be completely shielded from judicial review. They are subject to judicial review, to determine whether the limits of legitimate medical discretion were exceeded.

According to these standards, the Regional Court did not clarify the facts of the present case to the necessary degree. From § 58 of the Prison Act follows a right to medical treatment, which is guaranteed by the first sentence of Article 2.2 of the Basic Law. If the prison doctor reaches the limits of his ability or the equipment of the prison is insufficient, he has to seek the counsel of another (specialised) doctor or transfer the prisoner for treatment in a better equipped facility.

The Regional Court did not examine whether the applicant, given his ailments, had a right to be immediately treated in an eye clinic. Neither did the court examine the soundness of the doctor's decision to await a deterioration of the applicant's situation. A prompt and accelerated clarification of the facts was all the more warranted since the right to medical treatment guaranteed by the first sentence of Article 2.2 of the Basic Law covers not only the prevention of exacerbation, but also healing and relief of ailments. Considering the information provided by

the applicant, the possibility could not be excluded that a mere delay in treatment would lead to irreversible damage.

The challenged decision of the Regional Court is based on the violation of the Constitution. It cannot be excluded that the court would have come to a decision more favourable to the applicant if it had met the constitutional requirements for an investigation of the facts.

Languages:

German.



Identification: GER-2014-2-017

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 06.05.2014 / **e)** 1 BvL 9/12, 1 BvR 1145/13 / **f)** / **g)** to be published in the Court's Official Digest / **h)** *Neue Juristische Wochenschrift* 2014, 2093-2099; *Betriebliche Altersversorgung* 2014, 470-480; *Zeitschrift für das gesamte Familienrecht* 2014, 1259-1264; CODICES (German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

Keywords of the alphabetical index:

Pension rights, division, divorce / Supplementary pensions / Exceptions, unconstitutionality of / Insurance.

Headnotes:

§ 32 of the Pension Rights Division Act, which excludes the applicability of the adjustment provisions under §§ 33 and 37 of the same Act to supplementary pension rights for the public sector, is in line with the Constitution.

Summary:

I. Under German law, there is a division of pension rights in case of divorce. § 32 of the law that governs this division (Pension Rights Division Act, hereinafter, the “Act”) stipulates that certain pensions – those that were traditionally the main or primary pensions – are subject to certain exceptions from the division of pension rights. In contrast, what are considered “supplementary pensions” do not fall under these exceptions. The decision at issue concerns the question of whether it is constitutional that supplementary pensions for the public sector are not covered by certain exceptions. The Federal Constitutional Court had the task of deciding two cases: an application for judicial review and a constitutional complaint.

The first case concerned a husband who had been divorced from his wife. In the divorce proceedings, his (supplementary) pension rights were divided between him and his former wife. He also had to pay her alimony. If the above-mentioned exception pursuant to § 32 of the Act covered the husband's (supplementary) pension, § 33 of the Act would apply and his pension rights would not have to be shared with his wife. The Higher Regional Court found that the limited scope of § 32 of the Act was incompatible with the protection of property pursuant to Article 14.1 of the Basic Law and brought the question before the Federal Constitutional Court.

In the second case, the applicant had been divorced from his wife, and half of his (supplementary) pension rights were allocated to her. She subsequently died, having received these benefits for less than 36 months. If the pension rights were covered by above-mentioned § 32 of the Act, § 37 of the Act would apply, and the husband could ask that after his ex-wife's death, his whole pension be reinstated to him. His legal actions against the pension funds, in which he demanded his full pension, were, however, unsuccessful. He therefore filed a constitutional complaint.

II. The Federal Constitutional Court found that the fact that § 32 of the Act excludes supplementary pensions for the public sector from certain exceptions does not violate the fundamental right to property (Article 14.1 of the Basic Law) or the equal protection clause (Article 3.1 of the Basic Law). While it would be permissible under the Constitution to include supplementary benefits for the public sector in § 32 of the Act, there was no such constitutional mandate. Justice Gaier, however, dissented, arguing that Article 14.1 of the Basic Law had indeed been violated.

This decision of the Court's majority was based on the following considerations: First, the Court found that pension rights are subject to the typical risk of insurance. The insurance holders might thus get more or less than what they contributed, and this risk does not have to be mitigated by exception clauses for certain types of hardships. This risk continues after pension rights have been split between two former spouses. Thus, the partner whose rights have been reallocated does not have to bring a "needless sacrifice"; there is no enrichment of the community of insured citizens, and thus no violation of Article 14.1 of the Basic Law. The Court also found that the legislator has a wide margin of appreciation with regard to the question of which kinds of pension rights should be subject to exceptions. Since there was no violation of Article 14.1 of the Basic Law, and the distinctions were made pursuant to the kind of insurance (and not, for instance, individual traits of the persons concerned), the legislator's reasons for its decision were sufficient.

Languages:

German.



Identification: GER-2014-2-018

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10.06.2014 / **e)** 2 BvE 2/09, 2 BvE 2/10 / **f)** Federal Convention / **g)** to be published in the Court's Official Digest / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2014, 1149-1156; CODICES (German).

Keywords of the systematic thesaurus:

4.4.4.3 Institutions – Head of State – Appointment – **Direct/indirect election.**

Keywords of the alphabetical index:

Federal Convention, members, right to bring motions / Federal Convention, members, right to debate / Candidates, presentation.

Headnotes:

1. Under Article 54.1 of the Basic Law, it is the exclusive task of the Federal Convention to elect the Federal President; its procedures are meant to emphasise the particular dignity of this office.
2. Under Article 54 of the Basic Law, members of the Federal Convention are granted only limited rights apart from participating in the election. Their legal position does not correspond to the position of the members of the Parliament.

Summary:

I. In Germany, the Federal President, who is the head of state, is elected by what is known as the Federal Convention or *Bundesversammlung*. This Convention is made up of the members of the Parliament (*Bundestag*) and an equal number of members elected by the parliaments of the *Länder* (federal states). The applicant, a member of the Federal Conventions that convened in 2009 and 2010, claimed that the election procedures were unconstitutional.

II. The Federal Constitutional Court found that the re-election of Horst Köhler as Federal President by the 13th Federal Convention in 2009 and the election of Christian Wulff as Federal President by the 14th Federal Convention in 2010 do not give rise to objections under constitutional law.

The Court found that the applications concerning the validity of the election of the Federal President and the composition of the Federal Convention were inadmissible.

Furthermore, the Court held that the applicant's applications claiming a right to speak and to bring motions in the Federal Convention were unfounded.

Pursuant to Article 54.1 of the Basic Law, it is the exclusive task of the Federal Convention to elect the Federal President. The Federal President's office is shaped in such a way that he or she belongs to none of the three classical powers, but embodies the unity of the state. Against this backdrop, one cannot resort to the rights of the members of the German Parliament in order to determine the rights of the members of the Federal Convention. What is decisive is the visibility of the act of voting with its real and symbolic aspects; a public debate is not intended.

Pursuant to the first sentence of Article 54.1 of the Basic Law, the members of the Federal Convention

are granted (only) the right to elect the Federal President. This includes their right to participate in the election by casting their votes, and the right to have their votes counted pursuant to Article 54.6 of the Basic Law and the principles of free and equal election. Pursuant to Article 54.1 of the Basic Law, the election takes place “without debate”. Accordingly, the members of the Federal Convention are not entitled to debate on personalities or policies about, or with, the candidates. The prohibition of debates protects the dignity of the voting act, which is intended to be detached from party-political dispute. The prohibition therefore applies not only to the members of the Federal Convention but also to the candidates.

As chair of the Federal Convention, it is the task of the President of the Parliament to ensure that the election takes place correctly. Accordingly, the Convention’s chair shall not put to the vote those motions which do not concern the organisation of the election as such, or which are clearly not consistent with the Constitution, thus preserving the ceremonial and symbolical significance of the voting act. The chair must, of course, decide on the admissibility of motions in a way that is free from arbitrariness, i.e. not guided by irrelevant considerations.

Languages:

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



Identification: GER-2014-2-019

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10.06.2014 / **e)** 2 BvE 4/13 / **f)** Federal President’s authority to make statements concerning political parties / **g)** to be published in the Court’s Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2014, 451-455; *Neue Zeitschrift für Verwaltungsrecht* 2014, 1156-1159; CODICES (German).

Keywords of the systematic thesaurus:

4.4.6 Institutions – Head of State – **Status**.
4.5.10 Institutions – Legislative bodies – **Political parties**.

Keywords of the alphabetical index:

Federal President, role / Federal President, integrative task of the office / Political parties, equal opportunities / Elections, equal opportunities / Negative value judgments / National Socialist history, lessons.

Headnotes:

Decision regarding the Federal President’s authority to make statements concerning political parties. [Official Headnotes]

1. The Federal President is generally free to decide how to perform the representational functions and integrative tasks connected with the office. In so doing, the Federal President must comply with the Constitution and the laws, including the political parties’ right to equal opportunities.
2. Specific statements by the Federal President can only be objected to before the courts if the Federal President takes sides in a way that clearly neglects the integrative task of the office, and thus takes sides in an arbitrary manner.

Summary:

I. The applicant in this case is the National Democratic Party of Germany (*National-demokratische Partei Deutschlands* – NPD). It challenged certain statements made by the Federal President, the respondent.

In August 2013, in a school in Berlin-Kreuzberg, the respondent took part in a discussion with several hundred vocational school students between the age of 18 and 25. During the event, which had the motto “22 September 2013 – Your Vote Counts!” the respondent *inter alia* emphasised the importance of free elections for democracy and encouraged the students to become involved in social and political activities. Answering a student’s question, the respondent addressed certain incidents related to protests which the applicant’s members and supporters had launched against an asylum accommodation centre in Berlin-Hellersdorf. The press coverage of the discussion quoted the respondent as follows: “We need citizens who take to the streets and show the nutcases their limits. All of you are called upon to do so.” and “I am proud to be the President of a country in which the citizens defend their democracy.”

II. The Federal Constitutional Court found that the respondent's statements which the applicant challenged are not objectionable under constitutional law, and therefore do not violate the applicant's right to have the equal opportunities of political parties respected.

The Federal President represents the state and the people of the Federal Republic of Germany both externally and internally and is called upon to embody the unity of the state. The holder of the office of Federal President is generally free to decide how to breathe life into the representational functions and integrative tasks connected with the office. Therefore, the Federal President does not require a statutory authorisation beyond the authority to make public statements, which is inherent in his office, even when he points out undesirable developments or warns of dangers and in so doing names the groups or persons he considers responsible.

The Federal President's actions are limited by the Constitution and the laws. The rights that the Federal President must respect include the political parties' right to equal opportunities under Article 21.1 of the Basic Law, and, insofar as equal opportunities in elections are concerned, Article 21.1 of the Basic Law in conjunction with Article 38.1 of the Basic Law or Article 28.1 of the Basic Law. For a party, statements containing negative value judgments on its aims and activities can result in a negative effect on its equality of opportunities in competition.

When reviewing statements by the Federal President that affect the political parties' equality of opportunities, the Federal Constitutional Court considers whether he made them in a way that clearly neglects the integrative task of his office, and thus in an arbitrary manner.

According to this standard, the respondent's statements that the applicant challenged are not objectionable under constitutional law.

Under the necessary objective interpretation, it cannot be inferred from the Federal President's statements that he supported or approved violent protests against the applicant.

The use of the term "nutcases" in the specific context is also unobjectionable under constitutional law. In using this term, the respondent made a negative value judgment about the applicant and its members and supporters which, seen in isolation, could in fact be regarded as defamatory, and which could indicate an unobjective exclusion of the persons thus named. Here, however, as follows from the overall style of the respondent's statements, the term "nutcases", in addition to the terms "ideologists" and "fanatics",

serves as a collective term for people who have not learned the lessons of history and who, unimpressed by the dreadful consequences of National Socialism, hold nationalist and anti-democratic opinions. The exaggeration contained in the term "nutcases" was not only intended to make clear to the participants in the discussion that the persons thus termed would never change; it was also meant to emphasise that they hoped in vain to succeed with their ideology if the citizens "show them their limits".

Building on the lessons to be learned from the tyrannical rule of National Socialism, the respondent called for the involvement of citizens against political views which, in his opinion, pose dangers to the free democratic basic order and which, in his view, the applicant advocates. In so doing, he publicised a way of dealing with these views that conforms to the Constitution. He thus did not cross the boundaries regarding negative remarks about political parties imposed on him by the Constitution.

Languages:

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



Identification: GER-2014-2-020

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 20.06.2014 / **e)** 1 BvR 980/13 / **f)** Assembly on a cemetery / **g)** / **h)** *Neue Juristische Wochenschrift* 2014, 2706-2708; *Deutsches Verwaltungsblatt* 2014, 1188-1189; CODICES (German).

Keywords of the systematic thesaurus:

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

Keywords of the alphabetical index:

Assembly, communicative interaction, public / Public order, violation / Assembly, provocative expressions / Assembly, registration.

Headnotes:

1. An assembly is a local gathering of several persons for the purpose of common discussion or demonstration which aims at participating in the formation of public opinion. It includes provocative expressions. Freedom of assembly does not grant a right of access to any location, but allows a gathering where there is communicative interaction of the public.
2. The protection of Article 8.1 of the Basic Law exists independently of whether an assembly is subject to registration and has been properly registered, and it ends with the lawful dissolution of the assembly.

Summary:

I. On 13 February 2012, the city of Dresden organised a commemorative event on the premises of the *Heidefriedhof* cemetery in memory of the victims of the Second World War and the victims of the allied bombings on Dresden on 13 February 1945. Participation in the commemorative procession was open to the public. The applicant was positioned about fifty metres in front of the memorial wall and together with three other persons lifted, along the main path of the commemorative procession, a banner with the following words: "There is nothing to grieve about, only to prevent. Never again *Volksgemeinschaft* (People's Community) – destroy the spirit of Dresden. End the German commemorative circus. Anti-fascist action". The banner was visible to the passing procession of mourners for a few minutes, before attendant police officers persuaded the applicant to roll in the banner. The commemorative event at the *Heidefriedhof* cemetery then continued as planned.

The applicant challenged his conviction to pay an administrative fine of EUR 150 for intentional violation of the cemetery ordinance and intentional public nuisance, pursuant to § 118.1 of the Act on Regulatory Offences. The Local Court confirmed the administrative order; the applicant's appeal on points of law before the Higher Regional Court was unsuccessful.

II. The Federal Constitutional Court found that the gathering in the *Heidefriedhof* cemetery and the unrolling of the banner fell within the scope of protection of the freedom of assembly under Article 8.1 of the Basic Law.

An assembly is a local gathering of several persons for the purpose of common discussion or demonstration which aims at participating in the formation of public opinion. It includes provocative expressions. However, the freedom of assembly does not grant a right of access to any location, but allows a gathering where there is communicative interaction of the public. The protection of Article 8.1 of the Basic Law exists independently of whether an assembly is subject to registration and has been properly registered, and it ends with the lawful dissolution of the assembly.

Pursuant to these criteria, the applicant participated in an assembly within the meaning of Article 8.1 of the Basic Law. The gathering was meant to oppose the commemoration, and thus contributed to the formation of public opinion. In the situation at hand, there was communicative interaction with the public at the cemetery. Beyond the private commemoration, the procession served "to send a message for the eradication of war, racism and violence", and thus used the cemetery to address socially relevant issues. Therefore, the applicant could, at least on that day, rely on the protection of the freedom of assembly especially since his protest related specifically to the subject of the procession.

The challenged judgment of the Local Court misinterprets the scope of protection of the freedom of assembly. It also fails to include a balancing of interests, as required by the Constitution.

The Local Court denied that the gathering constituted an assembly for reasons which are not supported under the Constitution. The Local Court assumed that there was no assembly because the gathering had not been registered pursuant to the cemetery ordinance. However, an assembly within the meaning of Article 8.1 of the Basic Law depends neither on registration nor authorisation. Even if one wanted to interpret the police officers' request to roll up the banner as a breaking up of the assembly, the applicant's conviction is based on his prior actions. The protection afforded by the freedom of assembly ends only at the time the assembly is broken up.

Furthermore, the Local Court's decision lacks sufficient balancing as to whether convicting the applicant was justified in view of the freedom of assembly. The concept of public order used in § 118.1 of the Act on Regulatory Offences refers to unwritten rules, adherence to which is a prerequisite for peaceful human coexistence pursuant to social and ethical principles at the time, and which are consistent with the values of the Constitution. When interpreting the undefined concept of "public order", the Local Court was obliged to consider the applicant's freedom of assembly. It should have discussed why it considered exercising the

fundamental right to freedom of assembly a violation of public order while, at the same time, there was a large public commemoration at the cemetery which was meant to send a message against which the applicant silently protested.

Languages:

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



Identification: GER-2014-2-021

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.06.2014 / **e)** 1 BvR 3217/07 / **f)** Lower Saxony Higher Education Act / **g)** to be published in the Court's Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2014, 470-482; *Deutsches Verwaltungsblatt* 2014, 1127-1132; *Neue Juristische Wochenschrift* 2014, 2856; CODICES (German).

Keywords of the systematic thesaurus:

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities.**

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

5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach.**

5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom.**

Keywords of the alphabetical index:

Freedom of research / Academic staff, decision-making, participation / Universities, organisational structure / Universities, decision-making powers / Patient care, quality, guarantee / University hospitals.

Headnotes:

1. The participation by academics in the overall structure of an institution of higher education's academic organisation as guaranteed by the first sentence of Article 5.3 of the Basic Law covers all decisions of academic relevance. This includes decisions about the organisational structure, the budget, and patient care, which is – in university medicine – inseparably intertwined with academic research and teaching.

2. The more fundamentally and the more substantially academically relevant decision-making powers that affect staffing and substantive matters are taken away from the representative body of academic self-administration and assigned to a management body, the more representative body must be involved in the appointment and removal of the management body as well as in its decisions.

Summary:

I. The applicant, a university professor and a member of the Academic Senate of the Hanover Medical School, challenged in his constitutional complaint the legislator's transfer of important decision-making powers within the Hanover Medical School from the Academic Senate to a three-person executive board. These provisions relate to the appointment, re-appointment and dismissal of the executive board, § 63c Sections 1 to 6 of the Lower Saxony Higher Education Act (hereinafter, the "Act"), and to certain powers of the executive board, § 63e of the Act.

II. The Federal Constitutional Court found that significant parts of the provisions of the Act relating to the organisation of the Hanover Medical School are incompatible with the Basic Law. This decision was based on the following considerations:

The academic freedom (first sentence of Article 5.3 of the Basic Law) obliges the state to ensure that research and teaching in universities are capable of functioning. In this respect, the legislator possesses wide discretion; it is not bound by traditional models of organisation for institutions of higher education. However, organisational provisions are incompatible with the first sentence of Article 5.3 of the Basic Law if they create an overall structure that presents a structural threat to free academic activity and free fulfilment of academic tasks.

The adequate level of participation by academics in the overall structure of an institution of higher education's academic organisation, which is guaranteed as a fundamental right, covers all decisions of academic relevance. These are not merely decisions that concern specific research projects or course programmes, but also those which concern planning the continuing development of an institution as well as the arrangements governing the running of the organisation.

At the same time, the state has a responsibility for patient care, which is, in university medicine, closely intertwined with research and teaching. The legislator must on the one hand respect freedom of scholarship, and on the other hand guarantee the

best possible patient care, since, under the first sentence of Article 2.2 in conjunction with Article 20.1 of the Basic Law; it has a constitutional duty to protect acknowledged legal interests of high importance.

The provisions of the Act regarding the management structure of the Hanover Medical School do not satisfy in their totality these constitutional requirements. There are serious concerns under constitutional law regarding the fact that within the overall organisational structure, crucial decisions regarding development, organisation and resources are essentially assigned to the executive board and taken away from the Academic Senate. The Academic Senate's inadequate powers to participate in the executive board's decisions on the finance plan, on distributing material, investment and staffing budgets to the organisational units as well as on providing resources for the central funds for teaching and for research may result in a structural threat to academic freedom.

The Court found that in the overall structure in question, the structural threats to academic freedom are not compensated for by the arrangements made to identify candidates for the executive board, and for appointing, re-appointing and removing the executive board.

Languages:

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



Identification: GER-2014-2-022

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.06.2014 / **e)** 1 BvR 2926/13 / **f)** Choice of grandparents as guardians / **g)** to be published in the Court's Official Digest / **h)** *Monatsschrift für Deutsches Recht* 2014, 964-965; *Neue Zeitschrift für Familienrecht* 2014, 734-737; *Zeitschrift für das gesamte Familienrecht* 2014, 1435-1439; *Europäische Grundrechte-Zeitschrift* 2014, 493-496; CODICES (German).

Keywords of the systematic thesaurus:

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:

Family, protection / Family, close relatives, ties / Guardian, choice / Relatives, close, fundamental rights / Child, well-being.

Headnotes:

1. The protection of the family under Article 6.1 of the Basic Law also includes family ties between close relatives, in particular between grandparents and their grandchildren.
2. This fundamental right covers the right of close relatives to be considered in choosing a guardian or supplementary curator. They take precedence over non-relatives, unless there are specific indications in an individual case that the best interests of the child are better served by choosing another person.
3. The Federal Constitutional Court reviews the choice [of a guardian or supplementary curator] pursuant to § 1779 of the German Civil Code on the basis of general principles as to the question of whether the challenged decision contains errors of interpretation that are based on a fundamentally erroneous view of the meaning of the fundamental rights of close relatives.

Summary:

I. The applicant is the grandmother of a girl who was moved to a foster family and put under the guardianship of the Youth Welfare Office after she was taken away from her mother. The applicant appealed this decision, arguing that she should have been chosen as guardian.

II. The constitutional complaint was unsuccessful because the family court had paid sufficient attention to the constitutional requirements in the selection decision of the girl's guardian. The challenged decisions thus did not violate the fundamental rights of the applicant. The decision was based on the following considerations:

While the applicant cannot plead the fundamental right of a parent (first sentence of Article 6.2 of the Basic Law), family ties between grandparents and

their grandchild are covered by the protection of the family under Article 6.1 of the Basic Law.

Article 6.1 of the Basic Law protects the family as, first and foremost, a living arrangement and child-raising community. Furthermore, the fundamental family right aims more generally at protecting specific family ties, such as those which can exist among adult family members and – although usually less prominently – over several generations among the members of an extended family. Family ties tend to be of great importance to the image an individual has of himself or herself and frequently have particular practical relevance in the day-to-day lives of the family members.

The challenged decisions satisfy the requirements of Article 6.1 of the Basic Law with regard to considering close relatives in choosing a guardian. The Federal Constitutional Court reviews the interpretation and application of ordinary law by the courts in the original case on the basis of general principles. Its task is merely to examine whether the decision contains errors of interpretation that are based on a fundamentally erroneous view of the meaning of a fundamental right or of the scope of its area of protection. Insofar as the Federal Constitutional Court applies a stricter standard when reviewing cases of withdrawal of custody, this is due to the particular protection of the parent-child relationship under the Constitution. The intensity of the intervention in the decision under review tends to be less severe than if the child were to be separated from its parents.

The challenged decisions show no disregard of the extent of the applicant's interests protected under Article 6.1 of the Basic Law. The family court proceeded from the assumption that the applicant had a special position when the guardian was chosen, and it did not make exaggerated requirements for appointing her. In particular, it did not assume that the applicant should be chosen only if the well-being of the child were better served by doing so as compared to her remaining with the foster family. Based on easily understandable arguments, the family court instead reached the conclusion that the child's well-being would be better served if it remained in the foster family than if it were moved to the care of the applicant.

Languages:

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



Identification: GER-2014-2-023

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 26.06.2014 / **e)** 2 BvR 2699/10 / **f)** Right to have third parties prosecuted / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

5.1 Fundamental Rights – **General questions.**

Keywords of the alphabetical index:

Prosecution, third parties, right / Law enforcement, effective, constitutional obligation / Self-defence.

Headnotes:

1. The Basic Law contains no fundamental right to have third parties prosecuted. Other considerations may apply to serious crimes against a person's life, physical integrity, sexual self-determination and freedom and offences by public officials or offences the victims of which were being taken care of by the state.
2. The constitutional obligation of effective law enforcement refers to the actions of all law enforcement agencies. This does not mean that the obligation in question can only be sufficiently met by bringing a case before the courts. In many cases it will be sufficient if the prosecution and the police investigate the matter and secure the evidence.

Summary:

I. The applicants are the parents of a 24-year-old man. He was shot multiple times by the police in 2009 and thereby fatally injured, after he had threatened them with a kitchen knife. This happened after repeated calls from the police to put down the knife, a warning shot, and two shots that went through his knee and arm. The applicants believe that the death of their son cannot be justified or excused, and they demand that the two police officers involved in this shooting be prosecuted.

The prosecution had conducted investigations against the participating police officers for (*inter alia*) manslaughter. It had, however, terminated the proceedings in December 2009, having reached the conclusion that the police officers had acted in self-defence pursuant to § 32 of the Criminal Code and that they had not violated other applicable law. The applicants' complaints against this decision before the prosecution and the Higher Regional Court were unsuccessful.

In their constitutional complaint, the applicants claim that their fundamental rights under Article 2.1 in conjunction with Articles 20.3 and 3.1 of the Basic Law were violated. They argue that the challenged decision violates their right to effective protection by criminal law, which they derive from Article 2.1 in conjunction with Article 1.1 of the Basic Law. According to the applicants, the Higher Regional Court had hastily assumed that a situation allowing for self-defence existed in the present case, meaning that the use of firearms was justified. They claim that the fact that the Higher Regional Court had considered the police officers' actions in total and without limitations as justified under self-defence, was arbitrary and in violation of Article 3.1 of the Basic Law.

II. The Federal Constitutional Court found that the constitutional complaint was unfounded. This decision was based on the following considerations:

The Basic Law contains no fundamental right to have third parties prosecuted. Other considerations may apply for serious crimes against the life, physical integrity, sexual self-determination and freedom of a person, for offences by public officials or offences the victims of which were being taken care of by the state.

The constitutional obligation of effective law enforcement refers to the actions of all law enforcement agencies. This does not mean that the obligation in question can only be sufficiently met by bringing a case before the courts. In many cases it will be sufficient if the prosecution and the police investigate the matter and secure the evidence. These constitutional requirements for effective prosecution of crimes also comply with the minimum standard set out in Article 2 ECHR in conjunction with Article 1 ECHR.

According to the established case-law of the Federal Constitutional Court, the guarantees of the European Convention on Human Rights, in their interpretation by the European Court of Human Rights, must be considered in interpreting the fundamental rights of the Basic Law, unless this would lead to an

unintentional (cf. Article 53 ECHR) limitation or reduction of the protection of fundamental rights under the Basic Law.

From Article 2 ECHR in conjunction with the general obligation of the state under Article 1 ECHR to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" there follows an obligation of the signatory states to provide an effective official investigation when a person has suffered a violent death.

The challenged decision of the Higher Regional Court meets those requirements. It neither fails to recognise the importance of the fundamental right to life, nor does it misunderstand the requirements for an effective prosecution of crimes. In its decision, over 30 pages long, the Higher Regional Court dealt in detail with the results of the investigations as well as with the complaints and concerns raised by the applicants. The court came to a conclusion that is defensible. Nor does the challenged decision violate the general principle of equality (Article 3.1 of the Basic Law) in its form of a prohibition of arbitrariness. The Higher Regional Court did not employ any irrelevant considerations in rejecting the applicants' application. It reconstructed in detail and as far as possible what had happened before and during the fatal shooting. In doing so, it discovered no signs of incomplete or biased investigations which were aimed at protecting the accused officers.

Languages:

German.



Identification: GER-2014-2-024

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 23.07.2014 / **e)** 1 BvL 10/12, 1 BvL 12/12, 1 BvR 1691/13 / **f)** Standard benefits / **g)** to be published in the Court's Official Digest / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Dignified minimum existence, guarantee / Underfunding / Benefits, calculation.

Headnotes:

1. In order to guarantee a dignified minimum existence (Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law), the requirements of the Basic Law to effectively ensure a dignified existence must ultimately be met, and it must be possible to explain the amount of benefits based on sound reasons.
2. Under the Constitution, the legislator is not barred from subsequently removing individual items from the generally admissible statistical calculation of benefits to secure the recipients' existence, as in a shopping basket model. However, the standard benefits to secure the recipients' existence must either be calculated overall in such a way that underfunding can be compensated internally or by saving up for certain expenses, or they must be covered by additional rights to benefits.

Summary:

I. The Federal Constitutional Court had to decide on two specific judicial reviews and a constitutional complaint. Subject of the proceedings were the standard benefits for singles, cohabitating adults, children up to the age of six, and for young people between the age of 14 and 17.

II. The Federal Constitutional Court ruled that the benefits to secure a dignified existence pursuant to the Second Book of the Code of Social Law are, currently, still constitutional. The Court held that, ultimately, the legislator had not violated its constitutional obligation to effectively ensure a dignified existence. Overall, the amount that was set by the legislator for benefits to secure the recipients' existence can be explained with reference to sound reasons. However, insofar as it is unclear whether certain specific existential needs are in fact covered, the legislator must ensure that, during the forthcoming redetermination on the basis of the

Income and Consumption Survey (*Einkommens- und Verbrauchsstichprobe*) 2013, they are viably calculated. The decision was based on the following considerations:

Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law guarantees the fundamental right to a guarantee of a dignified minimum existence. The right to benefits guaranteed by the Constitution covers the absolute necessities to secure one's physical existence and to ensure a minimum of participation in social, cultural and political life. The legislator must, in a timely and realistic fashion, assess the respective needs of all persons that require support. It has a margin of appreciation regarding both the assessment of the factual conditions and the evaluation of the needs that must be met. The result of the assessment must be based on sound reasons. However, the Constitution neither prescribes what reasons and calculations must be provided in the legislative process nor how, and when exactly, this must be done, but leaves room for negotiations and political compromise. Corresponding to the legislator's discretion, the Federal Constitutional Court employs a standard of restrained scrutiny; in its examination, the Court does not take the place of the legislator.

If the legislator decides to use a statistical model to calculate standard benefits, a model that measures the needs according to the average expenses of certain goods, it must take precautions against the risk of underfunding associated with this method. If the legislator uses the "basket of goods" model to reduce this statistical calculation, it must also ensure that the existential needs are actually met. In addition, benefits awarded as a lump sum must either completely secure financial flexibility so as to ensure that an underfunding of specific needs can be compensated internally, or so that the recipient can be held responsible for saving up and thus cover certain needs. If the legislative scheme fails to secure this, there has to be a right to receive some other kind of compensation for such underfunding. Generally, internal compensation cannot be based on the argument that benefits to cover socio-cultural needs could be used, since such benefits are part of the constitutionally protected minimum existence.

According to these standards, and based on the necessary overall assessment, the Court found that the challenged provisions still satisfy the requirements of Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law during the relevant time period. The Court did, however, remind the legislator that whenever there are serious doubts as to the actual coverage of existential needs, it is within the discretion of the legislator to conduct appropriate

follow-up surveys, to increase benefits on the basis of a separate index, or to otherwise absorb an underfunding.

Languages:

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



Identification: GER-2014-2-025

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 31.07.2014 / **e)** 1 BvR 1858/14 / **f)** Procedural order / **g)** / **h)** *Zeitschrift für die Anwaltspraxis* EN-Nr. 580/214; *StrafRechtsReport* 2014, 322; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 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**.
 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Trial, sound and photographic recordings / Administration of justice, proper functioning.

Headnotes:

Sound and photographic recordings immediately before or after a hearing, or in a recess, are covered by freedom of the press and broadcasting. An order that excludes or limits such recordings must disclose the grounds that gave rise to the decision, and thus show the concerned parties that all relevant circumstances have been given due consideration.

Summary:

I. On 11 June 2014, the Grand Criminal Division 1 of a Regional Court began the trial in the case of a three-year-old girl who had died of internal injuries in December 2013. The accused were the child's parents. The first date of the hearings was 11 June 2014, with a total of 22 hearings scheduled up to the end of September. The proceedings have been covered extensively in the regional and national media, and have aroused sustained interest among the public.

On 3 June 2014, the presiding judge issued a procedural order to the media regarding filming and photography in the courtroom and its vicinity. Among other things, the order limited the taking of photographs of the persons involved in the hearings. The applicant, who publishes a number of newspapers, stated that it had no knowledge of the reasons for this order, and challenged it on various counts. Asked by the Federal Constitutional Court for his reasons, the presiding judge stated without further explanation that the challenged order was the result of his balancing of interests, taking due account of the high priority of the freedom of the press guaranteed under Article 5 of the Basic Law, the justified interests and personality rights of the two accused and all other persons involved in the proceedings, and the obligation to ensure an orderly and focused course of the hearing.

II. The Federal Constitutional Court partially granted the application for a preliminary injunction. In expedited proceedings, the Court set aside parts of the procedural order concerning sound and photographic recordings because with respect to them, the constitutional complaint was clearly well-founded.

Sound and photographic recordings immediately before or after a hearing, or in a recess, are covered by freedom of the press and broadcasting. An order that excludes or limits such recordings must therefore disclose the grounds that gave rise to the decision, to show the concerned parties that all relevant circumstances have been given due consideration. In so doing, the presiding judge must take account of the importance of freedom of the press, and comply with the principle of proportionality. The presiding judge's discretion must account for the freedom of the press, the protection of the general personality right of the individuals concerned, specifically the accused and the witnesses, the parties' right to a fair trial (Article 2.1 in conjunction with Article 20.3 of the Basic Law), and the proper functioning of the administration of justice. This was not done in the present case.

The presiding judge will have to examine whether to issue a new order. Orders which restrict pursuant to § 176 of the Law on the Constitution of Courts photographic and television recordings of events related to the main proceedings interfere with the freedom of the press. They must thus be based on specific grounds relating to the above-mentioned interests.

Languages:

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



Identification: GER-2014-2-026

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 25.08.2014 / **e)** 2 BvR 2048/13 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

Keywords of the alphabetical index:

Plea bargaining, validity / Confession, validity.

Headnotes:

The duty to inform pursuant to § 257.c.5 of the Code of Criminal Procedure (hereinafter, the “Code”) is not a mere procedural guideline, but a vital constitutional safeguard of the principle of a fair trial and the right against self-incrimination. A plea bargain only meets the requirements of the principle of a fair trial if the accused has been informed about the limitations of the Court's commitment to the plea bargain prior to its conclusion.

Summary:

I. In 2012, a Regional Court convicted the applicant to a prison sentence of six years. The judgment was preceded by a plea bargain in which the court had signalled that it would not impose a sentence of more than six years and six months if the applicant, *inter alia*, made a full confession. The applicant, his lawyer, and the prosecutor agreed to the court's proposal. Only then was the applicant informed pursuant to § 257c.1 of the Code about the limitations of the Court's commitment to the plea bargain. In his appeal, the applicant challenged the fact that the Regional Court had not already informed him at the time it suggested the plea bargain. The Federal Court of Justice dismissed the appeal. The applicant challenged these decisions with his constitutional complaint.

II. The Federal Constitutional Court decided that the constitutional complaint was well-founded because the challenged judgments violate the applicant's right to a fair trial in accordance with the rule of law, as well as the protection against self-incrimination (Article 2.1 in conjunction with Article 20.3 of the Basic Law). The decision was based on the following considerations:

The right against self-incrimination is enshrined in the rule of law and has constitutional status. The accused must be able to freely decide whether and if so, to what degree to participate in the criminal proceedings. As a rule, a plea bargain only meets the requirements of the principle of a fair trial if the accused has been informed about the limitations of the Court's commitment to the plea bargain prior to its conclusion. This is the only way to ensure that he can decide independently whether to invoke his freedom to refuse to testify, or to commit to a plea bargain. For these reasons, the duty to inform pursuant to § 257.c.5 of the Code is not a mere procedural guideline, but a vital constitutional safeguard of the principle of a fair trial and the right against self-incrimination.

As a rule, a plea bargain without the accused being informed beforehand violates his or her right to a fair trial and the right against self-incrimination. If this information was omitted, an appellate court will usually have to assume that the confession and thus the judgment were based on this violation. Should the appellate court find no causal link between the lack of information and the confession, it has to make specific findings on this. The challenged decisions do not meet these standards.

Languages:

German.

*Identification:* GER-2014-2-027

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 26.08.2014 / **e)** 2 BvR 2172/13 / **f)** Duty to inform about a negative / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Plea bargain, disclosure, requirements / Plea bargain, not raised, disclosure necessary (*Negativmitteilungspflicht*).

Headnotes:

The first sentence of § 243.4 of the Code of Criminal Procedure contains the duty to disclose the fact that there had been no talks about a potential plea bargain.

Summary:

I. The applicant was sentenced by a Regional Court to four years and nine months in prison. He appealed this decision, claiming, *inter alia*, a violation of the first sentence of § 243.4 of the Code of Criminal Procedure (hereinafter, the “Code”), because the court had failed to disclose during the proceedings whether and if so, what kind of preliminary discussions the parties to the proceedings had engaged in. The Federal Court of Justice rejected the appeal as unfounded.

II. The Federal Constitutional Court decided that the applicant’s constitutional complaint was well-founded, because the Federal Court of Justice’s judgment violated the constitutional prohibition of arbitrariness

(Article 3.1 of the Basic Law). The decision was based on the following considerations:

Only in exceptional cases can the Federal Constitutional Court intervene against decisions by the regular courts because of a violation of the prohibition of arbitrariness. A judgment is only arbitrary if the application of the law or the procedure is under no conceivable aspect legally defensible and thus begs the conclusion that the decision was based on irrelevant considerations. The finding of arbitrariness does not contain a subjective allocation of blame. Arbitrariness rather needs to be understood objectively.

The challenged decision is based on an interpretation of the first sentence of § 243.4 of the Code according to which no disclosure is necessary if there had been no talks that aimed at a plea bargain. This interpretation violates in an indefensible and thus objectively arbitrary way the clear intention of the legislator, as identified *inter alia* in the Federal Constitutional Court’s judgment of 19 March 2013. While at first sight, the wording of this provision is ambiguous, a closer look at the whole provision, its context, history, object and purpose clearly shows that there is indeed a duty to disclose the fact that there had been no talks about a potential plea bargain (*Negativmitteilungspflicht*). This interpretation is also in accordance with the view of the Second Panel of the Federal Constitutional Court.

Cross-references:

- Decision 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11, 19.03.2013, *Bulletin* 2013/1 [GER-2013-1-007].

The Federal Constitutional Court used the same arguments in a very similar case decided on the same day, 2 BvR 2400/13.

Languages:

German.



Hungary

Constitutional Court

Important decisions

Identification: HUN-2014-2-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 09.05.2014 / **e)** 3141/2014 / **f)** On the winner compensation in the election system / **g)** *Magyar Közlöny* (Official Gazette), 2014/15 / **h)**.

Keywords of the systematic thesaurus:

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

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

4.9.11.1 Institutions – Elections and instruments of direct democracy – Determination of votes – **Counting of votes.**

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

Keywords of the alphabetical index:

Mixed electoral system / Compensation, winner.

Headnotes:

The provisions of the Act on the Elections of Parliament Members concerning the winner compensation do not violate the constitutional requirements of the equality of the right to vote.

Summary:

I. The applicants (a political party called “Together” and its representative) submitted a constitutional complaint, requesting the examination of the Act CCIII of 2011 on the Elections of Parliament Members (hereinafter, the “Act”). They contended that a provision of the concerned Act is contrary to the requirement of the equality of right to vote. The provision stipulated that the votes cast for the winning candidate in the individual constituency and the number of votes remaining after deducting the number of votes for the runner-up candidate plus one are considered as surplus votes during the distribution of

the mandates from the party list. In their view, the mandates that may be won from the party list by the surplus votes are meant to be a compensation in connection with the votes cast in the individual constituency. However, the compensation of the winner without any constitutional reason restricts the requirement of the equal weight of votes.

The parliament features 106 district mandates and 93 party-list mandates. Voters cast two votes in national elections: one for representatives in the voters’ individual constituency, and one for party lists. Individual constituencies are awarded on a winner-take-all basis. The votes are aggregated across the country and additional parliamentary seats are awarded to parties based on these results, above and beyond the seats won in the individual districts.

The unique feature of the election system is the winner compensation. Previously parties were compensated by gaining extra votes in their party list totals, which occurs when their candidates win a lower share of individual constituencies than the popular vote would predict.

Under the new election system, the party winning an individual constituency will be awarded not only that particular mandate, but also extra points in the party-list calculations when it wins by more votes than needed.

II. In accordance with its case law, the Constitutional Court pointed out that the Fundamental Law does not contain detailed provisions about the electoral system itself, prescribing only some electoral principles. Therefore, the Parliament has wide discretion to decide on the electoral system, the rules of the electoral procedure and the order of the distribution of mandates. However, this hardly means that the requirements of the Fundamental Law should not be taken into account.

The practice of the Constitutional Court does not require the “effective equality” of the right to vote. The equality of right to vote does not mean that expressed political wills prevail equally without any derogation.

In the view of the Constitutional Court, the application of the majority – proportional or the mixed electoral system – does not mean the violation of the equal weight of the votes. The challenged provision does not obstruct the right of the petitioners to vote and stand as a candidate in elections of Members of Parliament. Also, it does not violate the equal chance of the candidates prior to the elections. According to the Constitutional Court, the present system does not support the organisation whose candidate won the relative majority during the elections. Instead, it

supports the organisation that nominated the winner candidate in the individual constituency. This is not necessarily the same organisation with the relative majority regarding the final result of the elections. Furthermore, only a significant number of extra votes cast for the winner candidate results in a mandate.

III. Judge Béla Pokol judge attached concurring opinion and Judges András Bragyova, László Kiss and Miklós Lévy judges attached dissenting opinion to the decision.

Languages:

Hungarian.



Identification: HUN-2014-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 30.05.2014 / **e)** 19/2014 / **f)** On the responsibility for the content of internet comments / **g)** *Magyar Közlöny* (Official Gazette), 2014/76 / **h)**.

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:

Responsibility, internet comments, speech / Internet content providers.

Headnotes:

Internet content providers are responsible for abusive comments by third parties posted on their websites, regardless of whether they moderated the comments, or actively removed the harmful content on request.

Summary:

I. The Association of Hungarian Content Providers (hereinafter, the "Association"), a self-regulating body, was founded in 2001 by internet content providers

with the aim to develop the Hungarian internet business market with verified and professional support, and with self-regulation tools. In 2010 the Experient Real Estate Company (hereinafter, the "Company") sued the Association. The Company contended that comments under an article of the Association about its advertisements had injured it, showing it in a bad light and damaged its good reputation. The Supreme Court of Hungary (*Curia*) ruled against the Association. It reasoned that some "below-the-belt" comments about the Company advertising on the Association's webpage were "seriously derogatory and humiliating" and "crossed the boundaries of free speech".

The Association lodged a constitutional complaint, requesting the Constitutional Court to decide whether internet content provider bear responsibility for the content of the comments on their website even though they had no knowledge of the comments or immediately removed them at the request of the injured party.

II. The Constitutional Court dismissed the constitutional complaint filed by the Association concerning derogatory comments made on the website managed by the Association. It acknowledged that blogs and comments are considered a form of communication, thus enjoying the protection of the Fundamental Law. Nevertheless, the Court emphasised that the internet was not an area outside the law and internet communication was governed by relevant legal stipulations. Fundamental rights and obligations, as outlined in the Constitution, must also be observed in internet communication.

The moderation of the comments does not exonerate internet content providers from the responsibility for unlawful communication or from the obligation to honour liabilities. The responsibility for the unlawful comments is independent from the moderation. It is based merely on the fact of the unlawfulness; thus, there is no reason to distinguish between the moderated and un-moderated comments. The view of the Constitutional Court is that the operator of a website is responsible for blog entries or comments that violate others' rights even if those comments are moderated and even if the operator was unaware of such entries and had removed them without delay after receiving a complaint.

III. Chief Justice Péter Paczolay attached a concurring opinion and Judge István Stumpf attached dissenting opinion to the decision.

Languages:

Hungarian.



Identification: HUN-2014-2-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 15.07.2014 / **e)** 23/2014 / **f)** On the stricter conviction of certain cumulative offenses / **g)** *Magyar Közlöny* (Official Gazette), 2014/95 / **h)**.

Keywords of the systematic thesaurus:

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

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

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:

Cumulative offense, stricter conviction / Life imprisonment.

Headnotes:

The Criminal Code provision that imposes the stricter conviction on three-time offenders found guilty of violent crimes against persons at different times is not in line with the rule of legal certainty and the Fundamental Law.

Summary:

I. The Budapest-Capital Regional Court of Appeal and the Budapest-Capital Regional Court referred the case to the Constitutional Court. They contested Section 85.4 of the Act IV of 1978 of the Criminal Code (previous Code but in some cases it still applies) and Section 81.4 of the Act C of 2012 of the Criminal Code (Code currently in force). These provisions prescribed the stricter conviction of certain cumulative offenses when the perpetrator committed at least three violent crimes against persons at different times and these crimes were adjudicated in the same proceeding.

In these cases, the upper limit of the applicable punishment for the most serious criminal offense was automatically doubled. If the upper limit of the punishment exceeded twenty years, or if either of the said criminal offenses in the multiple counts carried a maximum sentence of life imprisonment, the perpetrator in question would automatically be sentenced to life imprisonment.

II. The Constitutional Court examined the challenged provision in the context of legal certainty. The underlying condition of the conviction for stricter cumulative offenses is that the crimes shall be adjudicated in the same proceeding. However, this condition depends on the decision of the courts, which take into account expediency viewpoints that are not mandatory. Therefore, the decision of the courts – namely whether the crimes are adjudicated in the same proceeding or not – would result in totally different sentencing in the same cases.

The Constitutional Court declared that the requirement of legal certainty and predictability was violated because the challenged regulations did not ensure the same circumstances for the concerned perpetrators.

The Constitutional Court ruled, moreover, that the provision prescribing the mandatory sentencing of life imprisonment in certain cases was contrary to the Fundamental Law. Following the reasoning of the decision, the concerned provision was contrary to the constitutional criteria of the penal system (within the framework of rule of law as enshrined in Article B of the Fundamental Law), as the courts were not able to evaluate each criminal offense according to their real emphasis.

The Constitutional Court annulled the unconstitutional provision with retroactive effect as of 1 July 2013.

Furthermore, the Constitutional Court prescribed – pursuant to the Act on the Constitutional Court – the revision of the closed criminal proceedings where the unconstitutional provisions had been applied. The obligatory revision concerns only the sentencing. This does not mean that any of the concerned sentences interrupt automatically or retrial shall be ordered.

Finally, the Constitutional Court emphasised that the subject of its examination was the provisions of stricter conviction of certain cumulative offenses and not the so-called “three-strikes rule” itself.

III. Judges Egon Dienes-Oehm and Béla Pokol attached dissenting opinion to the decision.

Languages:

Hungarian.



Identification: HUN-2014-2-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 23.07.2014 / **e)** 26/2014 / **f)** On the election of members of Budapest City Council / **g)** *Magyar Közlöny* (Official Gazette), 2014/101 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Direct voting / Local election system / Double majority / Compensation, elections.

Headnotes:

The lawmaker is allowed to create an election system whereby the voters directly elect one candidate for two positions if based on appropriate reasons. However, provisions that give extra compensation to losing candidates on the basis of a special quota related to the size of the population of each district is contrary to the equality of the right to vote.

Summary:

I. On 10 June 2014, Parliament approved an amendment to Act L of 2010 on the Local Government Representatives and Mayors Election System. Previously, the electorate voted for the party lists; now, however, the Budapest assembly seats are assigned to the direct winners of districts. Budapest residents will not vote separately for city assembly members and district mayor, as the Budapest assembly will be made up of the city mayor, 23 district mayors along with 9 losing district mayoral candidates from the party lists.

The amendment, additionally, stipulated that losing candidates could gain mandates to the Budapest assembly from a compensation list. Mandates would be distributed according to the weight of individual districts in terms of their population. The amendment also introduced a dual majority system. Besides a simple majority in the Budapest assembly, the majority should also represent more than half of Budapest residents.

Fifty-seven opposition Parliament members requested the Constitutional Court to review the new regulations concerning the elections of the members of the Budapest assembly.

According to the petitioners, it is unconstitutional that the districts mayors become automatically members of the assembly without being elected (23 members in total) directly by the voters. Furthermore, the equality of the right to vote is violated as well, because the votes from different districts do not carry the same weight, as the number of voters is significantly different in the 23 districts of Budapest and also due to the provisions of the compensation list. According to the latter provision, in order to have a mandate from the compensation list, the votes of the non-winning candidates for mayor are weighted, resulting in multiple weights for the votes of the voters belonging to bigger districts.

Moreover, in the petitioner's view, the right to personal data is restricted unconstitutionally as the voter shall request for information about his or her personal data on the registration sheet only until the decision on the registration of the candidate or until the list becomes valid.

II. The Constitutional Court, first, held that the changes concerning the basic regulations of the municipal electoral system of Budapest are not contrary to the Fundamental Law. As far as the direct vote is concerned, the Constitutional Court explicated the meaning of direct election: voters vote for the candidates directly and they do not elect electors. Thus, the challenged regulation does not violate the principle of direct election. The voters elect the mayors of districts of Budapest directly and they become members of the Budapest assembly automatically.

The Constitutional Court pointed out that there is no requirement – deducible from the Fundamental Law – that does not allow the lawmaker to create such an election system in which the voters elect directly one candidate for two positions at the same time based on appropriate reasoning. Owing to the partial modification of the municipal electoral system, it was an appropriate and acceptable reason that the lawmaker prescribed the mayors of the districts of Budapest to be the members of the Budapest assembly as well in order to solve the functional problems of the city.

Second, the Constitutional Court found the rules regarding the compensation list unconstitutional. Regarding the requirement of the equality of the right to vote, the Constitutional Court took the different size of the districts into consideration when it examined

the provisions that compensate the inequality among the weight of votes of the districts. The Constitutional Court declared that weighted calculation of the surplus votes is not an appropriate regulation to eliminate the differences among the districts. Furthermore, this regulation results in another kind of inequality. That is, the votes for the non-winning candidate are worth six times the value in the biggest districts than in the smaller ones. Because this weighing system is contrary to the equality of the right to vote, the Constitutional Court annulled it.

Third, the current regulation introduced a new decision-making system, namely the double majority system that ensures that the majority presents the major part of the inhabitants in every single decision, in order to enforce the equality of right to vote. The Constitutional Court declared that taking the effective functioning of the assembly and the historical traditions of the districts into account, the double majority system offsets properly the differences due to the different size of the districts.

Fourth, the Constitutional Court declared unconstitutional that the voter shall request for information about his or her personal data on the registration sheet only until the decision on the registration of the candidate or until the list becomes valid. The Constitutional Court annulled this regulation unanimously as there was no acceptable reason (e.g. enforcement of other fundamental right or protection of other constitutional value) to restrict the right to access personal data of the voters.

The Constitutional Court annulled the unconstitutional provisions; otherwise the petitions were rejected.

III. Judges Elemér Balogh, András Bragyova, László Kiss, Péter Kovács, Miklós Lévy, Péter Paczolay and László Salamon attached dissenting opinion, and judges István Stumpf, Péter Szalay and Mária Szívós attached concurring opinion to the decision.

Languages:

Hungarian.



Ireland Supreme Court

Important decisions

Identification: IRL-2014-2-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 27.02.2014 / **e)** SC 292/10 / **f)** Ó Maicín v. Ireland, The Attorney General, The Minister for Justice Equality and Law Reform, His Honour Judge Raymond Groarke and the Director of Public Prosecutions / **g)** [2014] IESC 12 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

4.3.1 Institutions – Languages – **Official language(s)**.

4.3.2 Institutions – Languages – **National language(s)**.

Keywords of the alphabetical index:

Criminal law / Jury, trial, right to an Irish-speaking jury trial / Language, special status of the Irish language under the Constitution / Bilingual State, bilingual jury which can understand trial without translation / Language rights.

Headnotes:

A native Irish speaker is not entitled to be tried before a jury which can understand the Irish and English languages on the grounds that it would result in a constitutionally impermissible exclusion of a significant number of persons from the jury panel so as to render a jury so empanelled in breach of the constitutional requirement of representativeness.

Summary:

I. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, and from the Court of Criminal Appeal which hears criminal appeals from the High Court (named the Central Criminal Court when dealing with criminal cases). The decision of the Supreme Court summarised here is an appeal from two decisions of the Court of Criminal Appeal.

II. The appellant Mr Ó Maicín was due to be tried for an assault which is alleged to have occurred in the Gaeltacht (i.e. a district of Ireland where the Government recognises that the Irish language is the predominant language or vernacular spoken in the home). The appellant and the alleged victim as well as most of the parties to the case were fluent Irish speakers. By way of background, Article 8.1 of the Constitution provides that the Irish language as the national language is the first official language. Case law recognises the constitutional right of persons to conduct their court cases in the Irish language. At issue in this particular case was whether an Irish speaker was entitled to a judge and jury who could hear the case without the need for translation or interpreters. In the High Court, see *Ó Maicín v. Éire & Others* [2010] IEHC 179, Justice Murphy refused to grant such a declaratory order. The judgment of the High Court was upheld by a majority of the Supreme Court. The Court held by a majority of four to one that the appellant Mr Ó Maicín was not entitled to an Irish speaking or bilingual jury.

Justice Clarke stated that to do so would offend the jury trial provision of Article 38.5 of the Constitution. The majority of the Supreme Court relied heavily on the earlier Supreme Court case of *de Búrca v. Attorney General* [1976] I.R. 38 (a case which concerned the *de facto* exclusion of the majority of women from jury service) where the Irish Courts had held that jury panels should be truly representative of all of society as a whole, and the exclusion of certain groups or sections of society was deemed unconstitutional. Justice Clarke felt that empanelling a jury who were capable of understanding a case conducted in the Irish language would mean the exclusion of a large portion of society who do not understand Irish and thus would run against the Court's earlier ruling in *de Búrca*. Clarke J further held that even if it were not unconstitutional to empanel a jury of Irish speakers, the relatively low number of Irish speakers in society as a whole would render it almost impossible to empanel a jury using the methods provided for by law at present.

III. Justice Hardiman delivered a dissenting judgment. He noted that Ireland is a bilingual jurisdiction as enshrined in Article 8 of the Constitution and also noted how British Columbia in Canada offers bilingual trials even though there is a very limited pool of French speakers in the province. Justice Hardiman was of the view that by virtue of Ireland being an officially bilingual state it was difficult to come to any other outcome other than to hold that Mr Ó Maicín was entitled to a bilingual jury. Justice Hardiman also urged that a jury region be created in the Gaeltacht to facilitate further trials.

Languages:

English, Irish.



Identification: IRL-2014-2-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 09.04.2014 / **e)** SC 69/11 / **f)** *Callely v. Moylan and others* / **g)** [2014] IESC 26 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Payment of expenses to parliamentarians / Procedures followed by a committee of parliament investigating allegations regarding the payment of expenses / Separation of powers, power of Courts to review disciplinary decisions made by Parliament in relation to parliamentarians.

Headnotes:

The internal disciplinary proceedings of the *Oireachtas* (Parliament) are non-justiciable and the Senate committee was entitled to find that the Senator had misrepresented his normal place of residence and committed a specified act which was inconsistent with maintaining public confidence in the performance by him of his office.

Summary:

I. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, and from the Court of Criminal Appeal

which hears criminal appeals from the High Court (named the Central Criminal Court when dealing with criminal cases). The decision of the Supreme Court summarised here is an appeal from two decisions of the High Court. By way of background, this case arose from a public controversy which emerged in the middle of 2010. Suggestions were made of impropriety in the way in which the respondent Mr Callyly made claims for expenses while serving as a Senator.

Formal complaints in writing were made by members of the public which were ultimately referred to the Committee on Members Interests of *Seanad Éireann* (the Senate of Ireland). The Committee conducted hearings during June and July of 2010 and ultimately determined that Senator Callyly had misrepresented his normal place of residence for the purposes of claiming such expenses. The Committee found that this action was inconsistent with the proper performance by Senator Callyly of the function of his office as a Senator and was inconsistent with the maintenance of confidence in the performance by Senator Callyly of his functions as such. The report of the Committee containing those findings. On the 14 July 2010, *Seanad Éireann* passed a resolution which, having referred to the Report, censured Senator Callyly and resolved that he be suspended from the House for a period of 20 days and that his salary not be paid during the time when he was so suspended. Senator Callyly sought an order of *certiorari* quashing the Report and certain other consequential relief in the High Court and was successful. The Committee and the *Seanad* appealed to the Supreme Court against that decision.

In the course of the proceedings before the High Court, an issue was raised on behalf of the *Seanad* and the Committee to the effect that it was inconsistent with the separation of powers as recognised in the Constitution for the courts to seek to quash either the Report or the Resolution. For the reasons set out in his judgment, *Callyly v. Moylan & Ors* [2011] 1 IR 676, Justice O'Neill rejected that argument. In addition, O'Neill J. held that the procedures which led to the conclusions in the Report and thus, to the consequences determined on in the Resolution, were unfair to the extent that both of those measures should be quashed.

II. In the joint judgment of Justice O'Donnell and Justice Clarke which allowed the appeal, they considered the extent to which it may be appropriate for one organ of Government to review or have a role in the exercise by another organ of its constitutional role was considered. They held that while the Constitution requires that there remain an area of activity in the *Oireachtas* (legislature) which is non-

justiciable, this does not mean that that that area is beyond the reach of the Constitution. In this case, the absence of formal rules or orders did not create unfairness in the Senate committee's hearings or any error of law in the Committee's conclusions.

III. In his concurring judgment, Justice Fennelly agreed with the broad basis of the challenge. He disagreed with the narrow basis of the challenge, i.e. it is essential to the principle that decisions made in internal disciplinary proceedings by either House of the *Oireachtas* (Parliament) are non-justiciable that such decisions shall have been made by House of the *Oireachtas* in question by way of enforcement of "its own rules and standing orders" made in accordance with the powers conferred by Article 15.10 of the Constitution, and in the absence of such rules or orders, the Supreme Court should not conclude that the subject-matter in question evades the purview of judicial review.

In his partially dissenting judgment, Justice Murray held that the appellants first ground of appeal should fail in their contention that the courts have no power or jurisdiction to review the legality or constitutionality of the procedures followed by the appellants and their decision which led to disciplinary action against the respondent. He held that to adopt the view that the courts have no such jurisdiction would be the antithesis of respect for the separation of powers and would deny the role accorded to the judiciary to safeguard personal rights and to ensure that powers are exercised lawfully and constitutionally.

In his dissenting judgment, Justice Hardiman rejected what he described as the desperate and contrived plea that the Superior Courts of Ireland have no jurisdiction in the case where an allegedly most grave injustice is challenged because the alleged injustice was inflicted by a committee of Parliament upon a parliamentary colleague.

Languages:

English.



Identification: IRL-2014-2-003

a) Ireland / b) Supreme Court / c) / d) 03.06.2014 / e) SC 107/11 and 92/12 / f) Director of Public Prosecutions v. Gormley, Director of Public Prosecutions v. White / g) [2014] IESC 17 / h) CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

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

Keywords of the alphabetical index:

Criminal law, evidence, admissibility / Lawyer, access, right / Samples, forensic, evidence / Trial, criminal, due process of law, constitutional right.

Headnotes:

Statements made by a person suspected of committing a crime who is detained in police custody are inadmissible in evidence if they are made after the person has requested a solicitor (lawyer) but before the solicitor arrives. Forensic samples taken from a person suspected of committing a crime who is detained in police custody after the person requested a solicitor and prior to the solicitor's arrival are admissible in evidence.

Summary:

The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, and from the Court of Criminal Appeal which hears criminal appeals from the High Court (named the Central Criminal Court when dealing with criminal cases). The decision of the Supreme Court summarised here is an appeal from two decisions of the Court of Criminal Appeal. By way of background, it is nearly forty years since the Supreme Court made clear in the case of *State (Healy) v. Donoghue* [1976] I.R. 325 that the requirement in Article 38.1 of the

Constitution that a person should not be tried on any criminal charge save in “due course of law” meant more than mere technical compliance with the letter of the law. The Court held that due course of law meant that a trial was required to be conducted in accordance with the concept of justice, that the procedures applied be fair, and that the person accused be given every opportunity to put forward a defence to the charges.

The core issue in these cases was whether a person arrested for serious criminal charges is entitled to legal advice before the start of any police interrogation, and prior to the taking of any samples for the purposes of forensic examination. One of the key questions which arose was whether the broad concept of constitutional fairness in the criminal process, as identified in *State (Healy) v. Donoghue*, requires such legal advice.

Both of the defendants (“Mr Gormley” and “Mr White”) were convicted of serious criminal offences. On the 7 November 2007, Mr Gormley was convicted in the Central Criminal Court of attempted rape. He was later sentenced on the 15 January 2008, to 6 years imprisonment dating from 14 January 2008, with 5 years post release supervision. Mr White was convicted at the Central Criminal Court on the 29 July 2009, of murder and was sentenced to mandatory life imprisonment. Both separately appealed to the Court of Criminal Appeal.

In the Court of Criminal Appeal (see *Director of Public Prosecutions v. Raymond Gormley* [2009] IECCA 86), Mr Gormley sought to challenge his conviction on the ground that his interviews with police were conducted in breach of his constitutional right of access to a lawyer. The Court dismissed his appeal. Mr White challenged the finding of the trial judge in allowing the taking of samples from him (mouth swabs and hair samples) was lawful, because of a breach of his right of reasonable access to his solicitor (see *Director of Public Prosecutions v. Craig White* [2011] IECCA 78). The Court of Criminal Appeal dismissed his appeal. In both cases, the Court of Criminal Appeal permitted the appellants to appeal the decisions to the Supreme Court.

The written judgment of the Court was delivered by Clarke J. The Court carefully considered relevant Irish jurisprudence which recognises that the right to have access to a lawyer while in custody is a constitutional right. A failure to provide reasonable access to a lawyer after a request from a suspect in custody can render the custody unconstitutional and lead to any evidence obtained as a result of such unconstitutional custody becoming inadmissible. The Court noted that Irish jurisprudence does not require that advice from

a requested solicitor actually be made available to the relevant suspect prior to questioning or the taking of samples. The Court also considered the jurisprudence of the European Court of Human Rights and that of the superior courts of other common law countries which have similar constitutional provisions. The Court emphasised that the Supreme Court has consistently held that the Constitution is a living document which requires to be interpreted in accordance with prevailing norms. It found that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law. The Court held that the need for basic fairness, which is inherent in the requirement of trial in due course of law under Article 38.1 of the Constitution, carries with it; an entitlement not to be interrogated after a request for a lawyer has been made and before that lawyer has become available to give the requested advice. The Court found that an entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody. The Court held that in Mr Gormley's case that right was denied. On the facts of Mr Gormley's case, it was established that he did not have a trial in due course of law. Therefore, the Court allowed his appeal.

The Court held that different considerations apply to forensic testing. It noted that the results of forensic testing are objective. Such results do not depend on the will of a suspect or comments made by a suspect in circumstances where the right to self-incrimination could have been invoked or where it is possible that the circumstances in which the interrogation took place led to the suspect, in the absence of advice, being unfairly prejudiced by the way in which the relevant questioning was conducted or responded to. The Court was not satisfied that the mere fact that otherwise lawful forensic sampling is properly taken prior to the attendance of a legal adviser renders any subsequent trial, at which reliance is placed on the results of tests arising out of that forensic material, unfair. However, the Court noted that the suspect is still entitled to reasonable access to a lawyer. The authorities in whose custody the suspect is held are required to take reasonable steps to facilitate such access. The Court was not satisfied that the "due course of law" provisions of the Constitution preclude the taking of objective forensic samples from a suspect while that suspect is in custody, after the relevant suspect has requested legal advice and before the relevant legal advice becomes available. That general statement is subject to the requirement that there be a legal basis for the taking of the sample concerned and that any conditions or procedures specified in the statute conferring that legal basis have been complied with.

The methods adopted must also be minimally obtrusive. The Court did not allow Mr White's appeal.

In summary, the Supreme Court held that statements made by a person suspected of committing a crime who is detained in police custody are inadmissible in evidence if they are made after the person has requested a solicitor (lawyer) but before the solicitor arrives. The Court also held that there is nothing, *per se*, which renders a trial unfair by the admission of evidence in the form of forensic samples which were taken after the suspect had requested the presence of a solicitor for advisory purposes and before that solicitor's timely arrival.

Languages:

English.



Israel

Supreme Court

Important decisions

Identification: ISR-2014-2-001

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Extended Panel / **d)** 28.01.2014 / **e)** HCJ 556/11; 6569/11 / **f)** Mamat-Magad v. Ministry of Interior / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.6.2 Institutions – Executive bodies – **Powers**.
5.3.33 Fundamental Rights – Civil and political rights
– **Right to family life**.

Keywords of the alphabetical index:

Couple, same-sex, child, surrogacy / Surrogacy, abroad, child, registration / Surrogacy, child, non-biological parent, registration / Surrogacy, same-sex couple, registration, parents.

Headnotes:

Concerning the registration of same-sex couples in the Population Register as the parents of children born by way of a surrogacy procedure conducted outside Israel, where it has been proved that one of the spouses is the genetic parent of the child, the spouse who is not the genetic parent cannot be forced to adopt the child as a condition for his registration as the parent.

Summary:

In this decision an expanded panel decided on two petitions concerning the registration of two same-sex couples in the Population Register as parents of children who were born outside of Israel by way of a surrogacy procedure. In one of the petitions the petitioners requested the Court to instruct the respondents to register them in the Population Register as the parents of their son who was born by way of a surrogacy procedure outside Israel, without requiring them to conduct a genetic test to prove the biological connection of either one of them to the son that was born. The Court dismissed this petition. It

ruled that in order to carry out the requested registration it was necessary to prove that the new born was entitled to status as an Israeli, “by descent”. The Court ruled that in the Israeli Nationality Law the term “by descent” means a biological connection between the applicant for status and an Israeli citizen. This being so it was determined that the issue in dispute is evidential – is it necessary to conduct a genetic examination in order to prove the biological connection between the applicant for status and Israeli citizen (by order of the Family Court), or are the foreign public documents presented by the petitioners to prove their parenthood sufficient. The Court ruled that since the matter is one of status, the registration clerk is entitled to establish a higher evidential threshold, and to require a written proof under the internal Israeli Law to prove the biological connection. The Court further ruled that written proof of this nature could take the form of a declaratory judgment of the Family Court. It was determined that the Family Court is entitled to request a genetic examination, but it is also entitled to rely on other evidence. Accordingly the petition was dismissed.

On the other hand, the Court accepted by majority the petition in HCJ 6569/11. In this petition a biological connection had been proved between one of the spouses and their daughter, but as a condition for the registration of the non-biological parent the respondents required that he adopt the child. In the proceedings before the Court the respondents agreed to register this parent provided that he apply for the grant of a “judicial parenthood order” in the Family Court. The Court ruled that the registrar clerk is not authorised to refuse the registration based on his claim of it being legally incorrect, and his claim that no recognition is given to parenthood created by force of surrogate procedure outside Israel. The Court ruled that the foreign certificates, which were in the category of public certificates, would suffice for purposes of registering the non-biological parent as the father of the girl. The minority view was that the force of the registrar is not just statistic and as such the petitioners should be referred to the Family Court for it to issue an adoption order or a judicial parenthood order, on the basis of which it would register parenthood.

Languages:

Hebrew.



Identification: ISR-2014-2-002

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 02.07.2014 / **e)** HCJ 4491/13 / **f)** College of Law and Business v. Prime minister of Israel / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.6.2 Institutions – Executive bodies – **Powers.**

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

Keywords of the alphabetical index:

Resource, natural, right to use or exploit / Parliament, delegation of powers / Authority, executive.

Headnotes:

An arrangement had cardinal implications. In discussing this issue the Court ruled that an arrangement pertaining to the exploitation of consumption of limited resources owned by the State must examine the extent of consumption and exploitation of the resource anchored in the arrangement. To the extent that the arrangement leads to gradual and restricted consumption of the resource which does not lead to its total depletion, so that the arrangement admits of alteration by a future government, the authorisation will be examined in a more liberal manner. Rapid and immediate exploitation of the resource that will result in its depletion with a short period of time will lead to a stricter examination of the requirement of explicit authorisation.

Summary:

I. Over the past few years impressive collections of natural gas have been discovered within the economic boundaries of the State of Israel. The discoveries presented opportunities for the Israeli economy, which have been described as historical. These possibilities also include the possibility of exporting part of the gas. For purposes of regulating the subject of exporting gas, the Israeli Government established an interoffice committee (hereinafter, the “Zemach Committee”) which was requested to propose a governmental policy for development of the natural gas market in Israel. In the framework of the Zemach Report that was submitted on 29 August 2012 the Committee recommended determining that the 450 BCM of natural gas be kept for the benefit of the Israeli economy and to permit the rest of the gas for export. On 23 June 2013 the Israeli Government decided to adopt the Committee's recommendations, but decided to keep the 540 BCM for the benefit of

the Israeli economy - an amount that as per the estimation of the Committees, was expected to supply the gas needs of the State of Israel for the next 29 years. This decision is the focus of the petition. The petitioners claimed that the Government's decision was included among the types of decision that should be adopted by the legislative authority. They claimed that the arrangement adopted by the Government was a “primary arrangement” that the Government has no authority to determine without explicit authorisation from the Knesset.

II. The Supreme Court ruled that the matter required a primary arrangement but that the Government had been authorised by the Knesset to execute this kind of arrangement in the framework of Section 33 of the Petroleum Law and accordingly it approved the arrangement.

Initially the Court explained the difficulty involved in the classification of an arrangement as a primary arrangement but ruled that in this concrete case the issue concerned a primary arrangement because this claim was agreed upon by all of the parties. The Court further examined whether the Knesset was even permitted to delegate its power for purposes of establishing a primary arrangement. Finally, the Court chose not to give a definitive ruling on this question, and focused on the question of whether in this case, Section 33 of the Petroleum Law authorised the Government to establish a primary arrangement forming the basis of the petition in a sufficiently explicit and direct manner. Section 33 of the Petroleum Law authorises the Government to obligate producers of petroleum and its derivatives, to initially supply the gas needs of the State of Israel does not explicitly and unequivocally authorise the Government to determine an overall policy in the matter of export of natural gas.

At the first stage the Court examined whether the arrangement violates protected basic rights. The Court ruled that a primary arrangement that violated protected basic rights would require a more explicit authorisation in the law than one which did not violate rights of this nature. The claim that the arrangement violated protected basic rights was not even mentioned in the petition and the Court ruled that there was no concern about a violation of this kind.

At the second stage the Court addressed the claim that an explicit authorisation was required because the arrangement had cardinal implications. In discussing this issue the Court ruled as set out in the headnotes.

The Court applied to in the instant case, ruled that the arrangement at the basis of the petition did not lead to a rapid exploitation of the gas fields and would not prevent a future government from conducting a renewed examination of the arrangement and hence it was possible to examine the authorisation relating thereto in a more liberal manner.

At the third stage the Court examined whether the authorisation in Section 33 was sufficiently explicit in order to authorise the Israeli Government to establish the arrangement that it had established. The Court ruled that even if there is no explicit authorisation in the Section 33 for establishing the arrangement there is an implied authorisation for this issue. The Court examined the purposes of the Petroleum Law, the purposes of Section 33 of the Petroleum Law and additional sections of the Law, as well as other laws in the area of natural resources. Finally, the Court concluded that Section 33 of the Petroleum Law provides sufficient authorisation for the Government to establish the arrangement for the export of natural gas. In view of this the petitions were rejected.

III. The minority view in this decision argued that the degree of strictness with respect to the requirement for explicit authorisation in the law derives from the degree of originality of the arrangement and not from the formal classification of the infringed value as a "right", "interest" or any other value. According to the minority this approach enables a substantive and flexible examination that distinguishes between different cases based on concrete circumstances relevant to the circumstances of the case, such as the legislative nature of the principle authorisation, the circumstances that lead to the establishment of the arrangement by force thereof and above all, the degree of importance of the resolution that the arrangement seeks to endorse. In applying this approach to Section 33 of the Petroleum Law the minority opinion ruled that a distinction must be made between exercising Section 33 of the Petroleum Law in an executive capacity, and its exercise in the general sense, as an "original" authority. The minority view ruled that Section 33 of the Petroleum Law contained no authorisation for its use as a general authorisation, as required for purposes of determining the current arrangement. As such, according to the minority position, the petitions should be granted.

Another minority position that requested to grant the petitions emphasised that authorisation of the Government to determine an arrangement of the kind that ought to be enacted by the Knesset, will prejudice the balance between the legislative authority and the executive authority, and which in Israel already tends in favour of the executive authority.

Languages:

Hebrew.



Italy

Constitutional Court

Important decisions

Identification: ITA-2014-2-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 05.05.2014 / **e)** 120/2014 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 14.05.2014 / **h)**.

Keywords of the systematic thesaurus:

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

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

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

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

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

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

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

Keywords of the alphabetical index:

Parliamentary rule, jurisdiction / Chambers of parliament, employees.

Headnotes:

While the exclusion of parliamentary rules from constitutional review aims to protect the chambers of parliament (Chamber of Deputies and Senate) against any form of interference by other State powers, it does not necessarily follow that parliamentary rules result in solely internal standards. These rules are among the “sources” of law and give rise to standards which are subject to the rules of interpretation valid for all legal norms; they are accordingly subject to the principles set out in the Constitution.

However, in respect of the rules adopted by the chambers regarding relations with their employees and suppliers, this is a more controversial question

and can, in principle, give rise to a conflict of jurisdiction coming under Article 37 of Law no. 87 of 11 March 1953. Rules which cannot be subject to constitutional review may indeed lead to decisions that breach constitutionally inviolable rights, and there must always be a possibility of ascertaining whether a branch of power (in this case the legislature) can, through its decisions, encroach on the constitutionally recognised sphere of competence of another branch of power (in this case the judiciary).

It is for the Constitutional Court to determine the bounds of each sphere of competence.

Summary:

I. The Court of Cassation raised the question of the constitutionality, in the light of Articles 3, 24, 102.2, 111.1, 111.2, 111.7 and 113.1 of the Constitution, of Article 12 of the Rule of the Senate, as approved on 17 February 1971 and successively amended, with regard to the section which, as customarily interpreted, empowers the Senate to settle, by means of a sole and final decision, any appeal against decisions and measures taken by its administration with regard to its staff (“domestic justice”). In the proceedings before it the Court of Cassation was asked to decide an appeal lodged in accordance with Article 111.7 of the Constitution (“An appeal to the Court of Cassation on grounds of violation of the law shall always be permitted against judgments and measures affecting personal freedom pronounced by ordinary or special courts. This rule can be waived only in respect of judgments by military tribunals in time of war.”) by an employee of the Senate concerning a decision handed down on appeal by the Board of Guarantee of the Senate.

Article 12, against which the appeal was lodged, provides *inter alia* that the Bureau of the Senate shall adopt the Rules of the Administration and measures relating to staff. This provision has always been interpreted as vesting the Senate with authority to take sole and final decisions on appeals lodged by its personnel. Any form of intervention by an “external” court has always been ruled out. The Court of Cassation considered that the abovementioned Article 12 was in breach of Article 3 of the Constitution (principle of equality: Senate employees had no access to the ordinary courts like other citizens, without there being any justification for this difference in treatment); Article 24.1 of the Constitution (guaranteeing everyone the right to bring a case before the courts seeking protection of their rights and legitimate interests); Article 102 of the Constitution (prohibiting the establishment of extraordinary or special courts, such as the chambers’ “internal” courts); and Article 111 of the

Constitution, the first paragraph of which states “justice shall be administered through due process”: “due process” cannot be considered to exist where a hearing takes place before one of the parties, such as the Bureau of the Senate, which is competent to determine measures in respect of staff, to whom the sole legal remedies available are an application to the Bureau itself and, on appeal, to the Guarantee Council.

The Court declared the question inadmissible.

II. It first had to determine whether parliamentary rules are subject to constitutional review. As provided in Article 64 of the Constitution, parliamentary rules are a reserved sphere of competence (“Each house shall adopt its own rules by an absolute majority of its members”) in which the law itself cannot intervene. Article 134 of the Constitution makes no mention of parliamentary rules among the instruments subject to the Constitutional Court’s review; only “laws” and acts “having force of law” (legislative decrees and delegated legislation) are referred to. On the basis of positive law alone, the constitutional review of parliamentary rules must therefore be ruled out. The Court thus confirmed the case-law established in its Judgment no. 154 of 1985 and its Orders nos. 444 and 445 of 1993.

While the exclusion of parliamentary rules from constitutional review aims to protect the chambers of parliament (Chamber of Deputies and Senate) from any form of interference by other State powers, it does not necessarily follow that parliamentary rules result in solely internal standards. These rules are among the “sources” of law and give rise to standards which are subject to the rules of interpretation valid for all legal norms; they are accordingly subject to the principles set out in the Constitution.

It is therefore in the light of these principles that the foundation of the chambers’ authority to hear appeals lodged by their employees (“domestic justice”) must be examined and its constitutionality judged. The chambers’ regulatory power, as provided for in Article 64 of the Constitution (“Each house shall adopt its own rules by an absolute majority of its members”) and Article 72 of the Constitution (whereby it is for the chambers’ rules to determine the legislative process), guarantees the independence of the parliamentary assemblies. The scope of the reserved sphere of competence, whether in respect of the rules governing internal organisation or of those concerning the legislative process, in so far as it is not directly laid down by the Constitution, is determined in line with this independence.

The chambers of parliament are unquestionably entirely free to interpret and apply the standards they have themselves adopted to govern their primary functions (the passing of legislation and scrutiny of the government). Any form of intervention by any external court must therefore be ruled out, as it would infringe the chambers’ constitutionally recognised independence.

Concerning the rules adopted by the chambers regarding relations with their employees and suppliers, the question is more controversial and can, in principle, give rise to a conflict of jurisdiction coming under Article 37 of Law no. 87 of 11 March 1953: rules which cannot be subject to constitutional review (such as the rules of the chambers of parliament) may indeed lead to decisions that breach constitutionally inviolable rights, and there must always be a possibility of ascertaining whether a branch of power (in this case the legislature) can, through its decisions, encroach on the constitutionally recognised sphere of competence of another branch of power (in this case the judiciary). The chambers’ independence must not undermine fundamental rights or hamper the implementation of incontrovertible principles.

It is therefore for the Constitutional Court, ruling on a conflict of jurisdiction, when a court or other judicial authority deems that its own powers have been infringed because one of the chambers of parliament has claimed jurisdiction in a case, to determine the bounds of each sphere of competence.

Supplementary information:

By this decision the Court confirmed its case-law precluding the constitutional review of parliamentary rules (Judgment no. 154 of 1985; Orders nos. 444 and 445 of 1993).

The possibility of raising a conflict of jurisdiction so as to permit the Constitutional Court to determine the respective bounds of the legislature’s and the judiciary’s authority in the matters regulated by the chambers of parliament had already been addressed in Judgment no. 379 of 1996, *Bulletin* 1996/3 [ITA-1996-3-010].

The European Court of Human Rights considered the issue of “domestic justice” in the case of *Savino and Others v. Italy*. An application had been lodged with this Court by employees of the Chamber of Deputies, who complained of a violation of Article 6.1 ECHR, since the “Judicial Section of the Bureau”, which was competent to hear appeals concerning disputes between the Chamber of Deputies and its employees, was composed of four members of the Bureau, the body of the Chamber of Deputies competent for ruling

on its principal administrative matters, including those concerning finance and the organisation of staff recruitment competitions. The Court took the view that the fact that the administrative body with powers such as that of the Bureau was the same as the judicial body with competence to rule on any administrative dispute was sufficient to give rise to doubts as to the impartiality of the tribunal thus formed. It considered that the applicants' fears as to the independence and the impartiality of the Judicial Section of the Chamber of Deputies had been objectively justified and found that there had been a violation of Article 6.1 ECHR.

Languages:

Italian.



Japan Supreme Court

Important decisions

Identification: JPN-2014-2-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 04.09.2013 / **e)** (Ku) 984/2012, (Ku) 985/2012 / **f)** / **g)** *Minshu*, 67-6 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 5.1.1 Fundamental Rights – General questions – **Entitlement to rights.**
- 5.2.2.5 Fundamental Rights – Equality – Criteria of distinction – **Social origin.**
- 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Inheritance, child born out of wedlock, equal treatment with legitimate child, right to inherit, statutory rules / Discrimination, children, marital status.

Headnotes:

A Civil Code provision that stipulates different statutory share in the inheritance between a child born out of wedlock and a child born in wedlock violated the Japanese Constitution, which guarantees equality under the law as of July 2001.

The judgment has no effect on any legal relationships that have already been fixed by rulings. Also, it does not impact other judicial decisions on the division of estate, agreements on division of estate or other agreements made on the assumption of the said provision with regard to other cases of inheritance that commenced between July 2001 and this judgment.

Summary:

I. This case concerns the estate of the decedent, who died in July 2001. The appellees (decedent's children born in wedlock) filed a petition for a ruling on the division of the decedent's estate against the appellants (decedent's children born out of wedlock). The appellants argued that a part of Article 900.4 of the Civil Code, which provides that a child born out of wedlock shall only be entitled to half of the share in inheritance that a child born in wedlock is entitled to receive (hereinafter, the "Provision"), violates Article 14.1 of the Constitution, which provides for equality under the law, and therefore void.

II. The Supreme Court noted that the legislature has reasonable discretion to define the inheritance system. Despite its discretionary power, it is appropriate to construe that the distinction violates Article 14.1 of the Constitution if there is no reasonable ground for the said distinction. The circumstances taken into consideration in order to define the inheritance system change with the times. Therefore, the reasonableness of the Provision should be regularly examined and scrutinised in light of the Constitution, which provides for individual dignity and equality under the law.

The Supreme Court also noted that in Japan, the forms of marriage and family have greatly diversified and people now have diverse perceptions of marriage and family since the introduction of the Provision in 1947. Such changes in attitude among Japanese people reflect the global trend to eliminate discrimination of out of wedlock children. Since the late 1960s, most countries have abolished discriminatory legal distinctions to make the inheritance share between children born in and out of wedlock equal. Countries that have retained the distinction are rare, however. United Nations committees have repeatedly expressed concerns, recommending that Japan redress the discriminatory provisions relating to nationality, family register, and inheritance, including this Provision.

In Japan, an ordinance regarding the entry of a child's relationship with the head of his or her household in his or her residence certificate was revised in 1994, and an ordinance regarding the entry of the relationship of a child born out of wedlock with his or her mother or father in the family register was revised in 2004. As a result, a child born out of wedlock must be indicated in the same manner as a child born in wedlock in the residence certificate and the family register. Furthermore, in the judgment of the Grand Bench of the Supreme Court of 2008, the Court declared that Article 3.1 of the Nationality Act, which provided rules to acquire Japanese nationality for

children born out of wedlock, had violated Article 14.1 of the Constitution as of 2003. In response to this Supreme Court judgment, the Nationality Act was revised.

In addition, the Supreme Court pointed out repeatedly the issue of the Provision since the 1995 Grand Bench Decision was rendered.

Considering the abovementioned changes from the time of the 1947 Civil Code revision introducing the Provision until now, it can be said that respect for individuals in a family, which is a collective unit, has increased. It is now impermissible, as a result of such change in the recognition, to treat children differently because their mother and father were not in a legal marriage when the children were born, which the children themselves had no choice or chance to correct. Rather, all children must be respected as individuals and their rights must be protected.

Putting all the above mentioned points together in light of the discretionary power vested in the legislative body, the distinction in terms of the statutory share in inheritance between children born in wedlock and children born out of wedlock had lost reasonable grounds by the time the inheritance of the present case commenced as of July 2001. Consequently, the Provision had contravened Article 14.1 of the Constitution.

If the judgment of unconstitutionality made by the decision of the present case is deemed to have a *de facto* binding force as a precedent and affect the division of estate, for instance, and ultimately impact already solved cases, this would amount to considerable harm to legal stability. Therefore, it is inappropriate to overturn at present such legal relationships that have already been fixed among the parties concerned by means of judicial decisions, agreement, etc.

Consequently, it is appropriate to construe that the judgment of unconstitutionality set by the decision of the present case has no effect on any legal relationships that have already been fixed by rulings. Also, it shall not impact other judicial decisions on division of estate, agreements on division of estate or other agreements, etc. made on the assumption of the Provision with regard to other cases of inheritance that have commenced during the period after July 2001 until the decision of the present case is rendered.

The decision has been rendered by the unanimous consent of fourteen Justices. Three Justices expressed concurring opinions respectively.

Supplementary information:

As a consequence of this decision, the provision was repealed in December 2013.

Languages:

Japanese, English (translation by the Court).



Kosovo Constitutional Court

Important decisions

Identification: KOS-2014-2-001

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 18.03.2010 / **e)** KO 01/09 / **f)** Qemajl Kurtishi v. the Municipal Assembly of Prizren / **g)** Official Gazette, 06.04.2010 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

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

4.8.6.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Deliberative assembly.**

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

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

Keywords of the alphabetical index:

Community, ethnic, identity / Emblem, heritage, majority / Emblem, minority rights, violation / Emblem, tradition / Minority, identity / Municipality, multi-ethnic.

Headnotes:

A prerequisite for a pluralist and genuinely democratic multi-ethnic society, be it a country, region municipality or other territorial unit, is non-majority community participation in the political, social economic and cultural life, in order to develop a sense of belonging and having a stake in the society. Such participation cannot be achieved if the common symbol of that society does not represent the rights of all communities, but, instead, ignores the rights of non-majority community.

Summary:

I. The applicant, the Deputy Chairperson of the Municipal Assembly for Communities in the Municipality of Prizren, filed a referral challenging Article 7 of the Municipal Statute on the Municipal

Emblem containing the house of the League of Prizren, the year 1878 and the inscription "Prizren", thereby alleging that proceedings foreseen under the law have not been respected, and that requests and remarks of communities related to the emblem were not taken into account, and that this emblem does not reflect multi-ethnicity of the Municipality. He claims that constitutional rights of other non-majority communities in the Municipality were violated for equality before law, protection, preservation and development of their identity, that there was violation of the Law on Local Self-Government, and of the Law on Protection and Promotion of Community Rights.

II. The Constitutional Court decided that when the Municipality decided to proclaim the emblem with the house of the Prizren League associated with the year 1878, they promoted Albanian heritage and tradition, without due regard to other communities, thereby violating rights of non-majority communities in Prizren to protect, maintain and promote their identity. Further, the Court decided that the Article 7 of Statute of the Municipality is not compatible with the Constitution, and ordered the Municipality of Prizren to amend it in order to ensure compliance with the Constitution.

Languages:

Albanian, English (translation by the Court).



Identification: KOS-2014-2-002

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 28.09.2010 / **e)** KO 47/10 / **f)** Naim Rrustemi and 31 deputies of the Assembly of Republic of Kosovo v. His Excellency, Fatmir Sejdiu, President of Republic of Kosovo / **g)** Official Gazette, 16.02.2011 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**

1.4.3 Constitutional Justice – Procedure – **Time-limits for instituting proceedings.**

1.4.7.1 Constitutional Justice – Procedure – Documents lodged by the parties – **Time-limits.**

1.4.7.3 Constitutional Justice – Procedure – Documents lodged by the parties – **Signature.**

4.4.2 Institutions – Head of State – **Temporary replacement.**

4.4.6 Institutions – Head of State – **Status.**

4.5.10 Institutions – Legislative bodies – **Political parties.**

Keywords of the alphabetical index:

Head of State, political party, chairman, compatibility / Political party, chairman, Head of State, compatibility.

Headnotes:

When the President of the Republic allows a political party to claim that he or she is the Chairman of their political party even under circumstances where he or she as Chairman will not make any active decisions on behalf of the party, he or she is exercising a political activity or at least allowing the political party to "make use of" of his name and position as President of the Republic. Every citizen of the Republic is entitled to be assured of the impartiality, integrity and independence of their President.

Summary:

I. The Applicants, 32 deputies of the Assembly of Republic of Kosovo, submitted a referral to the Constitutional Court alleging that the President committed and continues to commit a serious violation of Article 88.2 of the Constitution, by holding the Office of the President of the Republic and, according to them, the Office of Chairman/President of Democratic League of Kosovo.

After submission of the referral signed by 31 deputies, the Court notes that three of deputies who were signatories had withdrawn their signatures, and this, in the opinion of President's representatives renders the referral inadmissible. In addition to this, the opposing party in its reply also stated that the deputies did not submit their request within the deadline required under the Constitution and ultimately, that the President did not "exercise" his function in the stated political party but that he had "frozen" that function.

II. The Constitutional Court decided to declare the referral admissible with the reasoning that the matter is "referred [to the Court] in a legal manner by the authorised party" and the moment of referring the matter is the moment when it is decided if applicant is an authorised party. Furthermore, the Court recalled that even after a party withdraws, the Court could choose to decide on the referral.

Regarding the deadline of 30 days from the violation as foreseen under the Constitution, the Court considered that the alleged violation of the President presents a continuing situation since the President continues to hold those two offices even at the time when referral is submitted.

The Court decided that there was a violation of Article 88.2 of the Constitution in holding the two above mentioned functions, reasoning that it is not possible to “freeze” a party function. Furthermore, the Court decided that since the above mentioned President and party “benefit from their association with one another”, means that this party function was “exercised”.

Languages:

Albanian, English (translation by the Court).



Identification: KOS-2014-2-003

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 07.10.2010 / **e)** KO80/10 / **f)** The Referral of the President of the Republic of Kosovo, His Excellency, Dr. Fatmir Sejdiu, for Explanations Regarding Jurisdiction over the Case of Rahovec Mayor, Mr Qazim Qeska / **g)** Official Gazette, 16.02.2011 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.2.1.1 Constitutional Justice – Types of claim – Claim by a public body – **Head of State**.
 2.1.1.4.14 Sources – Categories – Written rules – International instruments – **European Charter of Local Self-Government of 1985**.
 4.4.3 Institutions – Head of State – **Powers**.
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.
 4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting**.
 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

Keywords of the alphabetical index:

Election, mayor, following resignation / Mayor, election / Mayor, resignation, determination, competent body.

Headnotes:

Taking into account Articles 123.2 and 45 of the Constitution in conjunction with Article 3.2 of the European Charter of Local Self Government, the Court finds that constitutional consequences of a mayor’s resignation are the calling for elections by the President of the Republic in order to ensure the right of the citizens to enjoy the right to a free and equal vote in establishing their local self-government. Any resignation of any mayor is final and definitive and it puts an end of a mayor’s mandate. The constitutional consequences of that act are the calling for elections by the President of the Republic in order to ensure the right of the citizens to enjoy the right to a free and equal vote in establishing their local self-government.

Summary:

I. The President of Kosovo filed a referral requesting from the Court a clarification as to which institution “...is responsible to assess the effectiveness and validity of a resignation and assess an eventual termination of the mandate of a mayor based on a release issued to its citizens...”. The President requested this clarification based on the case of resignation of, Mr Qazim Qeska, the mayor of Rahovec through a press release, reconfirmation of such resignation by the Ministry of Local Government, and later on the revocation of this resignation by Mr Qazim Qeska himself.

The applicant claims that the case at hand contains some unclear issues in relation to the competencies of respective institutions in determining the validity of the resignation and termination of the mandate of a mayor, and as a consequence of these unclear issues he cannot move on with further actions in line with the constitutional principle for free and fair elections. According to him, the President is the authorised party to submit this constitutional matter to the Court, and considering that he is obliged according to the Constitution to ensure compliance with the constitutional principle for free and fair elections, he has to clarify as to what are the further steps that he should undertake following a resignation of a given mayor.

II. The Constitutional Court decided that the referral is admissible based on the authorisations of the President in the Constitution to raise such constitutional issues

before the Court. Furthermore, the Court decided that based on the Law on Local Self-governance, the resignation of a given mayor is final and definitive and marks the termination of his or her mandate, and that the constitutional consequences of such an action are the announcement of new elections by the President in order to ensure that citizens enjoy the right to free and fair elections when establishing their local self-governance.

Languages:

Albanian, English (translation by the Court).



Identification: KOS-2014-2-004

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 30.03.2011 / **e)** KO29/11 / **f)** Sabri Hamiti and other Deputies – Constitutional Review of the Decision of the Assembly of the Republic of Kosovo, no. 014-V-04, concerning the election of the President of the Republic of Kosovo / **g)** Official Gazette, 31.03.2011 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies**.
4.4.4.3 Institutions – Head of State – Appointment – **Direct/indirect election**.
4.5.6.2 Institutions – Legislative bodies – Law-making procedure – **Quorum**.

Keywords of the alphabetical index:

Head of State, election, quorum / Head of State, election, candidates, minimum number / Parliament, quorum / Parliament, member, session, obligation to participate.

Headnotes:

The interpretation of Article 86 of the Constitution can only be that there must be more than one candidate for the election of the President of the Republic of Kosovo in order for the election procedure to be put in motion. Consequently, the election procedure conducted by the President of the Assembly lead to the single candidate being elected as President of

Kosovo, although, in the Court's opinion, it was inconsistent with the formal requirements of Article 86 of the Constitution.

All 120 deputies of the Assembly should feel obliged, by virtue of the Constitution, the Law on Deputies, the Rules of Procedure of the Assembly and the Code of Conduct, to participate in the plenary sessions of the Assembly and to adhere to the procedures laid down therein, but most of all an obligation vis-à-vis the people of Kosovo that elected them.

Summary:

I. The Applicants, a group of 34 Assembly Deputies, filed a Referral pursuant to Article 113.5 of the Constitution contesting the Assembly's decision to elect Behgjet Pacolli as President of Kosovo on its third ballot, alleging that the election proceedings violated Article 86 of the Constitution in three respects: the decision lacked the two-thirds quorum required for a Presidential election under Article 86.4 of the Constitution; there was only one candidate for the position, whereas Article 86.5 of the Constitution requires at least two candidates; and, there was an impermissible interruption during the election proceedings.

In his response, Mr Pacolli contended that the Assembly quorum requirement of Article 69.3 of the Constitution merely requires the presence of more than one-half of the Deputies, which was fulfilled at the beginning of the disputed session, adding that the departure of Deputies from the session were effectively votes against him, so the quorum existed. Mr Pacolli argued that Article 86.3 of the Constitution does not require the Assembly to nominate more than one Presidential candidate, asserting that the two-thirds vote and dissolution provisions of Article 86.5 and 86.6 of the Constitution apply only in a situation where more than two candidates are nominated for the post. Mr Pacolli also argued that the Assembly President is the final interpreter of the Assembly's Rules pursuant to Article 17.1 of the Assembly's Rules of Procedure, and that he approved the request for a break in the election proceedings.

II. The Court held that the Referral was admissible because the Applicants, members of a group comprised of 10 or more Assembly Deputies, were authorised parties and had met the 8-day deadline pursuant to Article 113.5 of the Constitution, and had complied with the requirements of Article 42 of the Law of the Constitutional Court by identifying its members, providing necessary signatures, identifying the challenged decision, specifying the constitutional provisions allegedly violated, and providing supporting evidence.

First, the Court held that Article 86 of the Constitution is breached when Assembly Deputies only nominate one candidate for President, emphasising that the intent of the drafters of the Constitution to embrace a more democratic system in which more than one candidate is a prerequisite to a Presidential election. The Court noted the absence of language allowing a Presidential election with only one candidate, citing the Constitutions of Albania and Hungary as examples. The Court concluded that the election in this case was invalid. Second, the Court concluded that the election was also invalid because of a lack of the 100 % quorum mandated by Article 86 of the Constitution, which obliged all 120 Assembly Deputies to vote (with the exception of those who had been properly excused by the President of the Assembly) in a Presidential election. In that regard, the Court emphasised that Deputies have a duty to participate in Assembly proceedings. Finally, the Court noted that Article 86 of the Constitution and the Rules of Procedure for the Assembly were silent on whether a break in Presidential election proceedings is allowed, highlighting that its duty is only to review allegations of constitutional violations and concluding that a break in the proceedings did not encompass a constitutional issue under Article 86 of the Constitution. The Court concluded that the Applicants had not submitted evidence of a constitutional violation.

For the reasons stated, the Court issued a judgment declaring that the Referral was admissible and, by seven votes in favour and two votes opposed, that the Assembly decision concerning the election of the President violated Article 86 of the Constitution and that it was, therefore, invalid.

Languages:

Albanian, English (translation by the Court).



Identification: KOS-2014-2-005

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 30.09.2011 / **e)** KO 98/11 / **f)** The Government of the Republic of Kosovo concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo / **g)** Official Gazette, 23.09.2011 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

4.4.6.1.1.1 Institutions – Head of State – Status – Liability – Legal liability – **Immunity**.

4.5.9 Institutions – Legislative bodies – **Liability**.

4.6.10.1.1 Institutions – Executive bodies – Liability – Legal liability – **Immunity**.

Keywords of the alphabetical index:

Government, member, immunity, functional / Head of State, immunity, functional, duration, unlimited / Parliament, member, immunity, functional.

Headnotes:

The immunities granted to the President are functional immunities to ensure that the President will be unimpaired in carrying out the State duties entrusted to that institution under the Constitution. Assembly Deputies and Members of Government enjoy functional immunity for actions taken or decision made within the scope of their responsibilities, encompassing opinions expressed, votes cast or decisions made, which is of unlimited duration. The Court clarified that the expression “[w]hile performing his or her duties” refers to performing the work of the Assembly during its plenary and committee meetings.

Summary:

I. The Applicant filed a Referral pursuant to Articles 93.10 and 113.3.1 of the Constitution, requesting an interpretation of the immunities afforded the President of Kosovo, Assembly Deputies and Members of Government, specifying Articles 89, 75.2 and 98 of the Constitution, respectively.

II. The Court held that the Referral was admissible, concluding that the Prime Minister was an authorised party pursuant to Article 113.3.1 because each question raised an issue related to the abilities of the President, Assembly Deputies and Members of government to perform their constitutional functions independently, noting that Chapter III of the Law on the Constitutional Court provides no deadline for Referrals submitted under Article 93.10.

On the merits, the Court held that Articles 75.1, 89 and 98 of the Constitution afford the President, Assembly Deputies and Members of Government functional immunity for actions taken or decision made within the scope of their responsibilities, encompassing opinions expressed, votes cast or decisions made, which is of unlimited duration. The Court clarified that the expression “[w]hile performing

his or her duties” refers to performing the work of the Assembly during its plenary and committee meetings.

As for Assembly Deputy immunities, the Court emphasised the importance of separation of powers and the Assembly’s independence, citing *Syngelidis v. Greece*. The Assembly President, the Assembly, three Assembly Deputies, and the Parliamentary Group of Vetëvendosja provided various responses and/or comments regarding the issue of immunity, which the Court took into account. The Court relied upon the plain language of Articles 29, 70, 72 and 75 of the Constitution when resolving the question of a Deputy’s immunities, noting also that a Deputy, like any other person under the jurisdiction of Kosovo courts, enjoys the protections of Articles 22, 24.1, 29, 30, 31 and 54 of the Constitution, as well as Articles 5 and 6 ECHR.

The Court held that a Deputy is not immune from criminal prosecution for actions taken or decision made outside the scope of his or her responsibilities, regardless of whether the criminal acts occurred prior to election or during service as a Deputy. It held that a Deputy could not be dismissed from the Assembly, except for reasons outlined in Article 70 of the Constitution. The Court held that with the Assembly’s approval an Assembly Deputy could be arrested or detained while performing his or her duties at plenary meetings of the Assembly and/or of its committees. It also held that an Assembly Deputy could be arrested or detained without the Assembly’s approval when there are no plenary meetings of the Assembly or meetings of its committees. The Court held that a Deputy could be arrested or detained without approval of the Assembly when caught committing a serious offence that is punishable by five or more years of imprisonment. It also held that a Deputy could be arrested or detained when his or her mandate ends arising from a conviction of an offence and a sentence of one or more years of imprisonment by a final court decision. The Court held that an authorised prosecutor has the right to request the Assembly for waiver of a Deputy’s immunity. The Court held that an authorised prosecutor could arrest or detain a Deputy without the Assembly’s consent provided that it occurs when there is no plenary meeting of the Assembly or of its committees.

As for the President’s immunities, the Court relied upon the plain language of Articles 89, 90 and 91 of the Constitution and the Law on the President, Law no. 03/L-094, when holding that the President is not immune from prosecution for actions taken and decision made outside the scope of his or her responsibility, and that a serious crime prosecution may be initiated against the President. It also held that the President is not immune from civil lawsuit for

actions taken and decision made outside the scope of his or her responsibilities. The Court held that the Assembly could dismiss the President in accordance with Article 91 of the Constitution. However, the Court held that the President could not be subjected to arrest or detention during his or her term of office due to the nature of the functions of the President, which require constant availability.

Regarding Members of Government, the Court relied upon Articles 97 and 98 of the Constitution when holding that they do not have any special immunity for actions taken and decisions made outside the scope of their responsibility.

The Court held that the Judgment was effective immediately.

Cross-references:

European Court of Human Rights:

- *Syngelidis v. Greece*, 24895/07, 11.02.2010.

Languages:

Albanian, English (translation by the Court).



Kyrgyz Republic

Constitutional Chamber

Important decisions

Identification: KGZ-2014-2-014

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 05.03.2014 / **e)** 18-p / **f)** Rayapov B. Asanov M. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

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

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

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

Keywords of the alphabetical index:

Judge, office, dismissal.

Headnotes:

Decisions by the Judicial Council on dismissing a judge from office should not limit the judge's right to appeal.

Summary:

I. The right to judicial protection is a universal one, irrespective of professional activity. Any decisions by the Judicial Council on dismissing a judge early from office should not limit the judge's right to appeal. The independence and integrity of judges and the responsibility of the judiciary to the public must be taken into account in such decisions. Any decision dismissing a judge early from office as a disciplinary measure must be open to verification as to objectivity and impartiality. Parliament should develop mechanisms allowing a judge to appeal the Judicial Council's decision between the time of its imposition and its approval by the President.

II. The Constitutional Chamber decided that the provisions under challenge did not contravene the Constitution. The Constitutional Law "On the Status of Judges of the Kyrgyz Republic", provides for a decision on early dismissal of Supreme and local court judges made by the President or Parliament on the basis of a decision by the Judicial Council.

The President and Parliament trust the decision of the Judicial Council.

The Constitutional Law "On the Status of Judges of the Kyrgyz Republic" does not recognise the possibility for a judge of the Supreme and local court to appeal against his or her early release from his or her office.

As mentioned above, a decision of the President or Parliament on early dismissal of a judge of the Supreme and local court carried out according to the procedure established by the Constitution and a by-law does not limit the right of judges to judicial protection.

III. Four dissenting opinions were put forward by judges of the Constitutional Chamber.

In the dissenting opinions of judges E. Oskonbaev and K. Sooronkulova, the point was made that the process of dismissing judges from office consists of several stages, each of which ends with the adoption of the relevant act. The existing constitutional order for the appointment and dismissal of judges is a sequence of logically interconnected stages of a single process, during which the authority in question is required to make an informed and educated decision under its constitutional powers. This order provides a degree of constitutional balance in terms of the formation of the judiciary and safeguards its independence. Violation or incorrect application of the relevant procedural rules can and should be subject to judicial review at any stage of the proceedings of dismissing a judge from office. Failure to comply with the appropriate procedures when the disciplinary liability of a judge is at stake may stand in the way of comprehensive and objective investigation of the circumstances and a lawful and reasonable solution.

Dissenting opinions of Judges Ch. Aidarbekova and M. Bobukeeva

The Constitution guarantees the right to judicial protection and serves as one of the main means of protection of human rights and freedoms of man and citizen. Under the Constitution, any interested person may exercise this right and apply to the court in order to protect violated or disputed rights or legally protected interests. By virtue of the provisions of the

Constitution and international treaties ratified by the Kyrgyz Republic, the right to judicial protection is fully applied to judges who have been dismissed from their posts.

Dismissal for judges is carried out in several stages. Each of them ends with a legal act that has the corresponding values for the continuation of this process. The adoption of these legal acts is done in conformity with the statutory procedures and powers of the constitutional authority of the Judicial Council, Parliament and a further judicial body. Each will have determined the early release independently within their competence and in accordance with the legislation.

This particular case is concerned with bringing judges to disciplinary liability in the form of dismissal. It is incumbent upon judges to comply with the Code of Honour for a Judge of the Kyrgyz Republic. A review of a judge's disciplinary offence by the Judicial Council cannot be considered as realisation of the right to judicial protection, as the infringed right can only be protected within the judiciary and through procedures pre-determined in law. Judges have a high status; there is a need to increase the level of trust in the institutions of state power. The provisions under dispute, in the view of the dissenting justices, limited the right to judicial protection of judges released early from office and were out of line with the Constitution.

Languages:

Russian.



Identification: KGZ-2014-2-015

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 19.03.2014 / **e)** 22-p / **f)** Shayahmetova V. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.4.3 Constitutional Justice – Procedure – **Time-limits for instituting proceedings.**
 1.4.8.7.1 Constitutional Justice – Procedure – Preparation of the case for trial – Evidence – **Inquiries into the facts by the Court.**

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

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

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

4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts.**

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:

New evidence, retrial.

Headnotes:

A decision to dismiss a criminal case due to the lapse of the deadline for initiation of criminal prosecution cannot serve as a basis for the resumption of a case due to newly discovered evidence.

Summary:

Under the International Covenant on Civil and Political Rights (Article 14.6), a retrial may be held in accordance with the criminal law of the State, if “there is evidence of new or newly discovered facts,” or if “any new or newly discovered fact shows conclusively the presence of a miscarriage of justice.” Legal grounds for the institution of limitation include a significant lessening of the social danger of the crime once a lengthy period of time has elapsed and the loss of social danger from perpetrators due to continued good behaviour.

Limitation periods are calculated from the date of the offence until an enforceable court judgment. The matter is subject to mandatory termination at the preliminary investigation stage, as ordered by the inquiry body, investigator or prosecutor. Termination of criminal proceedings due to a lapse of time is not allowed if the defendant objects to this (for example, if they believe themselves innocent). A person who does not agree with the termination of the criminal case due to the statute of limitations has the right to seek acquittal. Therefore, when deciding whether to reopen the criminal case on newly discovered evidence, a decision not to institute criminal proceedings due to the lapse of time should have the same legal consequence as a decision to discontinue the proceedings in the same circumstances. The format of the procedural act should not constitute an obstacle to the implementation by parties to the proceedings of the

right to judicial protection for the revision of an erroneous judicial act following newly discovered evidence.

Consequently, the absence of refusal to institute criminal proceedings due to elapsing of limitation periods from the list of grounds for reopening following newly discovered circumstances restricts the right to review the erroneous judicial act, thereby hindering the implementation of the right to judicial protection and fairness of justice, legal certainty and stability.

The Constitutional Chamber decided unanimously that the contested provisions were not contrary to the Constitution.

Languages:

Russian.



Identification: KGZ-2014-2-016

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 11.04.2014 / **e)** 25-p / **f)** Government of Kyrgyz Republic / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
4.5 Institutions – **Legislative bodies.**
4.10.2 Institutions – Public finances – **Budget.**

Keywords of the alphabetical index:

Republican budget.

Headnotes:

Legislation which provided for capital investments from the state budget in execution of the republican budget; it was at odds with the principle of separation of powers.

Summary:

The constitutional basis of the legal regulation of social relations in the public sector is enshrined within the Constitution. In accordance with the Constitution, the Government develops the national budget and submits it to Parliament. Parliament in turn approves the national budget. The Law on Basic Principles of Budget Law defines the fundamental principles of the formation and execution of the national budget. In this way, certainty, stability and continuity are achieved in terms of the cost of legal relations and the legal position of their subjects.

Under the Act, the budget process is a set of inter-related steps covering all stages from the design of the budget to the law approving the report on its implementation.

In providing for capital investments from the state budget in execution of the republican budget, the legislator went beyond the constitutional precepts, in terms of differentiation of functions and powers of public authorities. The Constitutional Chamber therefore decided unanimously that the provisions of the above law were contrary to the Constitution.

Languages:

Russian.



Identification: KGZ-2014-2-017

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 23.04.2014 / **e)** 26-p / **f)** Lou E., Turgunbaeva E. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal proceedings, victim / Preliminary investigation, notification.

Headnotes:

Victims and defendants involved in criminal proceedings need to be informed in a timely manner of the end of the preliminary investigation process so that the right to judicial protection may be realised; they may not otherwise have a proper opportunity to familiarise themselves with the case.

Summary:

The legal status of all subjects involved in criminal proceedings and their rights and obligations are set out in the Code of Criminal Procedure. Victims are recognised by the legislator as parties to the criminal proceedings and endowed with a level of procedural rights. Appropriate conditions need to be put in place at all stages of the criminal process, including the pre-trial stage, for the implementation of victims' procedural rights and those of others.

One such condition is timely notification of victims by those conducting the preliminary investigation of the need for their participation in legal or investigative actions. The principle of equality of arms in criminal proceedings assumes equal procedural possibilities for the side vigorously defending its position and contesting the allegations and for the opposing party.

The announcement of the end of the investigation period is the beginning of familiarisation with the case. The bodies that carry out the preliminary investigation are required to simultaneously notify all parties to the proceedings on the completion of the investigation. The period of notice is calculated from the end of investigative actions, so that, without interfering with the term of the preliminary investigation, the parties concerned can familiarise themselves with the materials of the case and make the appropriate application or appeal the decision in court proceedings.

The Constitutional Chamber decided unanimously that the provisions under challenge were not contrary to the Constitution.

Languages:

Russian.

*Identification: KGZ-2014-2-018*

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 30.04.2014 / **e)** 27-p / **f)** Saatov T.Dj. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Civil service, age limit.

Headnotes:

Legislation providing that employment will be terminated by the civil service administration when a public servant reaches the age limit; it is not discriminatory and ensures professionalism as well as continuous improvement of the civil service system.

Summary:

Part of the concept of equal access to public service is the right of citizens to engage in any public office without discrimination. Special requirements and restrictions in the public service, including an age limit for a public servant within the specifics of his or her employment, cannot be regarded as a violation or restriction of the rights and freedoms guaranteed by the Constitution. This type of legal regulation ensures the implementation of sustainability; professionalism, competence, continuity, turnover and continuous improvement of the civil service system and cannot be assessed as a discriminatory restriction of constitutional rights. Legislation establishing an age limit for public servants was therefore found, by a unanimous decision of the Constitutional Chamber, to be in line with the Constitution.

Languages:

Russian.



Identification: KGZ-2014-2-019

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 07.05.2014 / **e)** 28-p / **f)** Osinzev E.V / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Imprisonment, civil liability / Criminal responsibility.

Headnotes:

Provisions within the Criminal Procedural Code may apply criminal sanctions for non-implementation of judicial acts to citizens as well as local government officers and government officials.

Summary:

The Criminal Procedural Code provides that non-enforcement of judicial acts carries criminal liability. This applies not just to government officials and local government officers but also to citizens. This is in line with the principle of general validity of judicial acts, established by the Constitution, and is aimed at improving the credibility of justice and the faith of citizens in the fairness of judicial acts. Failure to prevent problems of implementation of justice can lead to redress becoming impossible or a defendant's objections not being properly dealt with. They can lead to loss of liberty.

Under the Criminal Code, liability for non-enforcement of judicial acts will come into play in cases of "wilful non-performance"; a failure on the part of the person concerned to face his or her responsibilities. It is important to establish too that the person concerned has not taken account of the mandatory prescriptions and has had a real opportunity to fulfil these requirements. The Constitutional Chamber accordingly held that the disputed provisions of the Criminal Procedure Code were in line with the Constitution.

Languages:

Russian.



Identification: KGZ-2014-2-020

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 14.05.2014 / **e)** 31-p / **f)** Isaev A.M. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.11 Institutions – **Armed forces, police forces and secret services**.
4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.

Keywords of the alphabetical index:

Internal affairs, organisation / Regulation, implementing.

Headnotes:

Provisions pertaining to service within the police force may allow an extension of service of up to five years.

Summary:

A question had arisen over the constitutional compliance of a provision within the Law on Internal Affairs, as defined by the Regulation on service within the police force, which allowed for an extension of service within internal affairs for up to five years.

The Law on Internal Affairs is intended to regulate public law relations of the most significant kind. It may not, therefore, contain detailed regulation or special features of certain aspects of public law relations. Regulations issued in accordance with this law must be issued on the basis and in pursuance of the law and should in no way contradict it. The argument was put forward that the statutory provision in point should not be viewed as limiting human rights and freedoms; it did not affect the content of the subjective right, but legislated for the possibility of extending service in internal affairs beyond the statutory age limit.

The Constitutional Chamber recognised the above provisions to be in line with the Constitution.

Languages:

Russian.



Latvia Constitutional Court

Important decisions

Identification: LAT-2014-2-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 12.02.2014 / **e)** 2013-05-01 / **f)** On the compliance of Section 22.1 (in the wording of the Law of 8 November 2012, which enters into force on 1 January 2015) and of Paragraphs 4 and 5 of the Transitional Provisions of the Law on National Referendums, Legislative Initiatives and European Citizens' Initiative with Articles 1 and 2 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 14.02.2014, 33(5093) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
3.3.2 General Principles – Democracy – **Direct democracy**.
4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity**.

Keywords of the alphabetical index:

People, power, source / Referendum, initiation / Referendum, national, reform / Referendum, right to request / Right, electors, legislative initiative.

Headnotes:

Norms that introduced a requirement that persons initiating a draft legislative initiative would need to collect signatures from at least ten per cent of the electorate were constitutional; they were introduced for valid reasons and actually simplified the process of the exercise of the right to legislative initiative by the electorate as a whole.

Summary:

I. The applicants, twelve members of Parliament, took issue with new norms which required that persons initiating a draft legislative initiative should collect signatures from no less than one tenth of the totality of citizens with the right to vote. The applicants contended that this violated the right of all citizens to participate in democratic legislative procedure; the threshold number of signatures was being raised in an unjustifiable fashion which significantly reduced the opportunities for citizens to exercise the constitutional right to legislative initiative.

Questions arose over the compliance of this legislation with the principle of democracy and the Article of the Constitution providing that the sovereign power of the State of Latvia is vested in the people. The question of whether Parliament had adhered to the limits of its discretion also had to be considered, as well as whether there were valid reasons for the adoption of the norm in question.

II. The Constitutional Court noted the close connection between the implementation of people's sovereign power and the democratic state order. As the people are the only subject of the state sovereign power, they should be able to influence decision taking in the State. Their will must be the source and basis of state power.

In a democratic system, the will of the majority of people is implemented, but the minority is also guaranteed the effective possibility of expressing its opinion. The people are entitled to participate in decisions on issues of national importance, but only within the framework of a democratic process that respects the opinion of the minority and implements the will of the majority.

A reasonable decision-making process is a prerequisite for the legitimacy of the power of the majority. The existence of such a procedure does not always guarantee impeccable results, but it does allow for a presumption that the decision has been correctly made.

The Constitutional Court Law defines the limits of the jurisdiction of the Constitutional Court. It does not grant the Constitutional Court the right to assess the political expediency of actions taken by other constitutional institutions of state power. The Constitutional Court examines issues falling within its jurisdiction, insofar as legal arguments, as opposed to law policy arguments, can be applied to them. Issues to be dealt with politically must be decided on by democratically legitimised political bodies of the State, primarily the legislature.

Amendments to the procedure for exercising citizens' constitutional rights are not *per se* indicative of a violation of the principle of people's sovereignty. However, people can exercise their right only within the framework of a democratic process. A procedure for exercising the electorate's right to legislative initiative which was incompatible with a democratic state order would not comply with the principle of people's sovereignty.

The Constitutional Court recognised that the reasons behind the introduction by the legislature of changes to the procedure for exercising the electorate's right to legislative initiative were valid. The contested regulation simplified the implementation of the electorate's right to legislative initiative, also making the exercise of this right more accessible to the electorate.

The Constitutional Court found that the possibilities of signing in favour of draft legislative initiative had been expanded (signatures could now be collected electronically). The term for collecting signatures in favour of draft legislation (a year) was recognised as being reasonable and sufficient for the electorate to express its will and for those initiating the draft law to collect the signatures of at least one-tenth of the electorate. It also found that the contested regulation promoted advances in the process of the right of the electorate to initiate legislative change (support by a sufficiently large portion of the electorate).

The Constitutional Court recognised that the contested provisions allow effective exercise by the electorate of its constitutional right to legislative initiative. It also emphasised that the legislator in a democratic state must consider the effectiveness of a legal regulation and potential for improvement on a continual basis. This applies to the procedure established by the contested regulation; the legislator should consider whether it could be improved and whether the electorate can exercise its right to legislative initiative effectively.

Cross-references:

Constitutional Court:

- no. 04-07(99), 24.03.2000; *Bulletin* 2000/1 [LAT-2000-1-001];
- no. 2002-04-03, 22.10.2002; *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2005-08-01, 11.11.2005;
- no. 2006-29-0103, 10.05.2007;
- no. 2008-40-01, 19.05.2009;
- no. 2008-35-01, 07.04.2009; *Bulletin* 2009/2 [LAT-2009-2-002];
- no. 2010-71-01, 19.10.2011;

- no. 2012-03-01, 19.12.2012; *Bulletin* 2012/3 [LAT-2012-3-005];
- no. 2013-06-01, 18.12.2013; *Bulletin* 2013/3 [LAT-2013-3-005].

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2014-2-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 23.04.2014 / **e)** 2013-15-01 / **f)** On the compliance of the words “Joining in Trade Unions” of Section 49.1 of the Border Guard Law with Article 102 and the second sentence of Article 108 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 28.04.2014, 82(5142) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

- 1.2.1.8 Constitutional Justice – Types of claim – Claim by a public body – **Ombudsman**.
- 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
- 5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions**.

Keywords of the alphabetical index:

Border guard, state, trade union.

Headnotes:

Legislation that imposed a ban on border guards establishing trade unions was out of line with the constitutional rights to unite in trade unions. Persons entrusted with the fulfilment of State tasks are in a public legal relationship with the State, which does allow the State a broader discretion in terms of their employment rights, and the norm had a legitimate aim, this being the protection of the territorial integrity of the State and the protection of public safety. However, this aim could have been achieved by less restrictive means, such as the ban on border guards taking part in or organising strike action.

Summary:

I. The Ombudsman, the applicant in these proceedings, argued that the restriction on rights established by the norm under dispute (the ban on border guards establishing trade unions) was disproportionate and that there was no need for such a restriction in society.

II. The Constitutional Court noted that under the Constitution, the legislator is obliged to adopt regulations which allow persons to unite in trade unions and thus exercise their freedom of association. The wording included in the Constitution “the State shall protect” imposes a special obligation upon the State to implement measures that will protect the freedom of trade unions. At the same time the Court recognised the broader discretion the State enjoys when defining the rights and obligations of those in public service relationships by comparison with those whose relations are founded upon an employment contract. In view of the role and tasks of the public service, the State has the right to regulate unilaterally the rights and obligations of persons who are in public service, but the legislator only has the right to impose restrictions on fundamental rights which are strictly necessary.

The Constitutional Court noted the substantive and procedural aspects to the rights protecting the freedom of trade unions. The right to unite in trade unions forms the substantive aspect of this right. Indeed, the right of association is recognised as one of the most essential individual political rights and is an important pre-requisite for the functioning of a democratic state order. It allows individuals to safeguard their legal interests by uniting to reach common aims, thus gaining the possibility to participate in the democratic processes of the state and society. The freedom of trade unions is a manifestation of the freedom of assembly. The concept “trade union”, referred to in the Constitution, is one of the ways in which the freedom of association manifests itself in the field of labour law.

A right on the part of border guards to unite in trade unions does not, *per se*, pose a threat to the security interests of the State or society. However, some procedural aspects of exercising the freedom of trade unions, such as the right to organise strikes and take part in them, may have an impact upon the security interests of the State or society.

The Constitutional Court recognised that the contested provision had a legitimate aim – the protection of public safety. To safeguard the independence of the State, its constitutional order and territorial integrity, the accurate and unimpeded functioning of the national border guard must be

ensured. However, the Court noted that this aim could be attained by other means which were less restrictive on the rights and legitimate interests of individuals, for example by the outright ban included in Section 49.1 of the Border Guard Law on border guards organising and participating in strikes.

The Constitutional Court therefore held that the contested norm placed disproportionate restrictions upon fundamental rights and was incompatible with the provision of the Constitution stating that the State shall protect the freedom of trade unions.

Supplementary information:

The Constitutional Court also analysed in the judgment the right of the Ombudsman to apply to the Constitutional Court, along with the procedure and requirements provided in the law.

Cross-references:

Constitutional Court:

- no. 2001-12-01, 19.03.2002; *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2003-12-01, 18.12.2003;
- no. 2003-13-0106, 27.11.2003; *Bulletin* 2003/3 [LAT-2003-3²-013];
- no. 2004-18-0106, 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-19-01, 22.12.2005;
- no. 2005-24-01, 11.04.2006;
- no. 2006-42-01, 16.05.2007;
- no. 2008-34-01, 13.02.2009;
- no. 2008-36-01, 15.04.2009;
- no. 2010-44-01, 20.12.2010;
- no. 2012-16-01, 10.05.2013.

European Court of Human Rights:

- *Demir and Baykara v. Turkey*, no. 34503/97, 12.11.2008, paragraph 109, *Reports of Judgments and Decisions* 2008;
- *Ramazanova and Others v. Azerbaijan*, no. 44363/02, 01.05.2007, paragraph 54;
- *Sindicatul "Pastorul cel Bun" v. Romania*, no. 2330/09, 09.07.2013, paragraph 131, *Reports of Judgments and Decisions* 2013;
- *Szima v. Hungary*, 29723/11, 11.02.2013, paragraph 31;
- *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, no. 11828/08, 11.02.2013, paragraph 54;
- *Tum Haber Sen and Cinar v. Turkey*, no. 28602/95, 21.05.2006, paragraph 36, *Reports of Judgments and Decisions* 2006-II.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2014-2-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 10.06.2014 / **e)** 2013-18-01 / **f)** On the Compliance of the Sixth Sentence of Section 563.3 of the Sentence Execution Code of Latvia with the first sentence of Article 92 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 13.06.2014, 115(5175) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.19 General Principles – **Margin of appreciation**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

Keywords of the alphabetical index:

Act, administrative / Convicted person, right to work / Right to freely choose employment and workplace.

Headnotes:

A decision by the Prison Administration regarding the employment of a convicted person outside the facility for deprivation of liberty did not significantly impinge on their fundamental rights and should be perceived as an internal decision of the institution, rather than an administrative act subject to control by an administrative court.

The fundamental human rights established in the Constitution do apply to convicted persons, insofar as these rights have not been restricted and are compatible with the aim of serving the sentence and the prison regime. Certain restrictions may, however, apply.

Reasonable restrictions may also be placed upon the right to a fair trial in order to ensure the effective functioning of the court system. The legislator should

ensure courts are relieved of examining obviously unfounded applications and prevent the misuse of court resources.

Summary:

I. The applicant had asked permission to work outside the prison area, but this was refused. In his view, the contested norm, which prohibited appealing against a decision by the Prison Administration, posed a disproportionate restriction on his right to a fair trial.

The applicant noted that the provision setting out the procedure according to which a convicted person could receive permission to be employed for remuneration envisaged that an order by the head of the facility for the deprivation of liberty would be needed. If this order contained a refusal to allow employment of a convicted person, it could be contested with the Prison Administration. However, decisions by the Latvian Prison Administration were not subject to appeal.

II. The Constitutional Court noted that when reviewing a case having regard to a person's constitutional complaint, its task was to review the constitutionality of a norm which had allegedly infringed a person's fundamental rights. In this case the actual circumstances, under which the norm infringed upon the applicant's fundamental rights were essential. The Constitutional Court accordingly reviewed the contested norm to the extent that it applied to employing convicted persons outside the facility for deprivation of liberty.

The norm had to be examined in connection with Administrative Procedural Law, i.e., it had to be established whether a decision by the Prison Administration should be recognised as being an administrative act and whether the decision by the Administration was adopted with regard to a person particularly subject to the institution and whether it significantly infringed upon their fundamental rights. An imprisoned person was a person particularly subject to the institution, namely the facility for deprivation of liberty.

The Constitutional Court assessed, whether the Prison Administration's decision significantly impinged upon a person's right to freely choose their employment and workplace. The Court found that these fundamental rights pertained to imprisoned persons only insofar as their exercise could be compatible with the regime and aim of execution of sentence. This right provided by the Constitution does not comprise the right of imprisoned persons to freely choose their workplace outside the facility for deprivation of liberty.

The Constitutional Court also found that the applicant had erroneously assumed that the Sentence Execution Code of Latvia allowed for the employment of imprisoned persons outside the territory of prison. In fact, only those convicted persons serving their sentence in an open prison can be employed outside the prison territory.

It therefore concluded that a decision by the Prison Administration regarding the employment of a convicted person outside the facility for deprivation of liberty did not significantly impinge on their fundamental rights and had to be recognised as an internal decision of the institution, rather than an administrative act subject to control by an administrative court. The contested norm was compatible with the right to fair trial.

Supplementary information:

The Constitutional Court emphasised that in the case under review the compatibility of the contested norm with the first sentence of Article 92 of the Constitution was examined in interconnection with the facts of the particular case. No assessment was made regarding other cases, where the right of recourse of especially subordinate persons (convicted persons) to a court could be restricted on the basis of a prohibition established by the Code.

Cross-references:

Constitutional Court:

- no. 2002-20-0103, 23.04.2003; *Bulletin* 2003/1 [LAT-2003-1-005];
- no. 2004-14-01, 06.12.2004; *Bulletin* 2004/3 [LAT-2004-3-009];
- no. 2006-31-01, 14.06.2007;
- no. 2007-08-01, 01.11.2007;
- no. 2008-02-01, 21.10.2008; *Bulletin* 2008/3 [LAT-2008-3-004];
- no. 2010-71-01, 19.10.2011;
- no. 2011-01-01, 25.10.2011; *Bulletin* 2012/1 [LAT-2012-1-001];
- no. 2011-04-01, 22.11.2011;
- no. 2012-22-0103, 27.06.2013.

Languages:

Latvian, English (translation by the Court).



Liechtenstein

State Council

Important decisions

Identification: LIE-2014-2-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 02.07.2013 / **e)** StGH 2013/011 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**

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

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

3.16 General Principles – **Proportionality.**

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

Keywords of the alphabetical index:

Mutual assistance, international, special trust / Good faith, protection / Trust, legitimate, protection / Retroactivity, laws and other normative acts.

Headnotes:

To class the law governing mutual administrative assistance as pure, objective procedural law is indefensible. Not everything in procedural law is similar and equivalent. Administrative assistance in tax matters is associated with weighty questions of interpretation. It not only concerns the administrative procedure of information exchange, but directly or indirectly impinges on the legal status of individuals. If a request for mutual administrative assistance, at least with reference to certain parts of the request, results in genuine retroactivity where completed operations and acts are concerned, it must be proportionate. Ten-year retroactivity is manifestly incompatible with the requirement of restraint as to duration. However, since procedural law is involved in matters of administrative assistance, more flexible handling of retroactivity is expedient.

Prohibition of retroactivity is a corollary to the requirement of predictability of law and has a close relationship with the principle of good faith. In that regard, where the appeal is concerned it appears

reasonable for retroactivity to go back to the time when a change in the legal situation was announced by the public authorities, or to the time when it was foreseeable for the persons concerned and when they could react accordingly.

Summary:

I. The US Department of Justice (hereinafter, “DOJ”) submitted a request for mutual administrative assistance to the Liechtenstein Tax Authority in May 2012. In a grouped application based on specific patterns of conduct, the DOJ requested the transmission of all the customer files from bank X concerning accounts with American beneficial owners which had existed since 2004 and had year-end balances exceeding \$500 000.

The Tax Authority sought the information from bank X. Three customers concerned unsuccessfully appealed to the Administrative Court against the Tax Authority’s order to execute the mutual assistance. A constitutional appeal was then lodged against the Administrative Court’s judgment on the grounds of violation of confidentiality and privacy under Article 32 of the Constitution and Article 8.1 ECHR and of violation of the prohibition of retroactivity or the fundamental principle of *nulla poena sine lege* under Article 33.2 of the Constitution and Article 7.1 ECHR.

The applicants argued that, on the basis of Article 30a of the Law on mutual administrative assistance with the United States on tax matters, the request for assistance should not have been granted, as it involved a retroactive change in the material conditions of criminal liability. They saw this as a violation of the prohibition of retroactivity or the fundamental principle of *nulla poena sine lege* under Article 33.2 of the Constitution and Article 7.1 ECHR. They also argued that it was not a grouped application but a classic fishing expedition.

II. In the context of a legislative review, the State Council found that Article 30a of the law on mutual administrative assistance with the United States in tax matters was unconstitutional in that it referred to tax years earlier than 1 January 2009.

Being unable to invoke the prohibition of retroactivity on the criminal law principle of conformity to law, this being inapplicable in the law governing mutual administrative assistance, it relied on the principle of good faith closely associated with the prohibition of retroactivity, backed by the idea that the law governing mutual administrative assistance in tax matters substantively affects the legal status of individuals.

Moreover, on all the available evidence, it considered fulfilled the high demands of the degree of precision stipulated in the case of grouped applications.

Languages:

German.



Identification: LIE-2014-2-003

a) Liechtenstein / **b)** State Council / **c)** / **d)** 28.02.2014 / **e)** StGH 2013/183 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.3.2 General Principles – Democracy – **Direct democracy.**

3.11 General Principles – **Vested and/or acquired rights.**

3.16 General Principles – **Proportionality.**

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

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:

Expectation, legitimate, pension / Good faith, assurance given by the authority / Trust, legitimate, protection / Legislative initiative, popular, annulment / Social justice, principle / Pension, trust, protection / Pension, determination, equality / Pension, reduction / Pension, public sector, retiree / Pension, system, reform / Pension, state / Pension, recalculation, legitimate expectation / Social security, system.

Headnotes:

Parliament's annulment of a popular legislative initiative in accordance with the Constitution and state treaties violates the political rights secured in Articles 29 and 64 of the Constitution.

Programmed withdrawal of the cost of living allowance does not constitute a breach of the constitutional principle of legitimate trust with regard to the weighing of interests as between the interest of pensioners affected by the pension reduction and the public interest in speedy rationalisation and preservation of pension insurance.

Lowering of future benefits is also reconcilable with the protection of legitimate trust. In principle there are no constitutional rights which preclude transition from the system of primacy of benefits to that of primacy of contributions.

The overall concept of rationalisation and preservation measures, proposed in the draft popular initiative, is also compatible with the principle of equal treatment.

Summary:

I. In the context of a popular initiative on rationalisation of the state welfare system, Parliament declared the initiative void for inconsistency with the Constitution and state treaties. The initiative relied heavily on a government bill but, through several measures, envisaged continuous reduction of the employer's burden to the detriment of the employed and pensioned beneficiaries. The annulment was founded ultimately on two expert testimonies which considered unconstitutional in particular the withdrawal of the cost of living allowance and the reduction of future benefits.

The legislative initiative envisaged, besides reduction of future benefits, withdrawal of the cost of living allowance granted on 1 January 2009 at the rate of 3.4% on current pensions. This allowance does not constitute an established right as it has not been financed by contributions of the insured or of the employers, and no assurance has been given either by the legislator or on an individual basis to the effect that the promised benefits would be maintained even should the legislation be amended. The mere mention in a pension notice of the pension's actual or purely potential amount, without an explicit guarantee of the pension's later irrevocability, is not in principle apt to serve as foundation for an established right.

II. From the principle of good faith there follows the need to make use of appropriate transitional regulations where an unforeseeable legal modification severely affects the citizen regarding the arrangements which he has made on the basis of the earlier legal rule and he has no possibility of adapting to the new legal position. Ample possibilities of organisation in the social insurance sphere must be preserved for the legislator, since the financing of social security systems essentially depends on economic and social developments whose predictability is by nature linked with uncertainties. Given that since at least 2009 the significant deficit of the state pension fund was common knowledge, and that the cost of living allowances were granted in spite of a constant large deficit, the pensioners could not absolutely expect that the improvements made to the benefits would endure in all circumstances. In view of this and of the moderate level of the reduction, it appears unlikely that corresponding arrangements were made. As there is moreover a major public interest in the speedy financial consolidation and sustainable financing of the state pension fund, the programmed withdrawal of the cost of living allowance does not constitute a breach of the constitutional principle of legitimate trust in regard to the weighing of interests as between the interest of pensioners affected by the pension reduction and the public interest in speedy rationalisation and preservation of pension insurance.

Likewise, the reduction foreseen in the initiative, concerning the future entitlements not already availing as established rights, does not constitute encroachment on established rights. Future entitlements are considered established, and avail as established rights, only when they no longer depend on anything but the passage of time or the occurrence of an event, and not on the amount of future contributions.

Lowering of future benefits under the initiative is also reconcilable with protection of legitimate trust. In principle there are no constitutional rights inimical to transition from the system of primacy of benefits to that of primacy of contributions. This change of system regularly attends reduction of pension entitlements. This is particularly so where a reform to the system is, as in this instance, necessary to meet a need for structural financing. However, no schematic answer can be given to the question whether the extent of the reductions of entitlements brought about by the change of system is admissible in the light of protection of legitimate trust. To examine this question in the instant case, consideration must be given to the size of the pension insurance deficit and the urgency of taking rationalisation measures. Likewise, reduction of entitlements cannot be measured by the sole

yardstick of reduction in the future pension insurance benefits. Also essential is the level of the contributions which insured employees will have to pay in future. The individual interest in maintaining the entitlements, hitherto seen in prospect, must be rated more highly the closer the insured person is to retirement. A further aspect to consider is the impact of legislative intervention in the situation of legitimate trust. As is common knowledge, since early 2009 at least, pension insurance has been in a difficult financial situation; nor can the fact that rationalisation and preservation measures must be initiated come as a complete surprise to the insured employees. The deficit of some 30% of the providence commitments, over CHF 300 million, has to be regarded as considerable. There is a major public interest in the speedy rationalisation of pension insurance. Reductions in entitlements of over 10% are not inadmissible either in general terms.

The initiative avoids huge deficits and loss of confidence, among insured persons nearing retirement, in the statutory calculation bases hitherto in force. With regard to the less favourable rules for the younger insured persons, it should be recalled that their interests must be deemed less preponderant. The provisional regulations proposed in the initiative meet the minimum constitutional requirements.

The overall concept of rationalisation and preservation measures proposed in the draft popular initiative is also compatible with the principle of equal treatment. Proportionality is upheld by the rationalisation and preservation measures envisaged in the initiative if provision is made, as it is, for suitable and fair apportionment of the burdens not amounting to excessive stringency and if these means are commensurate with the deficit and part of a balanced overall concept. Owing to interdependence in the apportionment of the burdens, the expediency of a measure cannot be assessed in isolation. The initiative relieves the burden of the employer or the public authorities, as the case may be, to the detriment of insured employees and pensioners. But according to the initiative, the employer still contributes an essential share of the costs of rationalisation. The apportionment of the burdens is the outcome of the complex weighing of the competing interests, in which the legislator has a considerable margin of discretion.

The same rule applies to legislative initiatives as to review of the constitutionality of laws, for which great restraint is appropriate as regards principles of democracy and separation of powers. The instrument of legislative initiative must in fact also afford citizens the possibility of demanding legislation which departs from the rules already laid down by Parliament. The movers of the initiative are entitled to the same

margin of legislative discretion as Parliament. As long as the legislative initiative is in keeping with the higher-ranking constitutional right, this margin of legislative discretion may also be appropriately used in a different way than the Government and Parliament themselves have done.

The State Council allowed the appeal brought against the annulment of the popular initiative.

For the remainder, the popular initiative, thus authorised, was narrowly rejected by the popular vote.

Languages:

German.



Lithuania Constitutional Court

Important decisions

Identification: LTU-2014-2-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 14.04.2014 / **e)** 22/2011-28/2011 / **f)** On the allocation of payments for employees of insolvent enterprises from the Guarantee Fund / **g)** TAR (Register of Legal Acts), 4467, 15.04.2014 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Employees / Contract, employment / Enterprise, insolvent / Work remuneration / Payments, allocation / Fake employment relations / Proportionality, measures / Guaranty fund.

Headnotes:

The principle of proportionality implies the requirement that the legislator should establish the legal regulation that would create preconditions for the sufficient individualisation of the limitations on the rights and freedoms of persons.

Summary:

I. In this constitutional justice case, which had been commenced subsequent to the petitions of the Court, the Constitutional Court investigated the constitutionality of legal provision establishing that the employees who concluded an employment contract with an insolvent enterprise starting from the day that the creditor (creditors) notified the enterprise about their intention to apply to a court for the institution of bankruptcy proceedings, does not receive any payments from the Guaranty fund. Usually the funds from the Guarantee Fund are allocated for the payments related to employment relations, where those

payments are paid for the outstanding claims that an employer (enterprise), due to their insolvency, are unable to pay to their employees. The payments from this fund are allocated to any employee who concluded an employment contract prior to the notification about the intention to start the bankruptcy proceedings.

II. The Constitutional Court found this legal provision in contradiction with the principle of proportionality. It has been reminded in the that the constitutional principle of proportionality means that the measures provided for in a law must be in line with the legitimate objectives that are important to society, that these measures must be necessary in order to reach the said objectives, and that these measures must not restrain the rights and freedoms of the person clearly more than necessary in order to reach the said objectives.

The Court did not held the validity of the presumption that in all cases when an employee concluded an employment contract with an insolvent enterprise after the notification about the intention of the applying to a court for bankruptcy proceedings, fake employment relations would be created for the sole purpose of the receiving payments from the funds of the Guarantee Fund. The information about the insolvency of the enterprise and about the fact that it had received a notification about the intention to apply to a court for the bankruptcy proceedings against it, was not public and persons who intended to conclude employment contracts with such an enterprise could be unaware of such information. It is not prohibited by any law for an insolvent enterprise to conclude employment contracts with new employees prior to the day of the passing of a court's ruling to institute bankruptcy proceedings against the enterprise or prior to the day of the decision of the creditors' meeting to carry out the bankruptcy procedures by extrajudicial means.

Thus it was held that the challenged provision had limited the right of a person, who was employed in good faith, to receive remuneration and other employment-related payments from the funds of the Guarantee Fund more than necessary in order to reach the objective – to prevent the right arising from fake employment relations to demand that the said payments be allocated.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2014-2-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 08.05.2014 / **e)** 20/2011-14/2013-15/2013-16/2013 / **f)** On the coefficients of the remuneration of judges and the Labour Code / **g)** TAR (Register of Legal Acts), 5188, 08.05.2014 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.
5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.
5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.

Keywords of the alphabetical index:

Judge remuneration / Period, transitional / Remuneration, reduction, / Independence, judge, court / Guarantee, material / Fair pay.

Headnotes:

The particular exceptional circumstances (as it was established in this case), especially the fact that the legal regulation of the remuneration of judges, which had been adopted by government, and applied before the adoption of the law, was temporary, inconsistent, contradictory, and characterised the transitional period of the formation of the system of courts, may lead to the a certain insubstantial reduction of the remuneration and other social (material) guarantees of judges.

Summary:

I. In this case, the Constitutional Court, subsequent to the petitions of the courts, investigated whether the legal provisions establishing the coefficients of the positional salaries of the justices of the Supreme Court, the judges of the Supreme Administrative Court of Lithuania and regional administrative courts, was not in conflict with Constitution. The petitioners asserted that this legal regulation had established smaller remuneration of judges of those courts if compared to the remuneration established in 1999 (by average 5.6 % smaller).

Also the question of constitutionality of the legal provision that prescribed that the employee shall receive the judicial award of the amounts of work remuneration and other amounts connected with employment relations due to them for not longer than a 3-year period was raised.

II. The Constitutional Court reminded that the independence of judges and courts is one of the essential principles of a democratic state under the rule of law and a necessary condition for the protection of human rights and freedoms; this is not a privilege, but one of the most important duties of judges and courts, stemming from the right of every person who believes that his rights or freedoms have been violated to have an impartial arbiter of the dispute who could, under the Constitution and laws, settle the legal dispute in substance. The independence of judges is ensured, among others means, by means of the consolidation of the self-governance of the judiciary, and its financial and material technical provision, as well as by means of the establishing of the social (material) guarantees for judges.

The Constitution prohibits the reduction of the remuneration and other social (material) guarantees of judges; any attempts to reduce the remuneration of the judge or their other social (material) guarantees, or the limitation upon the financing of courts should be treated as an encroachment upon the independence of judges and courts. However, a certain insubstantial reduction of the remuneration and other social (material) guarantees of judges, where such reduction is related to the unclarity, instability, and contradictoriness of the former legal regulation, could be justified by the exceptional circumstances of the transitional period of the formation of the system of courts (*inter alia*, the system of the remuneration of judges) of the Republic of Lithuania in view of the fact that the restoration of its independence had been a recent event at that time.

In this case the Constitutional Court took into consideration such exceptional circumstances: first, the government-established legal regulation, with which the petitioners compared the impugned legal regulation, was valid for a short period (2,5 years) and became no longer valid before eight years from the establishment of the impugned legal regulation; second, the increase of the remuneration (coefficients) of judges indicated by petitioners was later reduced because of the complicated economic and financial situation in 2000; third, according to the challenged legal regulation the minimum sizes of the remuneration of justices of the Supreme Court, the Supreme Administrative Court and regional administrative courts are by average 25.8 % bigger

than the minimum sizes of the remuneration of particular judges calculated during the period after the crises; fourth, the legal regulation indicated by petitioners (to which is compared the actual one) had not been established by law, and it had been temporary, inconsistent, and contradictory; the said legal regulation should be regarded as a transitional-period temporary factual legal regulation by which the system of courts of the Republic of Lithuania, whose independence had been restored, was formed. The requirement, stemming from the Constitution, for establishing the remuneration of judges by law and for differentiating the sizes of the remuneration according to clear criteria that are not connected with the consideration of cases at law, was implemented only by the Law on the Remuneration of Judges, i.e., upon the entry into force of this law, the transitional period of the formation of the system of courts of the Republic of Lithuania, whose independence had been restored, was over.

Concerning the second question examined in this case, the Constitutional Court said that such legal regulation had created the preconditions making it impossible to judicially award the amounts of the entire work remuneration and other amounts connected with employment relations due to a person, and the preconditions for violating persons' constitutional right of ownership together with the constitutional right to receive fair pay for work; the right of a court to administer justice and secure the implementation of the constitutional human rights was thus correspondingly limited; alongside, preconditions had been created for courts to adopt decisions that by their content would be unjust. In view of this fact, the challenged legal regulation was recognised in conflict with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2014-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.06.2014 / **e)** 3/2014 / **f)** On the actions of *Seimas* member Neringa Venckienė / **g)** TAR (Register of Legal Acts), 7164, 05.06.2014 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

1.3.4.7.4 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Impeachment**.

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

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

Keywords of the alphabetical index:

Impeachment proceedings / Duties, parliamentarian / Attendance, sittings / Reason, justified / Procedure, legislative / Activity, continuous / Nation, representative / Oath, breach.

Headnotes:

The drawing up of draft laws and other draft acts as well as their registration at the Secretariat of the parliament sittings is only one (the first one) of the stages of the legislative procedure. The mere fact that a parliamentarian implements their right to draw up draft laws and other draft acts does not mean that they duly discharge the duties of a representative of the Nation. Episodic attendance when part of the constitutional powers of the parliament to pass laws is implemented may not be judged to be a continuous activity of a parliamentarian and a proper implementation of the constitutional obligation of a member of the *Seimas* to represent the Nation, *inter alia*, the discharge of the duty to attend the sittings of the *Seimas* and of its structural subunits.

Summary:

I. The Parliament (*Seimas*) requested the Constitutional Court to draw a conclusion in the impeachment case whether the actions of one parliamentarian – failure to attend, without a justifiable reason, the 64 plenary sittings of the *Seimas* as well as the 25 sittings of the *Seimas* Committee on Legal Affairs, are not in conflict with the Constitution.

II. The Constitutional Court examined all the facts of the case and draw the conclusion that such actions are in conflict with the Constitution and that by these actions the parliamentarian has breached the oath and grossly violated the Constitution.

The Constitution unconditionally requires that a member of the *Seimas* take an oath to be faithful only to the State of Lithuania that they pledge to respect and execute its Constitution and laws. By taking the oath, a member of the *Seimas* assumes an unconditional obligation to observe all constitutional values, to conscientiously serve their Homeland,

democracy, and the welfare of the people of Lithuania.

Parliamentarians not only acquire respective rights, but they must also discharge certain duties stemming from the Constitution and the laws. Under the Constitution, a member of the *Seimas* is a professional politician, i.e. such a representative of the Nation whose work at the *Seimas* is their professional activity; the continuity of the activity of the *Seimas* also implies the continuity of the activity of a member of the *Seimas*, as a representative of the Nation. The constitutional status of a member of the *Seimas*, as a representative of the Nation, implies the constitutional obligation of a member of the *Seimas* to represent the Nation, thus, also their duty to attend the sittings of the *Seimas*. The constitutional duty of a parliamentarian to participate in the work of the *Seimas* includes also their duty to participate in the work of structural subunits of the *Seimas*, a member of which they are.

Situations may arise where, due to extremely important personal and other justifiable reasons, a member of the *Seimas* cannot attend, for a certain period of time, the sittings of the *Seimas*, and/or cannot discharge, for a certain period of time, other duties of a member of the *Seimas*; in the aforesaid cases, such a member of the *Seimas* must apply to the special institution for a permission not to attend, for the said period of time, the sittings and not to discharge his other duties; if the reasons specified by a member of the *Seimas* are especially important and justifiable, the aforementioned permission is granted to them; if such a permission is not granted, the failure of a member of the *Seimas* to attend the sittings or failure to discharge other duties would be unjustifiable.

The Court held that the named parliamentarian who failed to attend, without a justifiable reason, the 64 plenary sittings, discharged her duties dishonestly, acted by raising her personal interests above the interests of the Nation and the state, knowingly failed to discharge his duties, thereby showing disrespect for the Constitution and laws, thus, he did not act in the way that the oath taken of a member of the *Seimas* obliges. By these actions, she discredited the authority of the *Seimas* as the representation of the Nation. Reasons such as departure from the Republic of Lithuania, the fact that a person is a suspect in criminal proceedings and that their search is announced, as well as that they may be hiding from a pre-trial investigation in order to avoid criminal liability, cannot in themselves be important and justifiable reasons for failure to attend the sittings of the *Seimas* and of a committee of the *Seimas*, as well as for failure to notify of one's inability to attend the

said sittings. The mere fact that draft laws and other draft acts of the *Seimas* indicating that named *Seimas* member proposes them together with other members of the *Seimas* have been registered at the Secretariat of the *Seimas* Sittings does not mean that, by failing to attend, without a justifiable reason, the plenary sittings of the *Seimas* and of the sittings of the *Seimas* Committee on Legal Affairs, a member of which he is, he has duly discharged the duties of a member of the *Seimas*.

Languages:

Lithuanian, English (translation by the Court).



Luxembourg Constitutional Court

Important decisions

Identification: LUX-2014-2-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 07.06.2013 / **e)** 00098 / **f)** / **g)** *Mémorial* (Official Gazette), A, no. 110, 28.06.2013 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Parental authority, restriction / Parental authority, exercise / Parental authority, joint / Exercise of rights, statutory determination, manner / State interference, necessity / Family life, right / Privacy, invasion.

Headnotes:

A decision to place a minor outside the home of his or her parents, guardian or custodian, which results in the automatic transfer of the exercise of virtually all attributes of parental authority to the person or institution receiving the minor, does not constitute undue interference by a public authority in the exercise of the right to respect for private and family life.

Summary:

The Vice-President of the Luxembourg District Court, sitting as a judge dealing with urgent applications, in a case brought on the basis of Article 374 of the Civil Code, lodged by an underage child's grandparents against the mother with a view to being granted a right of access to their granddaughter, referred the following preliminary questions to the Constitutional Court, so as to determine whether the action to be brought against the party holding parental authority

had been validly lodged against the mother, whereas that authority had been vested in a foster home following a judgment by the Youth Court:

1. Is Article 11 of the amended Youth Protection Act of 10 August 1992 consistent with the principle of protection of the rights of the human person and the family, as laid down in Article 11.1 of the Constitution, in so far as, in the event of placement of a minor outside the home of his or her parents, guardians or custodians, it results in an automatic transfer of full parental authority to the person or institution receiving the minor, subject to visitation and correspondence rights, without it being possible for the judicial authorities to modulate this transfer according to the specific circumstances of the case, apart from imposing an additional restriction on the visitation and correspondence rights?

2. Is Article 11 of the amended Youth Protection Act of 10 August 1992 consistent with the principle of the protection of private life, as laid down in Article 11.3 of the Constitution, in so far as, in the event of placement of a minor outside the home of his or her parents, guardians or custodians, it results in an automatic transfer of full parental authority to the person or institution receiving the minor, subject to visitation and correspondence rights, without it being possible for the judicial authorities to modulate this transfer according to the specific circumstances of the case, apart from imposing an additional restriction on the visitation and correspondence rights?

Paragraphs 1 and 3 of Article 11 of the Constitution provide:

1. "The State guarantees the natural rights of the human person and of the family."

3. "The State guarantees the protection of private life, save for exceptions established by law."

Article 11 of the amended Youth Protection Act of 10 August 1992 provides "The parents, guardians or other persons having custody of a minor subject to educational assistance arrangements or maintained in his or her home environment on one or more of the conditions set out in Article 1.3 shall retain parental authority in respect of the minor and exercise all the attributes thereof which are not irreconcilable with the measure's application.

If the minor is placed outside the home of the parents, guardians or custodians, they shall solely retain visitation and correspondence rights. The Youth Court or a judge thereof shall determine the arrangements and may, if the child's interests so

require, decide that the exercise of both or one of these rights shall be suspended.

Regarding the minor's person, all other attributes of parental authority shall be transferred to the person or establishment entrusted with the minor, apart from the right to consent to the minor's adoption or marriage.

Regarding the minor's property, the Guardianship Court may appoint a public administrator for any minor subject to a placement measure decided by the Youth Court. ..."

The Court considered that everyone, including minors, is entitled to respect for their private and family life;

However, a public authority could interfere in the exercise of this right provided that there was a pressing social need for the interference and it was proportionate to the legitimate aim being pursued;

Such interference was also endorsed by Article 8.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950;

The provision of Article 11 of the Act of 10 August 1992, which solely concerns the exercise of parental authority not parental rights themselves, seeks to respect an underage child's best interests, as safeguarded by the international conventions ratified by the Grand Duchy of Luxembourg;

Parental authority is established to protect children's safety, health and morality;

As a general rule it is in a child's interest that parental authority should be exercised jointly by the parents;

When a court has, in accordance with law, taken a decision to place a minor outside the parents' home, which as such constitutes an interference with the parents' and the minor's right to respect for their private and family life, the automatic transfer of the exercise of virtually all attributes of parental authority accompanying the placement measure merely constitutes a necessary consequence thereof, corresponding to the child's psychological and physical interests;

In this case there can be no undue interference by the authorities with the right to protection of the human person and of family life, nor with the right to protection of privacy;

The fact that the law makes no provision for the judicial authorities to modulate this transfer according to the specific circumstances of the case is irrelevant in this respect;

It follows that, in so far as, in the event of placement of a minor outside the home of his or her parents, guardians or custodians, it results in an automatic transfer of full parental authority to the person or institution receiving the minor, Article 11 of the amended Youth Protection Act of 10 August 1992 breaches neither Article 11.1 nor Article 11.3 of the Constitution.

Languages:

French.



Identification: LUX-2014-2-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 07.06.2013 / **e)** 00099 / **f)** / **g)** *Mémorial* (Official Gazette), A, no. 110, 28.06.2013 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Parental authority, exercise / Parental authority, restriction / Child born out of wedlock / Equality between men and women.

Headnotes:

A legal provision giving the mother alone parental authority in respect of a child born out of wedlock and acknowledged by both parents breaches the principle of equality between men and women.

Summary:

The Vice-President of the Luxembourg District Court, sitting as a judge dealing with urgent applications, in

a case brought on the basis of Article 374 of the Civil Code, lodged by an underage child's paternal grandmother against the child's mother with a view to being granted a right of access to her granddaughter, referred the following preliminary question to the Constitutional Court of his own motion, so as to determine whether the action to be brought against the party holding parental authority had been validly lodged solely against the child's mother:

“Is the second sentence of Article 380.1 of the Civil Code consistent with the principle of equality between men and women, as laid down in Article 11.2 of the Constitution, in so far as it establishes the principle that parental authority, entailing both rights and duties, over children born out of wedlock who have been acknowledged by both parents shall be exercised by the mother individually and as of right and in so far as it thus establishes a difference between the situation of the mother of a child born out of wedlock and that of the father?”

Article 380.1 of the Civil Code provides that parental authority in respect of a child born out of wedlock shall be exercised by either the father or the mother who has voluntarily acknowledged the child, if he or she has been acknowledged by only one parent. If both parents have acknowledged the child, parental authority is to be exercised by the mother;

Article 11.2 of the Constitution provides that women and men are equal in rights and duties;

The principle of equality between women and men is a specific application of the principle of equality before the law enshrined in Article 10bis.1 of the Constitution;

The Court noted that, in a judgment of 26 March 1999, the Constitutional Court had held that Article 380.1 of the Civil Code, in so far as it gave parental authority in respect of a child born out of wedlock and acknowledged by both parents exclusively to the mother, was not in keeping with Article 11.2 of the Constitution, which, as then worded, established the principle of Luxembourgers' equality before the law;

It considered that this conclusion was still relevant today for two reasons: firstly, the position of the principle of equality between men and women in relation to the principle of equality before the law and, secondly, the fact that Article 380.1 of the Civil Code had not been brought into conformity with the Constitution by parliament following the above mentioned judgment of 26 March 1999;

It followed that Article 380.1 of the Civil Code, in so far as it gave parental authority in respect of a child born out of wedlock and acknowledged by both parents exclusively to the mother, was not in keeping with Article 11.2 of the Constitution.

Languages:

French.



Identification: LUX-2014-2-003

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 13.12.2013 / **e)** 00105 / **f)** / **g)** *Mémorial* (Official Gazette), A, no. 229, 27.12.2013 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Adoption, statutory requirement / Adoption, child, conditions.

Headnotes:

A legal provision which, in the case of simple adoption, requires children over the age of fifteen to give their personal consent to being adopted, implicitly basing this requirement on their capacity of discernment and necessarily excluding from the adoption procedure any person over the age of fifteen who is unable to give their reasoned consent thereto on account of a serious mental disability, breaches Article 10bis.1 of the Constitution (principle of equality).

Summary:

The Luxembourg District Court, ruling on the simple adoption of a person over the age of fifteen who had been placed under guardianship and suffered from a severe mental disability, referred the following preliminary question to the Constitutional Court:

“Is Article 356 of the Civil Code, in so far as it excludes a group of people from the benefits of the institution of adoption - a protective institution - on account of their severely diminished mental faculties, consistent with the constitutional standard of citizens' equality before the law, as laid down in Article 10bis.1 of the Constitution, in the light of the differential treatment it introduces between adults under guardianship whose mental faculties are severely diminished and all other adults and minors over the age of fifteen, and with Article 11.1 whereby the State guarantees the natural rights of the human person and of the family?”;

Article 356 of the Civil Code provides “If they are over the age of fifteen, adoptees shall personally consent to their adoption”;

Article 10bis.1 of the Constitution provides “Luxembourgers are equal before the law”;

Under Article 11.1 of the Constitution “The State guarantees the natural rights of the human person and of the family”;

Article 10bis.1 of the Constitution:

By requiring that an adoptee over the age of fifteen shall consent personally to being adopted, Article 356 of the Civil Code implicitly bases this requirement on the capacity of discernment of the person concerned and necessarily excludes from the adoption procedure any person over the age of fifteen who is unable to give their reasoned consent thereto on account of a serious mental disability, thereby establishing two different legal regimes;

As a result the adoption of a minor over fifteen or adult placed under guardianship, even where it is unquestionably in their interest, is impossible on account of the difference in treatment introduced by Article 356 du Civil Code;

The consequences of this difference in treatment, although deriving from objective disparities, are not rationally justified and are not proportionate to the aim being pursued;

While protection through guardianship is aimed at safeguarding the interests of those subject to it, precluding the adoption of the person being protected is counter to their interests;

In the case of minors, consent to adoption is given either by the parent(s) or by the family council or, in the event of a waiver of this right, by a social welfare service or an adoption body;

Article 506 of the Civil Code governs the marriage of adults under guardianship; the law makes no provision to remedy the person under guardianship's failure or inability to consent through either their representation or an assistance measure;

By requiring that an adoptee over the age of fifteen shall personally consent to being adopted, but making no provision, when personal consent is impossible, for the courts to waive this requirement and take an adoption decision in accordance with the adoptee's interests, Article 356 of the Civil Code breaches Article 10bis.1 of the Constitution;

In view of the comparable situations under consideration, under the principle of equality a court must be permitted to disregard the requirement of personal consent and take an adoption decision in accordance with the adoptee's interests, as in the case of an adoptee under the age of fifteen, in keeping with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms; it is accordingly necessary to bring the provisions governing the adoption of persons incapable of giving valid consent into line with Articles 351 to 355 of the Civil Code (adoption of children under the age of fifteen, adoption of married persons) under the supervision of the Guardianship Court;

Article 11.1 of the Constitution:

Adoption has its basis in positive law, not natural law; since is not a natural right, this institution cannot be in breach of Article 11.1 of the Constitution.

Languages:

French.



Mexico Supreme Court

Important decisions

Identification: MEX-2014-2-002

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** Plenary / **d)** 20.06.2013 / **e)** Unconstitutionality Action AI 29/2011 / **f)** Setting aside of a law preventing the use of Twitter because it restricts freedom of expression and information / **g)** Registration no. 24667, Tenth Period, *Semanario Judicial de la Federación y su Gaceta*, Tome 1, XXVI, October 2013, p. 15 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
4.8.6.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Deliberative assembly**.
5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.

Keywords of the alphabetical index:

Freedom of expression, exception / Expression, political, freedom / Terrorism, fight / Internet, information, false, dissemination, prohibition.

Headnotes:

Although the legislative assembly of a State of the Federation may restrict public freedoms, such restrictions must remain reasonable. In other words, the State's intervention in the private sphere must be kept to a minimum, particularly with regard to rights of access to freedom of expression. When several solutions are possible, the legislator must choose the one which restricts freedoms the least in accordance with the principles of necessity and proportionality.

Summary:

I. In August 2011, two young activists from upper secondary schools in Veracruz (on the Gulf of Mexico) were placed in pre-trial detention (pending investigations into offences of terrorism). Maria Bravo and Gilberto Martinez had told their fellow students on Twitter that the police had used explosives to control the public protests which had begun some days previously in the region. The use of explosives was never confirmed but the intensity of the protests among students most certainly increased as a result of these allegations.

Immediately, Javier Duarte, the Governor of Veracruz, initiated the adoption of an amendment to the Criminal Code of his State to punish certain acts related to the disruption of public order. The amendment was approved on 20 September and was limited to the dissemination of false allegations. The amendment made it a criminal offence to transmit messages which “falsely announce the presence of explosive or other devices”, in the words of the legal text, even by error or owing to a misperception of the facts. On 17 October the National Human Rights Commission (an independent administrative body operating at federal level) referred the case to the Supreme Court by means of an application for an abstract review of constitutionality, alleging that the measure taken by the State of Veracruz was not constitutional.

The Commission considered that the use of the expression “explosive or other devices” in the law was ambiguous and that this ambiguity was incompatible with the principles of legal certainty enshrined in Article 14 of the Constitution.

II. On 21 February 2013, the First Division of the Supreme Court decided that the case should be heard by the full court. Investigation of the case was assigned to Judge Pardo Rebolledo. The complaints of unconstitutionality alleged a violation of freedom of expression, which is guaranteed by Article 6 of the Constitution and by international legal instruments.

More specifically, the impugned measure made it a criminal offence to disseminate false information through any medium but did not require any proof of intention to harm by the person issuing the message. The law did not require there to be an intention to transmit false information, meaning that the measure placed excessive limits on the right to freedom of expression enshrined in Article 7 of the Constitution. Furthermore, the measure took no account of the fact that the message may have been transmitted by error or owing to a misperception of the facts. Punishing the publication of information could constitute a deterrent, restricting freedom of expression.

The argument put forward by the National Human Rights Commission was considered well-founded by the Supreme Court, which found the impugned article to be unconstitutional by a majority of 10 votes to one.

III. The effects of the decision had to apply retroactively. Consequently, the decision applied to the actions of individuals who had found themselves in the scenario described above since the entry into force of the unconstitutional amendment.

Languages:

Spanish.



Moldova

Constitutional Court

Important decisions

Identification: MDA-2014-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 22.05.2014 / **e)** 13 / **f)** Constitutional review of Section 72 of Article IX of Law no. 324 of 23 December 2013 on amending and supplementing certain legislative acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Personal data, information of subject / Personal identification number / Profession, practice.

Headnotes:

Legislation introducing certain changes to the Tax Code meant that those exercising liberal professions were no longer obliged to have a fiscal code distinct from their personal identification code. The personal identification code normally fell into the category of personal data but the new Law resulted in it falling within the public domain; it was potentially visible to anybody with whom the persons concerned transacted business.

Summary:

On 22 May 2014 the Constitutional Court delivered judgment on the constitutionality of Section 72 of Article IX of Law no. 324 of 23 December 2013 on amending and supplementing certain legislative acts (Complaint no. 12a/2014).

The case originated from a complaint submitted to the Constitutional Court on 21 February 2014 and supplemented on 16 April 2014 by the MP, Mr Mihai Godea, in which the applicant pointed out that, as a

result of amendments made to the Tax Code, the state had assimilated the citizen's personal identification code with the fiscal code given for carrying out a liberal profession, thus establishing interference in the private life of the person, which contravenes Article 28 of the Constitution and Article 8 ECHR.

He contended that an individual's state personal identification number (hereinafter, "IDNP") falls into the category of personal data and is protected by the state, but has become public due to the amendments.

The President of the Republic of Moldova was of the view that using IDNP on tax receipts issued for confirming payment of certain fees for services provided by persons carrying out a liberal profession did not represent a risk within the meaning of the Law on personal data protection.

Parliament was of the view that the rules under scrutiny were not out of proportion to the provisions of the legislation in force, which ensures a balance between the necessary legal regulations for respecting human rights and personal interests, as guaranteed by the Constitution.

The Government observed that excessive interference with the private life of individuals was not justified by overlapping the IDNP with the fiscal code.

The Court noted that the need to ensure protection of personal data, in order to respect and protect the intimate, family and private life of the person, is enshrined in the national and international legal framework.

Protection of personal data means respect of private life and a guarantee of an acceptable level of security.

The Court held that the state is obliged, under the requirements of domestic and international law, to ensure that personal data is properly protected and private life is not interfered with. By making the amendments under challenge, the state has paved the way for public disclosure of the state identification number of an individual exercising a liberal profession, without their consent. The personal identification codes of notaries, lawyers and bailiffs, which are also used as fiscal codes, are available to anybody they interact with in their normal line of business.

With their personal information so readily available, such persons are very vulnerable to interference in their private lives. Failure to comply with the requirements imposed by national and international

law on the processing of personal data, which requires the person's consent, establishes interference in the private life of the person.

The Court noted that the right to informational self-determination guarantees the freedom of every person to decide on the disclosure and use of personal data. Registration and use of this data should generally be authorised by the person concerned. The Court emphasised that despite measures such as the possibility of using confidential codes, the right to informational self-determination and human dignity was under threat.

It drew attention to the provisions of Article 7 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which states that "appropriate security measures shall be taken for the protection of personal data stored in automated data files [...] against unauthorised access, alteration or dissemination."

The Court stressed at the same time that when the state introduces legislative regulation, it is under both a negative obligation not to interfere unduly in a person's private life, home and correspondence and a positive obligation to ensure effective respect of the values it seeks to protect.

The Court also noted that, given the "sensitivity" of the right to privacy and in order to prevent interference in the exercise of this right, the legislature must provide opportunities and effective remedies.

The Court held that protection of personal information is of fundamental importance for ensuring the right to private life. The regulations under dispute have the effect of allowing access by an unlimited number of people to the state identification number of a person carrying out a liberal activity, without his or her consent. This is an encroachment on the private life of the person, disproportionate to the aim pursued, in breach of Article 28 of the Constitution.

Languages:

Romanian, Russian.



Identification: MDA-2014-2-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 27.05.2014 / **e)** 15 / **f)** Constitutional review of Law no. 61 of 11 April 2014 on amending certain legislative acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.3.1 General Principles – Democracy – **Representative democracy.**
 4.9.9.4 Institutions – Elections and instruments of direct democracy – Voting procedures – **Identity checks on voters.**
 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

Keywords of the alphabetical index:

Passports, ex-Soviet.

Headnotes:

Amendments to the Electoral Code which prohibited voting if citizens produced ex-Soviet type passports as evidence of their identity did not constitute a disproportionate encroachment on the right to vote.

Summary:

On 27 May 2014, the Constitutional Court reviewed the constitutional compliance of Law no. 61 of 11 April 2014 on changes to certain legislative acts, namely the Electoral Code (Complaint no. 29a/2014).

These changes prohibited voting based on the following pieces of identity:

- a. Ex-Soviet type passport of 1974, with specification on the citizenship of the Republic of Moldova, state identification number (IDNP) of individuals and residence registration;
- b. Ex-Soviet type passport of 1974, with no identification number (IDNP) and with specification "unlimited validity"; citizenship of the Republic of Moldova and residence registration – for individuals who gave up the acts of identity of the Republic of Moldova out of religious reasons.

The review was prompted by a complaint lodged with the Constitutional Court on 17 April 2014 by Members of Parliament Artur Reșetnicov and Igor Vreamea. The applicants argued that the disputed law provided for an ungrounded restraint of the fundamental right to vote.

The President of the Republic of Moldova was of the view that the challenged provisions were in line with the constitutional framework; the rationale behind them was state security and the establishment and development of the Republic of Moldova as an independent and sovereign state. The interference was proportionate to the aim pursued; it was not detrimental to the existence of electoral rights, did not impinge on the right of the individual to attend the ballot, did not rule out free expression of will and did not actually deprive anyone of their voting rights; they simply had to exchange their ex-Soviet passports.

Parliament stated that the exchanging of ex-Soviet type passports formed part of state policy ensuring that citizens had pieces of identity which fell within the National Passport System. It would be unjust, twenty two years after independence and in today's information era, if documents continued to be used from a non-existent state.

The Government observed that the state, through its legislative authority, is entitled to establish, under Articles 66.a and 72.2 of the Constitution, regulations and conditions with regard to the status of a citizen. These particular legislative amendments were not aimed at striking out or obstructing the exercise of the constitutionally protected right to vote; rather, they strengthened the legal institution of the obligations each citizen has towards the rule of law state. The state in fact encourages the exercise of this right by granting facilities when citizens apply for the necessary acts of identity.

The Court noted that under Article 2 of the Constitution, a genuine democracy shall be constituted only by the people, by the exercise of national sovereignty in a direct way or through its elected representatives by democratic ballot.

It observed that the right to vote is an essential element of the rule of law and the electoral system. Nonetheless, it is not an absolute right; restrictions may be put in place and Parliament disposes of a large margin of appreciation in regulating it. When the constitutionality of a restriction on the right to vote is under scrutiny, its impact must be considered; the limitation must not diminish the substance of the right or deprive it of efficacy.

The Court found that the provisions of Law no. 61 of 11 April 2014 were formulated in explicit terms and did not generate ambiguous interpretation. They were accessible following their publication in the Official Gazette; any interested person may take cognisance of their content. They were predictable; citizens of the Republic of Moldova holding passports of the ex-Soviet type could comply with social conduct so their rights would not be limited.

It observed that, on 27 August 1991, stemming from the secular aspirations of the people to live in a sovereign country, the Republic of Moldova proclaimed its independence. In line with its status as a sovereign and independent state, it was inadmissible that citizens of this state would hold as identification documents issued by a non-existent state. In the aftermath of USSR dissolution, there was a transition period aimed at replacing ex-Soviet passports. This time span could not be unlimited.

When it enacted legislation prohibiting voting with ex-Soviet type passports, the legislature had, in the Court's view, pursued several legitimate aims, such as strengthening civic spirit, respect for the rule of law and the smooth running and maintenance of democracy.

The Court held that Law no. 61 of 11 April 2014 was aimed at creating a uniform and adequate legal framework for the provision of IDs to all citizens. The Court noted that the Government had undertaken the necessary measures in order to facilitate the exchange of the Soviet type passport. It accordingly held that the interference was a necessary measure within a democratic society, in pursuit of a legitimate aim and in proportion with that aim. It did not detract from the substance of electoral rights or impinge upon the right to vote. Neither did it remove the freedom of expression of the people in electing the legislative body. The provisions only regulated the types of evidence of identity which people had to produce in order to exercise the right to vote.

Languages:

Romanian, Russian.



Identification: MDA-2014-2-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 02.06.2014 / **e)** 18 / **f)** Constitutional review of the provisions of Law no. 109 of 3 May 2013 on amending and supplementing certain legislative acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

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

4.7.4.1.6.3 Institutions – Judicial bodies – Organisation – Members – Status – **Irremovability.**

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

Keywords of the alphabetical index:

Constitutional Court, judge, independence.

Headnotes:

Changes to the law which gave Parliament the opportunity to remove Constitutional Court judges from office and which brought in limitations on the Court's competences and the time frame for examining complaints are not in line with the principle of judicial independence and impartiality.

Summary:

On 2 June 2014 the Constitutional Court delivered judgment on the constitutionality of Law no. 109 of 3 May 2013 on amending and supplementing certain legislative acts (Law on the Constitutional Court and the Constitutional Jurisdiction Code) (Complaint no. 34a/2014).

The case stemmed from a complaint submitted to the Constitutional Court on 20 May 2014 by MPs, Messrs Mihai Ghimpu, Valeriu Munteanu, Gheorghe Brega and Mrs Corina Fusu.

On 3 May 2013, Parliament adopted amendments to the Law on the Constitutional Court and to the Constitutional Jurisdiction Code, which allowed for the removal from office of Constitutional Court judges by Parliament for "loss of confidence". They also imposed limitations on the Court's powers and reduced time spans for examining complaints.

The changes that permitted Parliament to "withdraw" the mandate of constitutional judges represent an act of revenge for the Constitutional Court's Judgment

no. 4 of 22 April 2013 on the constitutionality of the Presidential Decrees no. 534-VII of 8 March 2013 on the dismissal of the Government, in the part concerning the staying in office of the Prime Minister dismissed by a motion of no confidence (on allegations of corruption) of 8 March 2013 until the formation of the new government and no. 584-VII of 10 April 2013 on the nomination of the candidate for the office of Prime Minister.

Pursuant to the above judgment, the acting Prime Minister was removed from office, there being appointed an interim Prime Minister, and was disqualified from nomination as candidate for the office of Prime Minister and for creating a new Government.

The enactment of Law no. 109 sparked a number of prompt reactions from various international organisations.

The applicants pointed out that once it became possible for Constitutional Court judges to be removed from office, they were deprived of irremovability.

Despite the pressure exerted by persons in high office for the adoption of the draft law and efforts made in this regard, Law no. 109 of 3 May 2013 was not promulgated by the President of the Republic of Moldova, Mr Nicolae Timofti, and was returned to the Parliament for re-examination. The President was of the view that the changes brought in by Law no. 109 could be qualified as an attempt to establish political responsibility on the part of judges of the Constitutional Court to the Parliament, in breach of Articles 134 and 137 of the Constitution.

The representative of Parliament at the plenary of the Court noted that the Legal General Division had underlined in its Briefing Note during the process of enactment of the draft law that it included elements of unconstitutionality and could be declared unconstitutional by the High Court.

The Court held that, under Article 137 of the Constitution, judges of the Constitutional Court are irremovable, independent, and only abide by the Constitution. Irremovability is a safeguarding measure for the independence of judges; it means judges cannot be dismissed, demoted, transferred to an equivalent office or advanced in office without their consent.

The Court held that the institution of the constitutional litigation court has the task of examining the activity of Parliament. The submission of the Court judges to the need for "confidence" in Parliament is contrary to the very purpose of a constitutional court.

In this context, the Court noted that the liability of Constitutional Court judges to the Parliament whose activity they examine is inadmissible. Such a possibility generates a risk of pressure from Parliament in certain cases that may appear before the Court, and this fact is likely to create suspicions over the judges' impartiality of the judges, a risk having been created of subordination of the whole purpose of the Court to external influences.

Furthermore, the Court found that the removal from office of Constitutional Court judges by Parliament is a legal nonsense; Parliament does not appoint all six judges of the Constitutional Court. It only appoints two of them; the others are appointed by the Government and the Supreme Council of Magistracy. This method of appointing judges of the Constitutional Court provides the most representative and democratic structure; it expresses the choices of the highest public authorities of all three branches of state power: legislative, executive and judicial.

Although the Court judges take their oaths before the Parliament plenary, the President of the Republic and the Superior Council of Magistracy, Parliament does not intervene as a deciding factor in their appointment. It is simply a solemn ceremonial investiture and a way of marking the start of the judges' term of office.

For the reasons outlined above, the removal from office of Constitutional Court judges by Parliament is an inadmissible interference in the activity of the Constitutional Court. It is a breach of the principle of its independence, and runs counter to the principles of judicial irremovability and independence [Articles 134.2 and 137 of the Constitution]. Consequently, Sections 1 and 2 of Article I of Law no. 109 of 3 May 2013 on amending and supplementing certain legislative acts are unconstitutional.

Regarding the establishment of limitations on the time for examining complaints, the Court noted that the effectiveness of the Court's activity, exercised according to the competence enshrined under Article 135 of the Constitution, is inseparable from respecting certain reasonable terms. The constitutional jurisdiction might otherwise become illusory.

The setting of extremely reduced time limits does affect the independence of the Court and may compromise the full examination of cases. It could also deplete of content the Court's role as guarantor of the Constitution. There are no objective and reasonable arguments to justify a halving of the usual time span for examining complaints or introducing new terms for resolving cases pending before the Court.

The Court held, as a principle, that setting time limits for examination and for procedures of the Constitutional Court, through legislation issued by Parliament, contravenes the principle of independence of the Court.

Languages:

Romanian, Russian.



Identification: MDA-2014-2-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 05.06.2014 / **e)** 21 / **f)** Constitutional review of certain provisions of Articles 177 and 178 of the Electoral Code of the Republic of Moldova / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.3.2 General Principles – Democracy – **Direct democracy.**

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

Keywords of the alphabetical index:

Referendum, local / Local autonomy, implementation.

Headnotes:

Changes to the Electoral Code which allowed certain issues of particular local significance to be dealt with by local referendum and which set out the type of issue which could not be dealt with by local referendum were in line with the principle of local autonomy.

Summary:

On 5 June 2014 the Constitutional Court delivered judgment on the constitutionality of certain provisions of Articles 177 and 178 of the Electoral Code (Complaint no. 25a/2014).

On 13 March 2014, Parliament had enacted Law no. 29 on amending and supplementing Electoral Code no. 1381-XIII of 21 November 1997, whereby certain amendments were made to the organisation of local referenda.

The new version of Article 177.1 of the Electoral Code allowed for certain issues of particular local importance falling within the mandate of the local public administration to be subjected to local referendum. This article was supplemented by paragraph 1¹, which requires that the text of the issue set for local referendum must be written in a neutral manner, without ambiguity and without suggesting an answer. Issues must not be phrased in such a way that they are mutually exclusive.

Three new categories of issues which cannot be subject to local referendum were added to Article 178 of the Electoral Code:

- a. those of national interest, which are in the competence of Parliament, Government or other central public authorities, under powers established by the Constitution and by legislation;
- b. those related to the internal and external policy of the state;
- c. those that contradict the Constitution and the legislation of the Republic of Moldova.

The case stemmed from a complaint submitted to the Constitutional Court on 7 April 2014 by MPs Messrs Igor Dodon and Ion Ceban in which the applicants alleged that the changes to the Electoral Code regarding the competences of local public authorities in organising local referenda and the limitation of issues that can be proposed for local referendum contravened Articles 1.3, 2.1, 4.1, 7, 32.1, 75.1 and 109.1 of the Constitution.

Pursuant to the written opinion of the President of the Republic of Moldova, these amendments made by Article 177 of the Electoral Code were in line with the requirements of Article 3 of the European Charter of Local Self-Government. The provisions of Article 177.1 were of a technical nature and could not by their nature be contrary to the Constitution. Articles 178a, 178b and 178c of the Electoral Code were aimed at protecting the unity and sovereignty of the state.

Parliament put forward the view that local referenda, as a way of carrying out the principles of citizen consultation and local autonomy, can only be organised and conducted under law and can only cover issues of particular local importance.

Similarly, the Government, in its opinion, noted that local referenda may be held only on issues that can be resolved locally and cannot cover issues of national interest, which are in the competence of Parliament or of the Government, under powers established by the Constitution and laws. Moreover, applying the principles of local government cannot affect the unity of the state.

The Court noted that under Article 2.2 of the Constitution, no individual person, part of the population, social group, political party or any other public organisation may exercise state power on their own behalf. The usurpation of state power shall constitute the most serious crime against the people.

It also underlined that national sovereignty can be exercised directly by the people, by participating at referenda and elections.

In this respect, Article 75.1 of the Constitution provides that the most important issues of the society and of the state are to be resolved by referendum.

The referendum is considered to be, specifically for the rule of law, an instrument of direct democracy, allowing voters to express their choices in the most important matters of national interest, aiming to resolve them throughout the country or in a particular territorial unit and adopting a decision directly, without any intermediary.

The Court noted that, in terms of territorial criterion, the Electoral Code divides referenda into republican and local.

Under Article 109 of the Constitution, public administration within the administrative-territorial units shall be based on the principles of local autonomy, decentralisation of public services, eligibility of the local public administration authorities and consultation of citizens on local issues of special interest.

The Court held that the above constitutional norm establishes limits for local authorities on the public consultation of citizens, only on local issues of special interest.

Furthermore, the Court noted that the changes brought in by Law no. 29 of 13 March 2014 did not deviate from but rather developed Article 175 of the Electoral Code, which defines a local referendum as a consultation of the people on issues of particular interest to the village (commune), sector, city (municipality), district or administrative-territorial unit with special status.

It also held that it is the very essence of the principle of local autonomy to grant local authorities the right to settle and administer under the law their own legal interests, without interference from central authorities.

The Court reiterated that it is unacceptable that issues of national interest, which are in the competence of Parliament, Government and other central public authorities, to be assigned to local communities for settlement. Moreover, issues of national interest concern the interests of people throughout the territory of the Republic of Moldova, and are either resolved by legislative and executive powers within their constitutional powers or may be subject to a republican referendum.

The Court also emphasised that the issues of internal and external policy of the state can be seen as issues of one single community. Under Article 66.d of the Constitution, Parliament approves the main direction of the internal and external policy of the state, and under Article 96 Government ensures its implementation.

The Court accordingly held that the provisions of Articles 177 and 178 of the Electoral Code, which set limits for issues that might be subject to a local referendum, were fully consistent with the provisions of Articles 75.1 and 109.1 of the Constitution.

Languages:

Romanian, Russian.



Netherlands Supreme Court

Important decisions

Identification: NED-2014-2-001

a) Netherlands / **b)** Supreme Court / **c)** Criminal Law Chamber / **d)** 01.04.2014 / **e)** 11/03714 / **f)** X v. Public Prosecution Service / **g)** ECLI:NL:HR:2014:770 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Proceedings, criminal, access to a lawyer.

Headnotes:

As a matter of law, a statement made by the accused to the police without an attorney present is not inadmissible until the legislator implements the relevant case-law of the European Court of Human Rights and EU Directive 2013/48/EU of 22 October 2013 regarding the right to an attorney in criminal proceedings.

Summary:

I. The customs police at Schiphol Airport detained X, charging him for travelling on a forged US passport. X made a statement to the police, without consulting an attorney. After being told that he had the right to consult an attorney, he stated that he had removed a visa from his passport knowing it was a criminal offence. This statement was used as evidence in the criminal proceedings against X. Both the District Court and the Court of Appeals declared the statement made by X admissible as evidence against him in the criminal proceedings. X appealed to the

Supreme Court on a point of law, stating that the decision of the Court of Appeal was not in accordance to the right to an attorney in criminal proceedings as formulated by the European Court of Human Rights in its *Salduz* decision.

II. In her advice (*"conclusie"*) to the Supreme Court, the attorney general posed the question whether it was still a valid legal rule that a suspect can make statements to the police without an attorney being present. She was of the opinion that the case-law of the European Court of Human Rights and the recent EU Directive 2013/48/EU merited the legal opinion that statements made without an attorney being present were not admissible as a matter of law.

The Supreme Court held, however, that until such time as the legislator implemented the case-law of the European Court of Human Rights and EU Directive 2013/48/EU into Dutch law, a voluntary statement made by the suspect after having being informed of his right to an attorney, was not inadmissible as a matter of law.

Cross-references:

European Court of Human Rights:

- *Salduz v. Turkey*, no. 36391/02, 27.11.2008, ECLI:NL:XX:2008:BH0402, *Reports of Judgments and Decisions* 2008.

Languages:

Dutch.



Identification: NED-2014-2-002

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 04.04.2014 / **e)** 13/00912 / **f)** X, Y and Z v. The Dutch State / **g)** ECLI:NL:HR:2014:828 / **h)**.

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

Keywords of the alphabetical index:

Asylum, procedure.

Headnotes:

There is no provision in the Rome Statute for the review by the ICC of the detention of witnesses held in custody in another country on their transfer to the ICC, in order to avoid undermining the co-operation with State Parties to the Statute with the ICC.

Summary:

I. Three Congolese nationals held at the Scheveningen prison, at the ICC request in order to testify in a trial regarding international crimes committed in the Democratic Republic of Congo (hereinafter, the "DRC"), applied for asylum in the Netherlands. The agreement between the DRC and the ICC stipulates that they be returned to the DRC after their testimony to the ICC. The ICC suspended its compliance with this obligation since this would have a negative impact on their asylum request. The Netherlands, however, refused to receive the three detainees from the ICC. The three Congolese nationals lodged interim relief proceedings requesting that the Netherlands be ordered to cooperate with their transfer by the ICC to Dutch custody so they can await the outcome of their asylum request in the Netherlands. They argued that being held indefinitely in ICC custody due to the refusal of the Netherlands to receive them in its custody was a breach of their right to the review of the deprivation of their liberty as protected by Article 5 ECHR. The District Court allowed the application for interim relief, which was subsequently dismissed by the Court of Appeal. The three asylum seekers then appealed to the Supreme Court on a point of law.

II. The Supreme Court upheld the decision of the Court of Appeal. The Supreme Court referred to the decision of the European Court of Human Rights of 9 October 2012 regarding the detention of another Congolese witness at the ICC under Article 93.7 of the Rome Statute. In that case the European Court of Human Rights ruled that the Netherlands was not obliged to review the lawfulness of the detention of witnesses at the ICC since the legal ground for this detention is the Rome Statute and the arrangement entered into between the DRC and the ICC. The Supreme Court noted that there is no provision in the Statute for the review by the ICC of the detention of witnesses held in custody in another country on their transfer to the ICC, in order to avoid undermining the co-operation with State Parties to the Rome Statute with the ICC. The transfer of the three Congolese

asylum seekers into Dutch custody would have the same undesirable effect. If, however, in the context of their asylum procedure it is decided that they must be granted residence permits or that it is not safe for them to return to the DRC, the Netherlands would have to act accordingly. This means that in the *status quo* the fundamental rights and freedoms of the three applicants are sufficiently guaranteed.

Cross-references:

European Court of Human Rights:

- *Longa v. The Netherlands*, no. 33917/12, 09.10.2012, ECLI:NL:XX:2012:BY2306, *Reports of Judgments and Decisions* 2012.

Languages:

Dutch.



Identification: NED-2014-2-003

a) Netherlands / **b)** Supreme Court / **c)** Criminal Law Chamber / **d)** 17.06.2014 / **e)** 14/00090 / **f)** X v. The Republic of Rwanda / **g)** ECLI:NL:HR:2014:141 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Extradition, treaty / Due process.

Headnotes:

The Genocide Convention provides for a sufficient treaty relationship between Rwanda and the Netherlands to allow for extradition and the trial judge may rely on the guarantee of the requesting state that the requested person will receive a fair trial as protected in Article 6 ECHR.

Summary:

I. The District Court of The Hague declared a request by the Republic of Rwanda for the extradition of a person suspected of crimes under the Genocide Convention permissible. The requested person applied for the Supreme Court to review this decision. He claimed that no extradition treaty existed between Rwanda and the Netherlands; hence, it may not be assumed that the principle of the protection of legitimate expectations applies in the extradition proceedings in question. He also argued that his rights to a fair trial as protected under Article 6 ECHR would be flagrantly violated if he were extradited to Rwanda.

II. The Supreme Court upheld the decision of the District Court. The Supreme Court held that a treaty relationship allowing for extradition did exist between Rwanda and the Netherlands, through the Genocide Convention and the provision included therein allows for reciprocal extradition for genocide. In the extradition request, Rwanda gives guarantees that should ensure the person requested would receive a fair trial. The judge ruling on whether extradition is permissible in the present case must therefore, in principle, be able to rely on the guarantee given by the requesting state.

In the present case the district court opined that the argument of the person requested – namely, his rights under Article 6 ECHR would be flagrantly violated were he to be extradited to Rwanda – was not sufficiently substantiated by evidence. The Supreme Court held that the District Court decision was not manifestly unreasonable in light of the relevant facts of the case as presented to the Court.

Languages:

Dutch.



Netherlands

Council of State

Important decisions

Identification: NED-2014-2-006

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 23.04.2014 / **e)** 201302419/1/A3 / **f)** Occupy Rotterdam/Mayor of Rotterdam / **g)** ECLI: NL:RVS:2014:1439, *Jurisprudentie Bestuursrecht* 2014/121, *Administratiefrechtelijke Beslissingen* 2014/232 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

Keywords of the alphabetical index:

Occupy movement.

Headnotes:

Lawful restriction of Occupy Rotterdam's right to assembly and demonstration.

Summary:

I. The Mayor of Rotterdam (hereinafter, the "Mayor") announced that Occupy Rotterdam was to clear the WTC building's terrace in Rotterdam by 31 March 2012 and subsequently decided that Occupy Rotterdam would not be allowed to demonstrate at that location during four events, including the Rotterdam Marathon and Summer Carnival. The Council of State heard the case in appeal proceedings, adjudicating *in alia* on the lawfulness of the restriction of Occupy Rotterdam's right of assembly and demonstration.

II. Pursuant to Section 2 of the Public Assemblies Act, the powers to restrict the right to profess a religion or belief and the right of assembly and demonstration may be exercised only to protect health, in the interest of traffic and to combat or prevent disorder. Under Section 5 of the same Act, the mayor may impose conditions and restrictions or a prohibition

after receiving a notification. A prohibition may be imposed only if the required notification was not given on time, the required details were not provided on time or one of the interests referred to in Section 2 so requires.

The Council of State recalled that the Mayor had made his decision in order to safeguard the public and demonstrator's security; and was based on police reports. The Council of State held that the Mayor had rightly decided that Occupy Rotterdam demonstrating at the said location might cause disorder during the four events. The Council of State took into account that the termination and prohibition were limited in time, as each event would take seven to eight days, and be restricted to a specific location.

Languages:

Dutch.



Poland

Constitutional Tribunal

Statistical data

1 May 2014 – 31 August 2014

Number of decisions taken:

Judgments (decisions on the merits): 23

- Rulings:
 - in 16 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
 - in 7 judgments the Tribunal did not find any challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
 - 5 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
 - 4 judgments were issued upon the request of courts – the question of law procedure (in one case three requests of courts were examined jointly)
 - 6 judgments were issued upon the request of a physical person – the constitutional complaint procedure (in one case five constitutional complaints were examined jointly)
 - 4 judgments were issued upon the request of the Public Prosecutor General
 - 2 judgments were issued upon the request of the group of *Sejm* deputies
 - 1 judgment was issued upon the request of a national organ of employers' organisation
 - 1 judgment was issued as a result of two request lodged by trade unions and one request lodged by a group of *Sejm* deputies which were examined jointly
- Other:
 - 1 judgment was issued by the Tribunal in plenary session
 - 2 judgments were issued with at least one dissenting opinion

Important decisions

Identification: POL-2014-2-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.05.2014 / **e)** K 43/12 (*en banc*) / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2014, no. 684; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2014, no. 5A, item 50 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

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

Keywords of the alphabetical index:

Acquired right, protection / Age, retirement / Age, retirement, increase / Retirement, age, gender equality / Retirement, old-age, age limit.

Headnotes:

The principles of protection of duly acquired rights and citizens' trust in the State and its laws do not preclude changes in the terms governing acquisition of old-age pension rights during a period when they are being acquired, where this is justified by such constitutional values as justice, social solidarity or the stability of public finances and are proportionate to the objective. However, the closer a given subject or group of subjects is to the prospect of meeting the said terms, the lesser the legislature's freedom of action as regards potential modifications.

Although an increase in the retirement age was considered as unexpected especially by those insured persons close to the acquirement of old-age pension rights, the six-months adjustment period as well as the gradual method of increase will allow, in principle, all the subjects concerned to adapt to the reform.

Convention 102 of the International Labour Organisation (hereinafter, "ILO") sets the standard retirement age at 65 years, allowing, at the same time, the retirement age to be increased on condition that the ability of elderly people to continue their professional activity is preserved in the country. Therefore, the examination of conformity of the increase in retirement age with the ILO Convention entailed verifying whether social analysis indicated that the aforementioned condition had been fulfilled. The reform would have been found to be incompatible with the ILO Convention if the legislature had based its decision on obviously false or unreliable socio-economic data.

The gradual equalisation of retirement age for men and women did not violate the principle of equal treatment regardless of gender. Although the Constitution as well as the acts of international and European Union law allow differentiation of the retirement age for men and women, this should be treated as a temporary affirmative action, the justification of which is vanishing due to the new demographic and social phenomena as well as the changing financial capabilities of the State.

Summary:

I. In 2012 the legislature amended the Act on old-age and disability pensions from the Social Insurances Fund, increasing and equalising the retirement age for men and women (from, respectively, 65 and 62 up to 67 years of age). Three subjects – the National Commission of Independent and Self-Governing Trade Union "Solidarność", a group of *Sejm* (parliament) deputies and the Polish Alliance of Trade Unions – submitted applications to the Constitutional Tribunal, alleging violation of a number of constitutional principles: the principle of appropriate legislation, social dialogue, protection of duly acquired rights, protection of citizens' trust in the State and its laws, equal treatment of men and women, social justice and social solidarity. Moreover, the applicants alleged a breach of Article 26.2 of International Labour Organisation Convention 102 concerning minimum standards of social security, which sets the standard retirement age at 65 years of age.

The amending Act of 2012 provided for the method of gradually increasing the retirement age, according to which the closer an individual was to acquiring old-age pension rights, the lower the degree of increase in the retirement age. As a consequence, the whole process of increase would be completed: for men in 2020, and for women in 2040. Furthermore, the legislature decided that the Act should come into force (i.e. the said process should be initiated)

after six months from publication thereof. The aforementioned gradual method was not applied exclusively with respect to public prosecutors, whose retirement age was immediately increased by six years.

As regards the equalisation of retirement age for both men and women, the applicant relied on the previous judgment of the Constitutional Tribunal of 15 July 2010, K 63/07, in which the lower retirement age for women had been assessed as constitutionally permissible affirmative action.

II. Formal allegations were dismissed at the outset.

The Constitutional Tribunal held that the reform did not violate the principle of appropriate legislation, forming part of the principle of democratic State of law enshrined in Article 2 of the Constitution, as it did not introduce any changes to the challenged Act which would render the latter incomprehensible or infringe its construct or coherence. Furthermore, the procedure of adoption of the impugned act did not breach the obligation of social dialogue arising from Article 20 of the Constitution.

Subsequently, substantive allegations were examined.

The Tribunal considered that the introduction of changes in the terms of acquiring old-age pension rights during a period when they are being acquired is admissible under the principle of the protection of duly acquired rights and citizens' trust in the State and its laws arising from Article 2 of the Constitution. Admittedly, while joining a compulsory insurance system, an insured person should be able to familiarise himself or herself with the aforementioned terms so as to take actions intended for acquiring a right to a given benefit. However, significant changes of circumstances may occur during the acquisition period lasting many years. Therefore, corresponding modifications may be justified by such constitutional values as justice, understood as the possibly equal burden related to incurring funds by subsequent generations of the insured, social solidarity and the stability of public finances. Nonetheless, the closer the prospect of meeting the said terms by certain subjects or groups of subjects, the lesser the lawmaker's freedom of action in relation to their legal situation.

Accordingly, although the increase in the retirement age introduced by the amending Act of 2012 was considered as surprising by the insured persons who are close to acquiring old-age pension rights, the six-month adjustment period as well as the gradual method of spreading out the increase in retirement age across different age ranges would allow the

persons concerned to adjust to the reform. For instance, in the case of women born in 1953 and men born in 1948, for whom the adjustment period was particularly short, an increase in the retirement age was slight and ranged from one to four months.

The immediate extension by six years of the period of service for military public prosecutors should be considered as a particularly serious interference in their legal security. However, in the Tribunal's view this legislative step was justified in light of the reform's objective which was to harmonise the situation of all persons entitled to old-age benefits, including judges and public prosecutors' special old-age pensions. It was also not without significance that the military public prosecutors' privileged status had not been anchored directly in the Constitution, as opposed to the recognised status of judges. Besides, the severity of extension of the former's professional activity period was mitigated by the maintenance of their entitlement to military old-age pensions being another type of privileged benefits.

The legislation in question was not considered as contrary to the Article 26.2 of the Convention 102 of the ILO. Admittedly, while the Constitution indicated merely the limits within which the law-maker is obliged to determine the retirement age, the ILO Convention specified the standard retirement age of 65 years, allowing, at the same time, an increase in retirement age on condition that the ability of elderly people to work is preserved in the country. Therefore, assessing whether the reform increasing the retirement age was compatible with the ILO Convention required a determination as to whether social analysis indicates that the aforementioned condition had been fulfilled. The fact that the ILO Convention was adopted more than 60 years ago and that the standard in question became a universally attainable principle since then must be also taken into account. The statement of non-conformity of the reform with the ILO Convention would have occurred if the legislature had based its decision on obviously false or unreliable results of socio-economic research. Instead, the available data indicated that this was not the case. Nonetheless, it will be still possible in the future to re-examine the conformity of the rules determining the retirement age with the ILO Convention as economic forecasts may be verified negatively, social policy objectives unattained, and the economic or demographic situation may be subject to further, significant, changes.

The gradual equalisation of retirement age for men and women did not violate Articles 32 and 33 of the Constitution, which refer to, respectively, the principle of equal treatment and equal treatment of men and women. Although differentiation of the retirement age

for men and women is admissible under the Constitution as well as international and European Union law, it should be considered as a temporary affirmative action. Therefore, the duty of the law-maker is to strive for equality of men and women, *inter alia* in the field of social rights. Moreover, the justification for the maintenance of the said affirmative action is vanishing due to the new demographic and social phenomena as well as the changing financial capabilities of the State. These arguments were already expressed by the Tribunal in its previous judgment of 15 July 2010, K 63/07, and signalling decision S 2/10 linked thereto.

The law-maker introduced an institution of, so-called, partial old-age pensions. These are a new kind of benefits, which may be received before reaching increased retirement age, designed to mitigate the rigour of the reform. Assuming that there are still circumstances justifying the partial maintenance of affirmative action instruments for women, the law-maker determined different terms of acquiring the benefits in discussion depending on the gender. However, the provisions on partial old-age pensions, insofar as the acquisition of the right provided therein was not limited by a time-limit and harmonised with the introduction of the same retirement age for men and women, violated Articles 32 and 33 of the Constitution as well as the principle of social justice arising from Article 2.

The Tribunal issued a signalling decision S 3/14, in connection with the case in discussion, which contained indications submitted to the parliament concerning inconsistencies and loopholes, removal of which is indispensable to ensure the integrity of the legal system. The Tribunal indicated the necessity to undertake systemic actions supporting the increase and equalisation of the retirement age for men and women, especially enforcement of effective employment and family policy. It also pointed out that, during the work on the reform, the objective of retirement age harmonisation for all professional groups fell by the wayside, while the constitutional principle of social solidarity should lead to a proportional distribution of the effects of financial difficulties of the State between the widest possible group of subjects. Furthermore, the Tribunal drew the legislature's attention to the necessity of constant monitoring of the demographic, economic and social situation, which would enable an assessment of whether the legislature's actions may attain the expected results. In the end, it referred to the aforementioned doubts regarding the institution of partial old-age pensions.

Cross-references:

- Decision Kw 5/91, 24.09.1991, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1991, item 5;
- Decision K 15/97, 29.09.1997, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1997, no. 3-4, item 37, *Bulletin* 1997/3 [POL-1997-3-020];
- Judgment K 5/99, 22.06.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 5, item 100;
- Judgment K 4/99, 20.12.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 7, item 165, *Bulletin* 2000/1 [POL-2000-1-003];
- Judgment K 14/99, 21.03.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 2, item 61;
- Judgment K 27/99, 28.03.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 2, item 62, *Bulletin* 2000/2 [POL-2000-2-010];
- Judgment K 1/00, 12.09.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 6, item 185;
- Judgment K 17/00, 30.01.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 1, item 4;
- Judgment K 24/00, 21.03.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 3, item 51;
- Judgment K 37/01, 18.01.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 6A, item 82, *Bulletin* 2003/1 [POL-2003-1-002];
- Judgment K 17/02, 02.09.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 5A, item 68;
- Judgment K 53/02, 29.10.2003, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2003, no. 8A, item 83, *Bulletin* 2003/3 [POL-2003-3-032];
- Judgment K 54/02, 24.02.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 2A, item 10;
- Judgment K 2/07, 11.05.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no. 5A, item 48, *Bulletin* 2007/3 [POL-2007-3-005];
- Judgment K 33/06, 10.07.2008, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2008, no. 6A, item 106;
- Judgment K 33/07, 11.12.2008, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2008, no. 10A, item 177;
- Judgment SK 82/06, 12.02.2008, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2008, no. 1A, item 3;
- Judgment K 17/09, 16.03.2010, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2010, no. 3A, item 21;
- Judgment K 63/07, 15.07.2010, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2010, no. 6A, item 60, *Bulletin* 2010/2 [POL-2010-2-005];
- Judgment K 27/09, 25.11.2010, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2010, no. 9A, item 109;
- Judgment K 23/09, 03.03.2011, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2011, no. 2A, item 8;
- Judgment P 33/09, 13.09.2011, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2011, no. 7A, item 71;
- Judgment K 1/12, 12.12.2012, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2012, no. 11A, item 134;
- Judgment K 9/12, 19.12.2012, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2012, no. 11A, item 136.

Languages:

Polish, English (translation by the Tribunal).

*Identification:* POL-2014-2-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 01.07.2014 / **e)** SK 6/12 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2014, no. 926; <http://otk.trybunal.gov.pl/orzeczenia> / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
 1.6.5.1 Constitutional Justice – Effects – Temporal effect – **Entry into force of decision.**
 1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**
 3.16 General Principles – **Proportionality.**
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Appeal, sanction, administrative / Fine, penalty, administrative fixed amount / Sanction, administrative.

Headnotes:

It is admissible under the Constitution to establish a regime of administrative sanctions taking the form of financial penalties which are imposed for infringements of administrative regulations and which function alongside the criminal justice system.

However, the legislature is obliged to introduce legal mechanisms enabling an administrative authority imposing a sanction to take into consideration all relevant circumstances of a given case so as to moderate the amount of financial penalty or even renounce its imposition.

Summary:

I. Several individuals lodged constitutional complaints alleging the inconsistency of the Nature Protection Act with the principle of property rights protection, arising from Article 64.1 and 64.3, in conjunction with the principle of proportionality of restrictions on constitutional freedoms and rights, enshrined in Article 31.3 of the Constitution.

Pursuant to the Nature Protection Act, cutting down a tree or shrubbery required a prior permit issued by a competent organ of local self-government. Obtaining such an authorisation by the holder of a given immovable property entailed paying an appropriate fee. Under certain circumstances, e.g. if the tree or shrub constituted a danger to the safety of people or property, applicants were exempted from the payment, but not from the obligation to obtain the prior permit. Cutting down or damaging a tree or shrubbery without permit was sanctioned by a financial penalty in a fixed amount equal to three times the amount of the fee for prior consent, regardless of any particular circumstances of the given case. The sanction was imposed on the holder of property, provided that the offence was committed by him or with his knowledge or consent.

The constitutional problem in the present case was whether an unconditional obligation to impose a fine for the offence, as defined above, in a strictly fixed amount as well as regardless of any particular circumstances of that action was consistent with the principle of property rights protection in conjunction with the principle of proportionality of restrictions on constitutional freedoms and rights.

II. The Constitutional Tribunal held that the establishment of a regime of fines imposed by administrative authorities for offences against administrative regulations was constitutionally acceptable. The objective of such sanctions was to guarantee the effective enforcement of administrative regulations. The main advantage was that a mere infringement against an administrative rule constituted the basis for their imposition. Furthermore, the decision in this respect was issued by the organ of public authority within the administrative proceedings and was appealable to the administrative court providing a limited scope of review. Such a procedure generated much less effort and expenses than the regular criminal court procedure. As regards the advantages for an individual, the imposition of administrative sanction did not entail, in principle, any stigmatisation or other negative consequences which were a natural consequence of a conviction under criminal court procedures.

However, the Tribunal clarified that the above does not mean that the legislature may establish a system of absolute liability offences along with the regime of administrative sanctions, the imposition of which was completely detached from the circumstances of a given case, especially, the guilt of a perpetrator. The terms of application of the administrative sanctions and their amount should be fixed in a manner compatible with the principle of the adequacy of the State's interference in the constitutionally protected sphere of an individual, arising from Article 2 of the Constitution. The said principle entailed that the perpetrator should be able to release himself from liability by showing that the failure to observe an administrative rule constituted the result of circumstances for which he bears no responsibility (case of *force majeure*, state of necessity, other individuals' actions). Furthermore, the competent authority must be empowered to moderate the amount of fine for a given offence or even to renounce its imposition with regard to the relevant circumstances of the case. Consequently, the court reviewing the decision must provide an appropriate standard of review.

As concerns the consistency of the challenged legislation with the constitutional protection of property rights in conjunction with the principle of proportionality of restrictions on constitutional freedoms and rights, the Tribunal considered that the property holder's obligation to obtain a prior permit to cut down a tree or shrubbery under pain of a fine was, in principle, an adequate and necessary instrument of natural environment protection. The very high significance of ensuring protection of the natural environment as a constitutional value should be also considered. Nevertheless, the law-maker had

exceeded the constitutional boundaries imposed on him by the principle of proportionality by recognising the objective character of the holder's liability and establishing an excessive sanction.

Therefore, the Nature Protection Act, insofar as it provided for an obligation to impose an administrative fine by a competent organ of local self-government for cutting down or damaging a tree or shrubbery without a prior permit by a holder of a given immovable property, in a fixed amount and regardless of the circumstances of that action, was inconsistent with Article 64.1 and 64.3 of the Constitution, in conjunction with Article 31.3 of the Constitution.

The Tribunal, pursuant to Article 190.3 of the Constitution, ruled that the above provisions will cease to have effect after the lapse of eighteen months from the date of the publication of the judgment in the Journal of Laws.

Cross-references:

- Judgment U 7/93, 01.03.1994, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1994, part I, item 5;
- Decision K 11/94, 26.04.1995, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1995, part I, item 12;
- Decision U 4/95, 26.09.1995, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1995, II, item 27;
- Judgment K 17/98, 26.05.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 4, item 48, *Bulletin* 1998/2 [POL-1998-2-012];
- Judgment P 7/98, 27.04.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 4, item 72, *Bulletin* 1999/2 [POL-1999-2-011];
- Judgment P 43/06, 04.09.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no.8A, item 95;
- Judgment SK 9/98, 25.05.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 4, item 78, *Bulletin* 1999/2 [POL-1999-2-017];
- Judgment SK 22/98, 25.10.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 6, item 122;
- Judgment P 2/98, 12.01.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 1, item 2, *Bulletin* 1999/2 [POL-1999-1-002];
- Judgment SK 6/99, 21.03.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 2, item 66;
- Judgment K 23/99, 18.04.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 3, item 89;
- Judgment K 15/98, 11.04.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 3, item 86, *Bulletin* 2000/2 [POL-2000-2-011];
- Judgment P 11/98, 12.01.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 1, item 3, *Bulletin* 2000/1 [POL-2000-1-005];
- Procedural decision K 31/00, 05.12.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 8, item 269;
- Judgment SK 15/00, 21.05.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 4, item 85;
- Judgment K 27/00, 07.02.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 2, item 29;
- Judgment K 33/00, 30.10.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 7, item 217;
- Judgment P 12/01, 04.07.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 4A, item 50;
- Judgment K 2/01, 23.04.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 3A, item 27;
- Judgment SK 41/01, 08.07.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 4A, item 51;
- Judgment SK 10/03, 13.01.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 1A, item 2, *Bulletin* 2004/1 [POL-2004-1-009];
- Judgment SK 21/03, 14.06.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 6A, item 56;
- Judgment P 20/02, 29.06.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 6A, item 61;
- Judgment SK 13/03, 19.10.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 9A, item 101;
- Judgment SK 40/02, 10.05.2005, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2005, no. 5A, item 48;
- Judgment SK 52/04, 24.01.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 1A, item 6;
- Judgment P 19/06, 15.01.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no. 1A, item 2;
- Judgment SK 50/06, 10.07.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no. 7A, item 75;
- Judgment K 28/06, 16.10.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no. 9A, item 104;

- Judgment K 2/07, 11.05.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no. 5A, item 48, *Bulletin* 2007/3 [POL-2007-3-005];
- Judgment SK 75/06, 31.03.2008, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2008, no. 2A, item 30;
- Judgment SK 17/07, 10.06.2008, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2008, no. 5A, item 78;
- Judgment SK 34/07, 24.02.2009, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2009, no. 2A, item 10;
- Judgment P 64/07, 05.05.2009, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2009, no. 5A, item 64;
- Judgment Kp 2/09, 13.05.2009, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2009, no. 5A, item 66;
- Decision Kp 4/09, 14.10.2009, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2009, no. 9A, item 134;
- Judgment P 66/07, 12.05.2009, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2009, no. 5A, item 65;
- Judgment P 9/08, 25.03.2010, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2010, no. 3A, item 26;
- Judgment SK 23/07, 17.11.2010, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2010, no. 9A, item 103;
- Decision P 29/09, 18.11.2010, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2010, no. 9A, item 104;
- Judgment P 8/10, 09.07.2012, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2012, no. 7A, item 75;
- Judgment SK 12/12, 29.07.2013, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2013, no. 6A, item 87;
- Procedural decision SK 59/12, 17.12.2013, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2013, no. 9A, item 144.

Languages:

Polish, English (translation by the Tribunal).



Portugal Constitutional Court

Important decisions

Identification: POR-2014-2-008

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 07.05.2014 / **e)** 394/14 / **f)** / **g)** *Diário da República* (Official Gazette), 108 (Series II), 05.06.2014, 14832 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Child maintenance / Social pension, attachment.

Headnotes:

The principle of the dignity of the human person cannot be seen unilaterally, inasmuch as failure to fulfil the right to maintenance payments directly affects the recipient's living conditions, but respecting it can endanger the payer's right to life itself, or at least his or her right to a dignified life.

Where the parent who is in breach of the obligation to pay child maintenance is concerned, what is at stake is not just fulfilling a debt, but also a duty which in constitutional terms is an autonomous fundamental duty.

When the issue is how to make the principle of the personal dignity of the parent compatible with the coercive fulfilment of the child's right, the latter's position as the creditor in relation to a maintenance payment should not in fact be seen through the prism of the constitutional guarantee of the right to property, as applicable to credit rights.

Summary:

An article in the Law governing the Organisation of the Custody, Protection and Re-education of Minors provides for the means required to make child maintenance orders effective, and says that maintenance can be deducted from pensions owed to the person who is judicially required to pay it, if he or she does not do so. A norm extracted from this article was interpreted to mean that there was no minimum base amount below which such deductions could not be made from social pensions in order to pay maintenance owed to a minor child, even if this meant depriving the person required to pay the maintenance of the indispensable minimum needed to ensure his or her subsistence. The Constitutional Court found that when interpreted in this way, the norm was unconstitutional, because it undermined the fundamental right of the person required to pay child maintenance to a decent standard of living.

In this concrete review case the Public Prosecutors' Office brought a mandatory appeal against a ruling in which the Porto Court of Appeal refused to apply a norm regarding the means needed to enforce child maintenance payments owed to a minor child, which was extracted from the Law governing the Organisation of the Custody, Protection and Re-education of Minors.

The Constitutional Court noted from the case file that it had been proven that the respondent (the successful appellant before the Court of Appeal), who was the father of the minor to whom the maintenance was supposed to be paid, received an invalid's pension. If he had paid the maintenance the original court had imposed on him in the decision that was then revoked by the Porto Court of Appeal, the respondent would have been left with a monthly amount below the combined cost of the seniors' home where he lived and his medicines, in a situation in which, even as things were, it was already necessary for his other children to help pay his expenses.

The Court recalled that the discussion on the untouchability of income derived from the receipt of social pensions has revolved around the idea that application of the principle of the dignity of the human person means that a part of such incomes cannot be attached. In its jurisprudence the Constitutional Court had already held that social pensions which do not exceed the national minimum wage or the Social Insertion Income are unattachable.

This guideline was also extended to income from work, thereby making it legally impossible to order an attachment that would deprive a person of the

monthly income equal to the national minimum wage, when the debtor does not have other property or income that can be attached.

Specifically on the question before it in the present case, the Constitutional Court had already found that where child maintenance obligations are concerned, the right of a minor child to a decent standard of living can collide with his or her parent's fundamental rights. In such cases the principle of the essential dignity of the human person must be safeguarded for all the persons involved, in a process in which the objective is to ensure that the rights of all of them are harmonised in practical terms.

The Porto Court of Appeal applied the constitutional court jurisprudence set out in the headnotes.

The problem in the present case involved determining the level below which the Constitution precludes deductions from an invalid's social pension received by the person under the obligation to pay child maintenance.

In its jurisprudence the Constitutional Court recognises the existence of a guarantee of the right to a minimally decent level of subsistence. At stake in the present case was the negative dimension of this guarantee of a minimally decent standard of living – i.e. recognition of a right not to be deprived of that which is essential in order to preserve an income which is itself indispensable to that minimally decent standard of living.

When considering the pressing nature of the maintained child's need, one must take into account the fact that if it is impossible for payments to be made coactively, the public authorities will make payments instead – payments rooted in the state's task of protecting childhood. In concrete terms, in such cases it falls to the Fund for Guaranteeing the Maintenance Due to Minors (hereinafter, the "FGADM") to make payments instead of a parent from whom it has not been possible to secure payments by the means provided for in the Law governing the Organisation of the Custody, Protection and Re-education of Minors (albeit the exact amounts in question may not be identical).

In its decision the Porto Court of Appeal found that the then appellant would have been left with an income that was clearly less than the Social Insertion Income, which the social solidarity subsystem considers to be the minimum of minima compatible with the dignity of the human person.

The Constitutional Court took the view that the Court of Appeal had properly weighed up the conflicting

fundamental rights of the then appellant and his minor child in its decision. The extent to which the minor child's fundamental right to a decent standard of living was affected was not disproportionate, in that neither was it permissible for his subsistence to be legally secured at the cost of his father's subsistence, nor did the decision deprive the child of alternative mechanisms which would in principle provide for that subsistence, given that a minor child's fundamental right to a decent standard of living can be provided for via the FGADM mechanism.

In the light of all the above, the Constitutional Court held the normative interpretation before it unconstitutional.

Cross-references:

- no. 177/02, 23.04.2002;
- no. 509/02, 19.12.2002, *Bulletin* 2002/3 [POR-2002-3-009];
- no. 96/04, 11.02.2004;
- no. 306/05, 08.06.2005, *Bulletin* 2005/2 [POR-2005-2-006];
- no. 312/07, 16.05.2007.

Languages:

Portuguese.



Identification: POR-2014-2-009

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 30.05.2014 / **e)** 413/14 / **f)** / **g)** *Diário da República* (Official Gazette), 121 (Series I), 26.06.2014, 3420 / **h)** The fulltext Section of CODICES contains a detailed summary in English; CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.10 General Principles – **Certainty of the law.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 3.20 General Principles – **Reasonableness.**
- 4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**
- 4.10 Institutions – **Public finances.**

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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.**

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

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

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.**

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Crisis, economic and financial / Costs, public / Sovereign debt / Public sector worker, pay cuts / Sickness and unemployment benefit / Pension, supplements / Survivor's pension.

Headnotes:

The suspension of the payment of pension supplements only warrants protection when: the expectations that the legal regime in question will remain stable have been induced or fuelled by the behaviour of the public authorities; those expectations are legitimate – i.e. founded on good reasons, which must be evaluated as such within the axiological constitutional-law framework; and the citizen affected by the situation has oriented his or her life and made choices based on those expectations that the existing legal framework would be maintained.

These conditions must also be complemented by a process of weighing up the private interests that are unfavourably affected by the amendment of the normative framework that regulates them on the one hand, and the public interest that justifies the change on the other. This process cannot reveal the existence of public-interest reasons which, on balance, justify discontinuing the behaviour that generated the expectation.

The Constitution guarantees both the coexistence of the public, private and cooperative/social sectors of ownership of the means of production, and the freedom of initiative and organisation within the overall framework of a mixed economy. The constitutional economic order precludes the state from favouring enterprises that belong to the state-owned business sector in relation to their competitors from other sectors.

State-owned enterprises are also subject to the Competition Law, and cannot be attributed improper public aid. Public operating subsidies may be justifiable, but only if they fulfil a rationale that requires them to be in the public interest.

If an enterprise that awards pension supplements ceases to be economically and financially self-sustainable, those awards must also cease until the enterprise recovers its ability to self-finance its current production activities. One cannot consider expectations that pension supplements will continue to be paid to be legitimate until that recovery has occurred.

Sickness and unemployment benefits are contributory benefits (included in the general compulsory contributory social security regime) whose purpose is to substitute for labour income (welfare subsystem). They are concrete implementations of both the fundamental right to material assistance that pertains to workers when they are ill or involuntarily find themselves in unemployment, and the constitutional right to social security.

The unemployment benefit is a kind of compensation for non-fulfilment of the right to work; and should under ideal conditions be universal, with no time limit, for as long as the involuntary unemployment situation persists, and permit a decent standard of living. However, inasmuch as it is a right to benefit payments, its precise concrete implementation depends on the legislator.

The Constitution does not contain an express reference to material assistance in cases of non-occupational illness. However, conjugation of the constitutional norm that gives workers the right to assistance in involuntary unemployment situations with the constitutional right to social security and solidarity, does appear to result in a constitutional requirement that the ordinary law provide for forms of material assistance for workers who, although not unemployed, are temporarily prevented from working for another reason.

Given the essential nature of this type of benefit, the right to conditions that guarantee the minimum

needed to ensure a decent standard of living must be seen as a positive right that is immediately binding and justiciable.

It is not the Constitutional Court's place to evaluate the strategy that is being pursued in order to balance the country's public finances, nor should it participate in the debate on whether that strategy ought to focus on the income or the spending side of the equation.

III. The Ruling was the object of a total of 13 dissenting opinions, thus reflecting the complexity of the questions before the Constitutional Court, which is made up of 13 Justices. However, the fact that these opinions addressed different norms meant that it was nonetheless possible to secure a majority in relation to each particular norm.

Supplementary information:

For an extended précis see the English fulltext section in CODICES.

Cross-references:

- nos. 128/09, 12.03.2009; 396/11, 21.09.2011;
- no. 353/12, 05.07.2012, *Bulletin* 2012/2 [POR-2012-2-011];
- no. 187/13, 05.04.2013, *Bulletin* 2013/1 [POR-2013-1-006];
- no. 602/13, 20.09.2013, *Bulletin* 2013/3 [POR-2013-3-013].

Languages:

Portuguese.



Identification: POR-2014-2-010

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 25.06.2014 / **e)** 480/14 / **f)** / **g)** *Diário da República* (Official Gazette), 179 (Series II), 17.09.2014, 24004 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Easement, administrative / Easement, military / Right to property, limitation / Property, right, ablation / Compensation, right.

Headnotes:

Whether or not an administrative easement that is directly derived from the law entitles the affected party to compensation depends on whether that party suffers a serious sacrifice which merits reparation, or whether the easement merely constitutes a particular way of shaping the rules governing property by generically delimiting its content and limits.

Summary:

The Constitutional Court found that a norm under which military easements and other restrictions imposed in the military interest do not give rise to a right to compensation is not unconstitutional. The easement in the present case does not imply the loss of legal suitability for construction purposes, but rather a mere subjection of work and other activities – including erecting constructions of any kind – to the need for a permit from the competent military authority.

We are thus not in a situation in which a concrete legal position guaranteed by the Constitution is taken away, but instead a case of public-law norms which, for constitutional reasons (as is also true of norms included in the law on urbanism and spatial planning), impose general limitations on the *jus aedificandi* – limitations whose definition does indeed fall within the scope of the order to regulate which the Constitution gives to the ordinary legislator, whereby the latter must shape the rules governing property in accordance with values it defines itself. In this particular case, values embodied in the requirements imposed by the need to defend the nation explain why, for reasons linked to the security of persons and property, it is necessary to prevent the construction of buildings within given perimeters of areas adjacent to military facilities.

I. The Public Prosecutors' Office was required by law to bring this concrete review case, because the court *a quo* refused to apply a norm on the grounds that it was unconstitutional.

Owners of land encompassed by military easements created in 1949 applied to the Ministry of Defence under the 1982 National Defence and Armed Forces Law for a military permit to divide the land into plots on which to build detached houses. This application was denied, and an appeal to the Supreme Administrative Court against the latter's decision was unsuccessful.

The owners considered this outcome equivalent to an expropriation, and brought administrative actions against the Portuguese State in which they asked the court to order the state to pay them just compensation for the losses derived from the military easement.

Sitting at first instance, the Funchal Administrative and Fiscal Court ruled in favour of the claimants. The Public Prosecutors' Office appealed this decision to the Central Administrative Court – South (hereinafter, "TCA-S"). The TCA-S found that the laws governing the temporal application of the law meant that the more recent law on expropriation and the compensation for it was not applicable in this case because it had not existed when the easement was created. It therefore revoked the initial sentence and absolved the Portuguese State from the claim.

This TCA-S decision was annulled by the Supreme Administrative Court, which agreed with the Central Court on the rules governing the application of laws in time, but said that the TCA-S had failed to consider the possibility of the supervening unconstitutionality of the applicable easement regime – i.e. the question of the extent to which legal norms that predated the 1976 Constitution of the Portuguese Republic (hereinafter, "CRP") and did not provide for any compensation for administrative easements imposed directly by law subsisted after the CRP entered into force.

In its new ruling the TCA-S again considered that the later legislation was not applicable to this situation because of the rules on the succession of laws in time, but in the end applied it anyway on the grounds that the earlier easement regime conflicted with the principles of equality, proportionality and just compensation enshrined in the 1976 Constitution. It was against this TCA-S decision that the Public Prosecutors' Office appealed to the Constitutional Court.

The norm whose constitutionality was under review is contained in a 1955 Law (the regime governing areas adjacent to military organisations or facilities or others of value to national defence). This norm says that military easements and other restrictions imposed on the right to property in the military

interest do not entitle the affected party to compensation. Under the principle that ordinary law which predated the entry into effect of the 1976 Constitution is maintained unless it is contrary to that Constitution or the principles enshrined therein, this norm is still in effect today.

The TCA-S found that this norm suffered from supervening invalidity, because it conflicted with the principle of equality and the right to just compensation in cases involving expropriation in the public interest, both of which are enshrined in the Constitution.

This interpretation was underlain by acceptance of a principle under which the Constitution is said to prohibit the ordinary legislator from excluding the possibility of compensation in such a situation, inasmuch as a military easement implies an abating effect equivalent to that of expropriation, and the CRP lays down that "...expropriations in the public interest may only be undertaken ... upon payment of just compensation". The military easement is a form of administrative easement. The latter are not constituted by a legal act, but result directly from the law. Having said this, there are cases (e.g. military easements) in which there must be a legal act that defines the area actually encompassed by the easement.

Administrative easements are also characterised by the fact that they only give rise to an entitlement to compensation if the law that creates them expressly says so.

The question of whether this characteristic is unconstitutional had already come before the Constitutional Court in the past. Under the 1933 Constitution, the exclusion by law of compensation for administrative easements did not present a constitutional-law problem. In a legal system based on the primacy of the ordinary law and not of the constitution, like the 1933 one, the ordinary legislator has the last word on the question of the circumstances in which asset-related sacrifices imposed on private entities in the name of the pursuit of the public interest should be compensated. However, in a legal system based on the primacy of the Constitution, like the current Portuguese one, if the ordinary law says that an easement does not give rise to any compensation, the law can be questioned on constitutional grounds. One can thus see why the central issue posed in the present case is far from new to the Constitutional Court.

In its case-law the Court has never said that it would always be unconstitutional for a legal norm to fail to provide for any compensation for the imposition of

private asset-related sacrifices analogous to those involved in the present case.

The question of whether or not an administrative easement that is directly derived from the law entitles the affected party to compensation must be preceded by another question: whether the law which imposes the easement is subsumed into the constitutional norm that establishes the right to compensation in cases of requisition and expropriation in the public interest on the one hand, or into the constitutional norm that guarantees the right to private property as laid down in the Constitution on the other. The Constitution requires the ordinary legislator to regulate the right to property; the ordinary legislator has the competence to define the limits and content of that right within the legal system.

The concept of military easement can be questioned on constitutional-law grounds, but the award of compensation is not a condition for the easement to be constitutionally lawful. Such a condition would only exist if the law in question could be seen, not as a law which shapes property and ownership, but rather as a law that deprives an owner of property by bringing about a serious sacrifice whose value is the same as that of requisition or expropriation in the public interest, which the Constitution says must be the object of just compensation.

Under the Law that contains the norm before the Court, the purposes that justify the constitution of military easements and other restrictions on the right to property in the military interest are the need to: guarantee the security of military organisations or facilities or others of value to national defence; guarantee the security of persons and property in the areas adjacent to such organisations or facilities; enable the armed forces to carry out their assigned missions; and maintain the general appearance of given areas that are of particular interest to the defence of Portuguese territory and thereby attempt to conceal any military organisations, facilities or equipment in those areas.

With regard to the legal regime, it is also important to note that military easements are divided into general easements and private easements. The former comprise prohibitions on carrying out certain general types of work and activity – namely construction of any kind – without the permission of the competent military authority. Private easements comprise prohibitions on engaging in types of work and activity that are specified when the easement is created, unless they are permitted to do so by the competent military authority.

The easement in the present case was of the private type, and the legal criteria for granting permits in relation to the area covered by it are those needed to ensure that its specific purposes are guaranteed. When it established the rules for the creation of this military easement, the legislator fulfilled the constitutional requirement to determine the content of and limits on the owners' rights to use the property. The limitation this regime places on the private use of the property is one that affects the owners' rights and duties in general and abstract terms. In the light of the obligations to which the Constitution subjects the state in the national defence field, the legislator delimited the owners' or users' rights in relation to the property, excluding certain options that would otherwise be available to private users, because of the need to pursue the values linked to the defence of the nation.

III. One Justice dissented from the Ruling. She took the view that the norm is unconstitutional because it violates the right to property, inasmuch as it absolutely excludes the duty to pay compensation in cases in which military easements or other restrictions are imposed in the military interest, even when the effect of the ensuing diminution of the right to property is equivalent to an expropriation.

Cross-references:

- nos. 262/93, 30.03.1993; 594/93, 28.10.1993; 329/94, 13.04.1994; 405/94, 17.05.1994; 72/95, 21.02.1995; 112/95, 23.02.1995; 142/95, 15.03.1995; 154/95, 15.03.1995; 230/95, 16.05.1995; 588/95, 07.11.1995; 665/95, 22.11.1995; 147/96, 07.02.1996; 329/99, 02.06.1999; 544/01, 05.12.2001; 347/03, 08.07.2003.

Languages:

Portuguese.



Identification: POR-2014-2-011

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 15.07.2014 / **e)** 544/14 / **f)** / **g)** *Diário da República* (Official Gazette), 183 (Series II), 23.09.2014, 24388 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**
- 5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**
- 5.4 Fundamental Rights – **Economic, social and cultural rights.**
- 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Religion, working hours and schedule, flexible.

Headnotes:

Freedom of religion is not only enshrined in the Constitution of the Portuguese Republic (hereinafter, “CRP”), but is also recognised in both universal and regional international law, including EU Law, and possesses binding force under the founding law of the European Union.

The right of freedom of religion confronts the constitutional judge with one of the most important core areas of the various fundamental rights. The Constitution defines this right as “inviolable” – an adjective the CRP only employs in relation to two other cases: the inviolable right to life; and the inviolable right to moral and physical integrity.

Freedom of religion is assured even in cases in which the exercise of other rights is suspended by a declaration of a state of siege or emergency.

Religious freedom requires of the state is not a pure, negative *non facere*, but a positive *facere* embodied in a duty to ensure or provide the conditions needed to exercise one's religion.

The protection the CRP gives to the freedom of religion encompasses both the individual and the collective exercise of religion, with the latter including its institutional dimension. The externalised subjective aspect of religious freedom gives people both the right to act freely in accordance with the respective convictions and beliefs in their relations with public authorities and others, and the possibility of freely engaging in activities that constitute manifestations and expressions of the religion they profess.

Notwithstanding the fact that the scope of the protection afforded to the right of freedom of religion in the jurisprudence of the European Commission of Human Rights and the European Court of Human

Rights suggests that what counts is the negative dimension 'non-discrimination', these days the protection of religious freedom possesses a framework in which the higher level offered by a positive protection must prevail. The transnational systems for protecting human rights do so at the minimum requirable level, but this does not prejudice the possibility that each state's internal law can provide a broader protection at the higher level of protection derived from the individual national constitution.

The Portuguese Constitution requires the ordinary legislator to ensure that workers in subordinate positions can exercise the right of freedom of religion. It does not demand the neutralisation of this personal facet when people work for third parties, albeit the duties derived from contractual obligations must be safeguarded.

The state must remove obstacles to the exercise of religious freedom, and must create social conditions which are more favourable to that exercise.

Summary:

I. The present case concerned norms contained in the Law governing Religious Freedom (hereinafter, the "LLR") which say that workers subject to a flexible working-time regime can be dispensed from working on the religious holidays and at the times on the day on which their faith requires them to worship or refrain from working, and that they can make up for this by working the same number of hours at a different time.

The courts of first instance and appeal interpreted these norms such that they did not apply to the shift-work regime as well. The appellant challenged the Court of Appeal decision on the grounds of her constitutional freedom of religion.

The Organic Law governing the Constitutional Court gives the latter the competence to determine the constitutionality of a norm as interpreted and applied by a lower court whose decision is then appealed to the Constitutional Court, and if it finds the norm interpreted in this way to be unconstitutional, to say how it should in fact be interpreted and applied in the case in question. In pursuance of this competence, the Court decided that these norms do indeed also apply to the shift-work regime.

II. The Court held that if the LLR is interpreted in conformity with the Constitution, the flexibility concept must be considered to include every situation in which it is possible to make working hours compatible with dispensing workers for religious reasons.

The variable, rotating configuration of the shift-work regime is flexible and permits solutions that fulfil both the letter and the spirit of the law, in such a way as to create conditions that favour the exercise of workers' religious freedoms whenever possible.

The appeal in this concrete review case was against a decision in which the Lisbon Court of Appeal rejected a judicial challenge against the dismissal of a worker on the grounds that she had failed to fulfil her contractual work schedule. The appellant (the actual appellant was a trade union acting on behalf of its member) alleged that she was entitled to refuse to work from sunset on Fridays until sunset on Saturdays, because her religion observes this period as a day of rest. This meant only partially completing her work schedule on those Fridays on which her shift ended after sundown, and not working on Saturdays. The court *a quo* considered that for this to be the case, the worker must be subject to a flexible working scheme, and that for schemes to be considered flexible, there must be situations in which there are delimited periods within which the worker must obligatorily be present, but he or she can choose the exact times at which he or she begins and ends work, within certain limits.

In casu the appellant invoked the right to worship and the right to reserve a day each week – from sunset on Friday until sunset on Saturday – for that purpose, as required by her religion; however, the exercise of the right to act in conformity with her religious convictions conflicted with the duties derived from her labour situation.

The ordinary legislator has provided for a regime under which work can be suspended in order for workers to exercise their religious freedom, with the creation of a specific duty on the part of public and private employers to respect that right.

The legal regime governing the requisites for a worker to be dispensed from work under the LLR are as follows: the worker must be part of a flexible working-hours regime; he or she must belong to a church or religious community that has officially communicated the rest days and times prescribed by the belief they profess; and the working hours from which the worker is dispensed must be made up for in full. The regime reflects a concern on the legislator's part to take account of religious organisations besides the Catholic Church: the standard weekly rest day for workers in Portugal is Sunday, which is the Catholic holy day, and this legal regime thus responds to the desire to not only accommodate minority religious organisations, but also, as far as possible, the factual differences between them.

The judgement as to how to make the rights and interests at stake in a worker's religious freedom on the one hand and the employer's right to exercise its economic initiative on the other – in the present case with the latter including the right to organise working time – compatible with one another must be made by the legislator. When exercised within the scope of a labour relationship, religious freedom can be subject to a certain degree of compression justified by the rights and interests in play.

In its decision the Court of Appeal held that the exercise of the right to be dispensed from work can only be invoked by workers who are subject to a flexible working-time regime that is itself deemed indispensable to fulfilment of the requisite that the worker must fully make up for the working hours which are suspended. The court *a quo* then said that a 'flexible working-time system' can only be said to exist in working-time organisation regimes that delimit periods within which the worker must obligatorily be present, but can choose the exact times at which he or she starts and finishes work within given limits.

The Constitutional Court took the view that in the case before it, the way in which the Court of Appeal weighed up the configuration of the exercise of the workers' right of freedom of religion against other constitutionally relevant rights and interests was not in conformity with the protection the CRP affords to the freedom of religion. It felt that the Court of Appeal had placed the right of free economic initiative and the freedom of entrepreneurial organisation above the right of freedom of religion.

The Constitutional Court held that the command the Constitution gives the ordinary legislator is to grant maximum efficacy to the right derived from the freedom of religion, without prejudice to the need to adequately weigh up the other rights and interests that are protected by the CRP. An interpretation of the flexible working-time requisite that is entirely linked to a format for determining working hours which is decided by the employer, without any relationship to the possibility for a worker who is a religious believer to observe commands which are given by his or her religion and may in some way conflict with the working-time organisation scheme to which he or she is subject, de-characterises the broad protection the Constitution affords to religious freedom.

The Constitutional Court found that the lower court had found that the requisite for the worker to be subject to a flexible working-hour regime was not fulfilled in this case because it had attributed too narrow a scope to the flexible working-hour concept.

An interpretation whereby the only applicable situation is one in which workers are part of a scheme involving a period within which it is obligatory to be at work, but it is agreed that the exact starting and finishing times can vary within that period, would entail an unreasonable and excessive compression of the freedom of religion in a manner that would not be permissible under the constitutional principle of proportionality. Employers are also responsible for looking for solutions in terms of the ways in which labour is organised that enable workers to exercise their fundamental rights – in the present case, the right of freedom of religion.

Cross-references:

- no. 423/87, 27.10.1987, *Special Bulletin Freedom of religion and beliefs* [POR-1987-R-001];
- no. 174/93, 17.02.1993, *Bulletin* 1993/1 [POR-1993-1-007];
- no. 602/13, 20.09.2013, *Bulletin* 2013/3 [POR-2013-3-013].

Constitutional Court of Spain:

- Sentence no. 19/1985, 13.02.1985.

European Commission of Human Rights:

- *X v. United Kingdom*, no. 8160/78, 12.03.1981;
- *Tuomo Konttinen v. Finland*, no. 24949/94, 03.12.1996;
- *Louise Stedman v. United Kingdom*, no. 29107/95, 09.04.1997.

European Court of Human Rights:

- *Francesco Sessa v. Italy*, no. 28790/08, 24.09.2012; *Report of Judgments and Decisions* 2012.

Languages:

Portuguese.



Identification: POR-2014-2-012

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 15.07.2014 / **e)** 545/14 / **f)** / **g)** *Diário da República* (Official Gazette), 187 (Series II), 29.09.2014, 24830 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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:

Religion, employment / Working hours and schedule, flexible.

Headnotes:

Legislation providing that one of the requisites for being dispensed from work for religious reasons is that the person in question must be subject to a “flexible working-time regime”, must be interpreted such that it also applies to shift-work regimes. This is the only interpretation that is in conformity with the Constitution.

It would be unconstitutional to interpret the norm in such a way that it applied solely to a specific flexible working-hours regime, because this would be so restrictive that it would lead to the norm being applied in only a very small number of cases and to no significant practical effect. When the legislator referred to work under a “flexible working-time regime”, it did not mean just those situations in which workers can manage their working hours by choosing the times at which they begin and finish work, but also all those in which it is possible to make completing the total required number of hours at work compatible with being dispensed for the purpose of fulfilling religious duties. The decisive element in the light of the LLR requisites for this dispensation is that the applicable working-time regime must allow the worker to offset the periods in which he or she suspended his or her work against other periods in which he or she makes up the lost time.

Summary:

I. The appellant in this concrete review case was a public prosecutor, whose request to be dispensed from working shifts at times when the Public Prosecutors Office is required to be ready to respond to urgent cases, when those shifts fall on Saturdays, was refused by both the Supreme Council of the

Public Prosecutors Office and the Supreme Administrative Court. She argued that as a member of the Seventh Day Adventist Church she was obliged to reserve Saturdays for religious purposes and refrain from all secular work.

The question before the Constitutional Court was the constitutionality of a norm that subjects the right to dispensation from work for religious purposes to the requisite that the worker must be subject to a flexible working-time regime, when interpreted to mean that this legal formulation only applies to a specific flexible working-hours regime.

The court *a quo* argued that public prosecutors are subject to the operating hours practised by the country’s judicial services, and do not enjoy a specific flexible working-hours regime, which is one of the cumulative requisites for being dispensed from work for religious reasons. The Supreme Administrative Court considered that doing shift work on Saturdays was a functional duty which, inasmuch as it is freely accepted by staff who take up the position, is incompatible with the exercise of the freedom of worship.

The Supreme Council of the Public Prosecutors Office argued that the constitutional norm enshrining the right of freedom of religion lays down that no one can be deprived of rights because of their religious practice, but equally that no one can be released from duties for the same reason and that the LLR itself says that the freedom of conscience, religion and worship permits the restrictions needed to safeguard other constitutionally protected rights and interests.

II. The Constitutional Court recalled that the constitutional precept which enshrines the right of freedom of conscience encompasses various elements: that freedom itself, in the shape of the ability to choose ethical and moral standards by which to evaluate forms of conduct; the freedom of religion (the freedom to adopt a religion or not) and the freedom of worship, as a dimension of the religious freedom pertaining to believers (both an individual and a collective right to engage in outward acts of veneration specific to a given religion).

While the freedom of conscience only concerns the individual sphere, the freedom of religion possesses a collective and institutional dimension, and also implies that different faiths are free to exercise their religions. As an individual right, the freedom of religion requires the state to refrain from acts that would violate that right, but also places it under a regulatory obligation which presupposes that the state will undertake a set of obligations that can vary

depending on each religion's representativeness and are intended to provide believers with the conditions they need to fulfil their religious duties. The state is not ensuring the freedom of religion if, despite recognising their right to have a religion, it places religious believers under conditions that prevent them from practising it.

The principle of the separation of church and state and that the state must not be religious or faith-based implies that the state must be neutral in religious terms; it does not mean the state should be unaware of religious facts as social facts.

At issue in the present case was the freedom of worship, and particularly the right to reserve a certain period of time for religious purposes, when that period can be incompatible with fulfilment of labour-related duties within the framework of a subordinate labour relationship.

In various cases the European Commission of Human Rights and the European Court of Human Rights have seen the right of religious freedom from an essentially negative perspective, excluding the possibility that the freedom of worship can superimpose itself on the contractual obligations derived from a labour relationship and on other functional duties pertaining to a legally defined status.

In the present case a public prosecutor's request to be dispensed from shift work on Saturdays was denied because the Supreme Council of the Public Prosecutors Office and the Supreme Administrative Court both classified shift work as a rigid work schedule.

The Constitutional Court took the view that the LLR norm which makes flexible working-time a requisite for dispensation from work cannot be seen as blank chequebook that leaves the concrete implementation of the flexible working-time concept to other normative provisions. If this were not the case, the exercise of a fundamental right would be dependent on the ordinary legislator, who could opt to do away with flexible working times as a format in the Public Administration or restrict its field of application; or, in the case of private-sector labour relations, leave it to whether or not the parties either agreed to it or replaced it with some other system that did not fall within the typical concept of flexible working times.

The Court said that the flexible working-times regime is a concept that is broader than this and does not correspond to the technical/legal meaning of the term 'flexible working hours', which the legislator adopts in other places in the normative system and for other

legal purposes. There is nothing to prevent the flexibility regime to which the law refers from being applicable to shift work, given that this type of working arrangement is subject to a criterion of a rotating configuration and regular changes in the members of staff who do the work.

This is particularly evident in the case of the prosecutors who work for the Public Prosecutors' Office. They are bound to participate in the shifts which the Attorney-General's Office organises in order to respond to urgent situations, during the judicial holidays, or whenever else the Public Prosecutors' Office's work justifies it. They can also be included in the shifts organised by the law courts to undertake urgent duties which are provided for in the Criminal Procedural Code, the Mental Health Law and the Law governing the Custody, Protection and Re-education of Minors and which must be performed outside the normal working week. The Court said that it is precisely because we are not in the presence of a permanent judicial service that has to be undertaken on working days and during normal working hours, but rather a service that is organised in shifts, that the LLR provision is applicable.

It is possible for public prosecutors who ask to be dispensed from work for religious reasons to be assigned to judicial districts where there is less shift work at the times when the dispensation is needed, thereby making the exercise of this right as compatible with their fulfilment of their functional duties as possible.

The fact that the LLR norm that a person who requests dispensation from work on religious grounds must fully make up for the working hours in question at another time does not conflict with the classification of shift work as being a flexible working-time regime and if it is not materially possible to allow a prosecutor to make up for all the shifts she would like to be dispensed from, there is nothing to stop her from being granted that dispensation for the number of days that is possible.

The fact that it may be impossible to wholly or partially fulfil the condition that the dispensed working hours must be entirely made up for at another time does not de-characterise the variable, rotating nature of shift work, nor does it dispense the managerial body concerned from finding a staff management solution that is compatible with the exercise of a constitutionally guaranteed right.

There is nothing to prevent a flexible working-time regime from covering not only shift work, but also staggered working hours that make it possible to require different groups of staff to start and finish

work at different times, continuous working days that allow work to be concentrated during a particular time of day, and all the other situations that are not subject to fixed working hours or where there is no set work schedule. The Constitutional Court concluded that both the text of, and the reason – the desire to permit the concrete enjoyment of a fundamental right – for the precept suggest an expansive interpretation that excludes the one adopted by the Supreme Administrative Court.

The Court therefore found the norm, when interpreted as it had been by the Public Prosecutors' Office and the Supreme Administrative Court, to be unconstitutional.

Cross-references:

- no. 423/87, 27.10.1987, *Special Bulletin Freedom of religion and beliefs* [POR-1987-R-001];
- no. 174/93, 17.02.1993, *Bulletin* 1993/1 [POR-1993-1-007].

European Commission of Human Rights:

- *Tuomo Kontinen v. Finland*, no. 24949/94, 03.12.1996;
- *Louise Stedman v. United Kingdom*, no. 29107/95, 09.04.1997;
- *X v. United Kingdom*, no. 7215/75, 12.03.1981.

European Court of Human Rights:

- *Francesco Sessa v. Italy*, no. 28790/08, 24.09.2012, *Reports of Judgments and Decisions* 2012.

Languages:

Portuguese.



Identification: POR-2014-2-013

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 30.07.2014 / **e)** 572/14 / **f)** / **g)** *Diário da República* (Official Gazette), 160 (Series II), 21.08.2014, 21763 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.10 General Principles – **Certainty of the law.**
- 3.11 General Principles – **Vested and/or acquired rights.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 4.10.2 Institutions – Public finances – **Budget.**
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**
- 5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**
- 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security.**
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**
- 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:

Budget, balancing / Deficit, public, reduction / Financial Constitution / Pension, contribution, transfer to state budget / Pension, contribution, increase / Social security system / National Health System.

Headnotes:

The Constitution does not require that Central Administration organs possess financial or budgetary autonomy; nor does it prohibit the state purse from receiving revenue from the various public departments and services, or oblige the latter's revenues to be consigned to their specific missions.

Three cumulative prerequisites are needed for there to be a situation in which one is legitimately entitled to trust in the existence of a constitutionally protected legal certainty:

- i. the expectations that the legal regime in question will be stable must have been induced by the behaviour of the public authorities;
- ii. those expectations must be based on good reasons, which must be evaluated as such within the constitutional-law axiological framework;
- iii. and the affected citizens must have oriented their lives and made decisive choices based on expectations that this particular legal regime would be maintained.

It is also necessary to consider whether there are public-interest reasons which, when weighed up

against the other relevant factors, justify discontinuing the behaviour that generated the expectations concerned.

When the Constitutional Court gauges the applicability of the principle of the protection of trust (legal certainty), it must consider two opposing sets of interests: the private subjects' expectations that the current legislative framework will persist and the public-interest reasons that justify discontinuing these legislative solutions. The Constitution recognises these two groups of interest on an equal footing, so it is necessary to confront them with one another and place them on the scales in order to determine each one's variable weight and draw a conclusion as to which of them should prevail. The method for doing this is the same as the one used to judge the proportionality or substantial adequacy of a measure that restricts rights. Even if one concludes that the public interest in changing and adapting the current legislative framework is an urgent one, it is still necessary to use material and axiological parameters to determine whether the extent of the sacrifice is inadmissible, arbitrary or too heavy a burden.

Pensioners do possess a legal position that enjoys a special degree of protection, *maxime* with regard to this principle. However, despite the fact that as an acquired right, the right to a pension deserves greater protection from subsequent changes in legislation than rights that are currently under formation, the need to safeguard other constitutionally protected rights and/or interests that must be deemed to prevail over it can legitimate measures which affect pensioners' legitimately justified rights and expectations. Even if the other requisites for the applicability of the principle of the protection of trust (legal certainty) are in place, there are public-interest reasons which, when weighed against this principle, can justify the discontinuation of the behaviour that generated the expectations.

Summary:

I. In the present case the Court combined two requests for *ex post facto* abstract reviews of two norms that amended the 2014 State Budget law (LOE2014): one on the Extraordinary Solidarity Contribution (hereinafter, "CES"), and one on the reversion to the state of half the revenues from employers' contributions to the Directorate-General for the Social Protection of Public Servants (hereinafter, "ADSE") (a fund that provides social healthcare protection for public servants).

II. The Court had already weighed up the constitutionality of the CES in previous Rulings and decided that it could not be criticised on constitutional

grounds. The measure's reconfiguration in LOE2014 remained within the limits outlined by the constitutional-law principle of the protection of trust (legal certainty), defined in the way in which it has gradually been rendered operable in the Court's unwavering jurisprudence on the subject. Expectations that laws will remain stable were and still are attenuated in the economically exceptional context that justified both the creation of the Contribution and its successive amendments. Expanding the base on which the CES is levied is not an inappropriate means of achieving a budgetary balance. There was nothing that would have enabled the Court to conclude that expanding the CES base was not indispensable to the ability to safeguard the budgetary balance in the 2014 budget year.

The norm does not undermine the state's duty to subsidise a social security system that protects citizens when they are ill and it does not affect the National Health Service (hereinafter, "SNS"), inasmuch as ADSE provides additional protection that supplements the SNS cover, in a scheme which ADSE beneficiaries can choose to join or not.

The CES was designed to work in combination with other measures, in order to respond to the economic/financial crisis situation that has temporarily also required the political authorities to make choices involving an urgent strengthening of the social security system at the expense of its own beneficiaries.

Faced with a combination of a reduction in the social security system's revenues (due to rising unemployment, falling wages, and new emigratory trends) and an increase in the cost of supporting people in unemployment and poverty, with the ensuing need for the state to subsidise the system and a resulting worsening of the public deficit, the legislator opted to extend the requirement to pay social security system contributions to pensioners.

In the present case the Court had to consider the relative importance of the public interest that served as grounds for the creation of the CES: the need to achieve a budgetary balance and reduce the public deficit in a relatively short period of time. This weighing-up process, which must be undertaken using the criteria imposed by the principle that excess is prohibited, is what makes it possible to gauge whether or not the damage done to the trust and certainty is reasonable or justified.

In the case before the Court the reconfiguration of the CES affected both pensioners who were already subject to the Contribution and others who never had been. It can be said that there was a weakening of the

expectations of those now affected by the changed threshold that their legal position would continue unchanged, in that the exceptional economic context that justified creating the levy and successively amending it still existed. The public interest pursued by broadening the base for the subjective incidence of the CES was of key importance to the nation and possessed an urgency that manifestly made it prevalent. The expectations of the pensioners affected by the legislative amendment were incapable of resisting the social security system's need for additional funding in the 2014 budget year, in the exceptional situation invoked by the legislator.

The CES is an exceptional, transitional measure imposed in a budgetary norm and designed to respond to a situation of economic and financial emergency and budgetary imbalance. As such, the Court was of the opinion that from the specific perspective of the principle of the protection of trust (legal certainty), the renewed and amended version of the CES included in LOE2014 deserved a substantially different assessment from the one the Court had made of the analogous measure in LOE2013.

The Court also said that there was no breach of the principle of proportionality, and that there was no reason in the present case to differ from its previous finding on the appropriateness of and need for a CES, within the overall framework of a programme intended to achieve a balanced budget.

In abstract terms, broadening the base of CES contributors is not an inappropriate way to achieve budgetary balance, and where the need for the chosen option is concerned, it cannot be said that expanding the CES's objective scope is not the instrument that is least burdensome for the interests that are negatively affected in pursuit of that goal.

The Court said it was necessary to ask whether the amount of time that had passed since the Financial Assistance Programme for Portugal began and the measures taken alongside the CES were introduced, required the legislator to find alternatives to prevent the prolonging of the differentiated treatment from becoming clearly excessive for its targets. The legislator was not dispensed from looking for alternative measures that would make it possible to lessen the severity of the demands made on retirees and pensioners in the last few years, thereby sharing public costs out fairly between the recipients of every different type of income. However, this fact was not enough to exclude the possibility of renewing and reformulating a CES-type measure for 2014 from the legislator's ability to shape the country's budget legislation.

The Court considered that notwithstanding the intensity of the sacrifice suffered by the private spheres affected by the new Contribution, the public interest at stake was of such key importance and urgency that it manifestly prevailed in this case. It said that one must accept that the combination of the temporary and exceptional nature of the norms underlying the monthly payment demanded of the social security beneficiaries now covered as a result of the expansion of the CES base, and the goals those norms are designed to pursue, means that this sacrifice is not a particularly excessive and unreasonable one that would imply a violation of the principle of proportionality which could be criticised on constitutional grounds.

The Court declined to declare a norm that reverts 50 % of the income received from employers' contributions to Directorate-General for the Social Protection of Public Servants (hereinafter, "ADSE") to the state purse unconstitutional. These contributions are themselves made from state funds, because the employer in question is the state, and the norm's scope of application does not impinge on the principles of the so-called 'Fiscal Constitution', which in turn means that it is not in breach of either the principle of the unitary nature of the personal income tax, or the principle of equality.

III. Six Justices dissented from the majority decision on the norm regarding the CES, and one from that on ADSE. In addition, two Justices attached concurring opinions to the Ruling.

Cross-references:

- nos. 287/90, 30.10.1990; 128/09, 12.03.2009 and 396/11, 21.09.2011;
- no. 187/13, 05.04.2013, *Bulletin* 2013/1 [POR-2013-1-006].

Languages:

Portuguese.



Identification: POR-2014-2-014

a) Portugal / b) Constitutional Court / c) Plenary / d) 14.08.2014 / e) 574/14 / f) / g) *Diário da República* (Official Gazette), 169 (Series I), 03.09.2014, 4671 / 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.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.13 General Principles – **Legality.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**
- 4.10.2 Institutions – Public finances – **Budget.**
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**
- 5.2.1.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**
- 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security.**
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**
- 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:

Budget, deficit, reduction / Economic and financial crisis / Employment, pay-cut, temporary / European Union, legislation, Stability and Growth Pact.

Headnotes:

Portugal's participation in the European Union and the Eurozone obliges it to fulfil a range of demanding requisites in the budgetary field. One of the main obligations of Member States is to avoid excessive budget deficits, and the Union has the competence to monitor each Member State's budgetary situation and the amount of its public debt.

Norms contained in the European Union's founding law have been implemented by means of derivative-law rules – particularly regulations, especially those in the Stability and Growth Pact. The Court emphasised that the 'Budget Treaty' is not part of European Union Law, and is only applicable to the

extent that it is compatible with the founding Treaties and the legal provisions they contain. From a Portuguese Constitutional Law point of view, the 'Budget Treaty' does not enjoy the status the Constitution affords to the Treaties governing the European Union and the norms issued by European Union institutions in the exercise of their competences. The latter are applicable in Portuguese Law, subject to respect for the fundamental principles of a democratic state based on the rule of law. The 'Budget Treaty', on the other hand, is a source of Public International Law of the type that is governed by the constitutional norm according to which norms contained in duly ratified or approved international conventions have effect in domestic law once they have officially been published in Portugal and only for as long as they are binding on the Portuguese State.

Portugal is subject to an excessive deficit procedure under which various European Council recommendations have been approved. Setting aside doubts as to how binding such recommendations are, in any case they do not require Portugal to take specific concrete measures to control public spending and reduce the deficit. They instead limit themselves to listing the objectives which must obligatorily be achieved under European Union norms that are indeed binding – those included in the founding law of the European Union and the derivative law referred to above. The binding nature of European Union Law in this domain does not apply to the means by which the individual Member States actually achieve the goals imposed on them.

This signifies that the fact that one must accept that the norms which the national legislator has adopted in the past and will adopt in the future in pursuit of the aforementioned objectives must comply with European Union rules, has no consequences from the point of view of the application of national constitutional rules. In a multilevel constitutional system in which various legal systems interact with one another, domestic Portuguese legislative norms must necessarily comply with the Constitution and it falls to the country's Constitutional Court to administer justice in constitutional-law matters. European Union Law itself requires the Union to respect the national identities of the different Member States, as reflected in each one's fundamental political and constitutional structures.

The constitutional principles of equality, proportionality and the protection of trust (legal certainty), which have served as parameters by which the Constitutional Court gauges the constitutionality of national norms regarding the issues linked to those before it in the present case, form part of the

central core of the state based on the rule of law and are included in the common European legal heritage, which is also binding on the European Union.

Summary:

I. The President of the Republic asked the Constitutional Court to conduct a prior review of the constitutionality of a Decree in which the Assembly of the Republic approved a regime establishing temporary pay-cut mechanisms and the conditions under which they would be reversed within a maximum of four years.

The Decree included various such mechanisms: a pay cut in 2014 for staff paid out of public funds (similar to the one that had already been created in the State Budget Law for 2011 – LOE2011); a pay cut in 2015 worth 80% of the 2014 equivalent and the inclusion in the law of provisions under which similar cuts would apply in the subsequent years up until 2018. Together, these measures added a further five years to past cuts, thus bringing the total consecutive number of years with such cuts to eight (2011-2018). Unlike 2014 and 2015, the Decree did not specify the amount of the reductions that would apply in each of the years between 2016 and 2018.

II.1. Norms that provided for pay cuts in 2016-2018 for all staff paid out of public funds were unconstitutional.

Maintaining existing pay cuts into 2016-2018 would be constitutionally unacceptable, all the more so in that the norms did not determine the amount of the future reductions. Maintaining pay cuts for another three years, at levels that could be as much as 80% of those that had already been in place since 2011, would go beyond the permissible limits on the additional sacrifice that can be demanded of workers paid out of public funds. It would be in breach of the principle of equality, because nothing comparable would affect other types of income.

2. Norms that impose pay cuts in 2014-2015 for staff paid out of public funds are not unconstitutional.

In the present circumstances the public interest inherent in fulfilling the Portuguese State's international commitments implies a certain erosion of the principle of the protection of trust (legal certainty). In this case there was an absence of sufficiently clear elements that would have underpinned a finding that these pay-cut measures are unconstitutional in the light of this principle, even though they run counter to the expectations of a group of people who had been repeatedly affected by similar cuts in the past. Nor were there constitutional grounds for criticism based

on the principle of equality. Legal equality is always a proportional one, so gauging the existence or otherwise of inequality must take proportionality into account. The legislator's freedom to resort to reducing the pay and pensions of persons who receive them from public funds, with the goal of achieving budgetary balance even within the framework of a serious economic/financial crisis, cannot be without limits. However, given the exceptional nature of the current situation, and notwithstanding the unequal treatment of which they are the object, the additional sacrifice imposed on such staff still does not make that treatment arbitrary and the fact is that cutting their pay does immediately and automatically reduce public spending.

Even though in 2015 the country will already be free of the level of constraints on its budgetary choices that marked the years between 2011 and 2014, the continued existence of a procedure that is designed to reduce budgetary excess and follows on from the actual international financial assistance period, continues to configure an exceptional framework that is capable of justifying the imposition of pay cuts and making one consider that they do not violate the principle of equality.

The Court recalled the essential requisites it has used in its case-law to determine when the Constitution protects the principle of trust (legal certainty), which include the existence of relevant legitimate expectations. It said that in the present case it was credible to think that the fact that the successive pay-cut measures imposed since 2011 had been systematically presented as transitional – i.e. that they would be reversed – had generated such expectations – that their remuneratory situation would improve with time – on the part of workers paid out of public funds.

This expectation that the situation would improve was legitimated by the fact that the Portuguese State had already fulfilled the terms of the Financial Assistance Programme for Portugal (hereinafter, "FAP"), as well as by the improvement in the economic and financial situation reflected in various indicators, in the government forecasts included in the Budgetary Strategy Document 2014-2018 (hereinafter, "DEO"), and in the reduction in the Corporate Income Tax (hereinafter, "IRC") paid by large enterprises.

The Court acknowledged that admitting the expectations that the pay situation will improve are legitimate cannot eliminate the constraints derived from the state's international commitments – particularly those arising out of the Treaty on the Functioning of the European Union and the Treaty on Stability, Coordination and Governance in the

Economic and Monetary Union (known in Portuguese as the 'Budget Treaty'). The effects of the FAP will still be felt in 2015, given that it sets Portugal's budget deficit for that year at 2.5 % of GDP, as will the effect of the excessive deficit procedure. The logical consequence of these circumstances, which increase the relevance of the underlying public interest, is that the pay cuts provided for in 2015 remain within the limits of that which can be said to be expectable and therefore permitted by the principle of the protection of trust (legal certainty).

Turning to 2016-2018, however, a variety of indicators and above all the government forecasts set out in the DEO reflect an economic scenario in which there will be an improvement in the economic and financial situation, and this can be expected to have an effect on the situation of workers who are paid out of public funds. One can take the stance that this improvement should include more than just a mechanism under which it would still be possible for there to be no reversal of the previous pay cuts between 2016 and 2018.

The Court pointed to its own case-law, in which it has taken the view that the pay-cutting measures adopted since 2011 were designed to safeguard a public interest that should be considered to prevail over other factors, and that this was the decisive reason why the Court rejected the argument that the situation involved a constitutionally unacceptable lack of protection of trust (certainty). These are basically conjunctural financial-policy measures chosen by the country's legislative organ – itself legitimated by the principle of democracy seen as representation of the people – and also rooted in the need to respect the international commitments the Portuguese State made when it signed the FAP.

However, once the country reaches 2016, the FAP is over and the present excessive deficit procedure has been finalised, there would have to be other grounds in order to again conclude that the pay-cut measures were not unconstitutional because they were justified for very important public-interest reasons weighty enough to prevail over expectations of a return to a framework of stability in the law.

As set out in the norms before the Court, the pay cuts imposed on workers paid out of public funds since 2011 could have remained in effect until 2018 – i.e. for eight consecutive years. There was no guarantee whatsoever that this would not be the case.

The Court said that if this were to happen, it would be within a context in which the consequences of the overall remuneratory treatment of such workers – once again hit by pay cuts – would be much more

negative than just the results of these cuts. The latter would again come on top of the permanent effects of the increase in their working hours (which has effectively cut hourly rates of pay), the increase in their contributions to ADSE, the freeze on promotions and advancements in the career structure, and the programmes for reducing staff numbers and for limiting the intake of new recruits, with both the latter potentially increasing the effective number of hours worked by existing/remaining staff.

The norms did not establish any percentage by which pay would be cut in 2016-2018; this would instead be dependent on "budgetary availability" (for another three years). On top of this, the DEO sets the goal of conditioning the reversal of the pay cut measure "to the reduction in the overall wage bill by means of a quantity effect" – i.e. by cutting the number of public servants. The Court was of the opinion that when seen in the light of the principle of equality, these reasons were not capable of justifying continued cuts in the pay of staff who are paid from public funds, and their pay alone, for another three years. Given the constitutional requirement that public costs must be shared out equally, it is not constitutionally permissible for the strategy for balancing the public finances to be based on cutting spending by continuing to sacrifice those workers in particular.

As such, the Court found that the norms applicable to 2016-2018 would be unconstitutional.

III. Three Justices dissented (one partially) from the decision not to find the norms that cut the pay of workers paid out of public funds in 2014 and 2015 unconstitutional; five Justices dissented from the decision in which the Court pronounced the unconstitutionality of the norms that cut the pay of such workers in 2016-2018 and one Justice attached a concurring opinion to the Ruling.

Cross-references:

- no. 353/12, 05.07.2012, *Bulletin* 2012/2 [POR-2012-2-011];
- no. 187/13, 05.04.2013, *Bulletin* 2013/1 [POR-2013-1-006];
- no. 413/14, 30.05.2014.

Languages:

Portuguese.



Identification: POR-2014-2-015

a) Portugal / b) Constitutional Court / c) Plenary / d) 14.08.2014 / e) 575/14 / f) / g) *Diário da República* (Official Gazette), 169 (Series I), 03.09.2014, 4691 / 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.**
- 3.13 General Principles – **Legality.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 3.23 General Principles – **Equity.**
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**
- 5.2.1.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**
- 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.**
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**
- 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:

Intergenerational justice / Pension, calculation / Pension, reduction / Public sector retirement / Social security, contribution / Social security system, bases / Statute / Retirement, Public Sector / Retroactive laws.

Headnotes:

Recognising the right to a pension is not the same as recognising the right to a pension of a given amount. Neither recognition of the right to a pension, nor the specific protection afforded to that right, by themselves eliminate the possibility that the concrete amount of the pension can be reduced. The right to that amount only takes on precise content through ordinary legislation, which means that its value is infra-constitutional. The right to a certain pension depends on the state's financial possibilities – i.e. is subject to that which is possible – and is permeable to conjunctural pressures. However, it does also enjoy the specific protection derived from the key structural principles of a state based on the rule of

law, such as the protection of trust (legal certainty) and proportionality.

The vulnerability of this right to a pension of a certain amount is also derived from the way in which the right itself is structured. Its formation possesses a medium and long-term temporal structure, and the fact is that the socioeconomic contexts which form the framework for the work of the legislative authorities can change radically over the benefit's lifetime.

There is no general prohibition on going backwards in terms of social rights, such as to prohibit any new legal regimes that might affect legal situations encompassed by earlier laws. This would run the risk of destroying the autonomy of the legislative function, whose typical characteristics, such as the freedom to create measures without regard to precedent and the freedom to reverse one's own legislative acts, would be practically eliminated. The Court said that it is necessary ensure a harmony between the stability of the legislative *acquis* that has already been achieved in the social rights field on the one hand, with the legislator's freedom to shape legislation on the other. This harmonisation implies distinguishing between situations in which the Constitution gives a sufficiently precise order to legislate, when the ordinary legislator's freedom to take backward steps in the degree of protection that has already been attained is necessarily quite minimal, from those in which the prohibition on social retrogression is limited by the principle of democratic alternation and operates only when the change that reduces the content of a social right either affects the guarantee of fulfilment of the minimum imperative content of the constitutional precept, or implies violation of the principle of the protection of trust (legal certainty) because of the arbitrariness of the retrograde step. The legislator's power to reverse its own laws is based on the principle of democratic pluralism and is not unlimited, but must instead coexist with other constitutional principles.

Summary:

The Constitutional Court found that norms which defined the scope of application of a proposed Sustainability Contribution (hereinafter, "CS") and the formula for calculating it were in breach of the principle of the protection of trust (legal certainty), and therefore pronounced them unconstitutional.

The Sustainability Contribution would have applied to all pensions paid to single recipients by public social protection systems, regardless of the grounds on which the pension is awarded, including not only pensions paid by the different public systems, but

also all monetary benefits owed to pensioners and retirees under supplementary regimes, whatever they may be called.

The Court considered that the CS consisted of a pension-cutting measure in the strict sense, which affected legal positions that deserve intense constitutional protection within the overall framework of the control of the protection of trust (legal certainty).

When the rules governing the formation of pensions are changed before the point at which those pensions exist as “sealed” rights pertaining to their beneficiaries, it is already appropriate to use the parameter of the protection of trust (certainty) to measure the admissibility of the legislative amendment. This is all the more true of cases in which the change affects the amount of a pension that is already being paid out. In such situations the beneficiary has already seen a precisely defined subjective right enter his or her legal sphere and is in a position to demand that the state pay him or her his or her due, all the more so in that the exact content of the right today was determined by the legal rules that were in place when the right became part of the beneficiary’s legal sphere in the past. In such circumstances the consistency of the legal position affected by the entry into force of a new law is at the highest possible level for the purposes of the control of the protection of trust (certainty).

In addition, when the CS sought to affect acquired rights, it was entirely indifferent to the differences between the situations of pensioners who, solely because they left the active life at different moments in time, now found themselves worse off as a result of the evolution in the legislation on pensions. This is an issue that raises serious difficulties on the level of equality, internal fairness and intergenerational justice.

The legislator invoked the public interest in ensuring the sustainability of the public pension system. However, in the circumstances described above, when the means to this end is a measure that merely cuts the amount of pensions without taking account of other relevant factors which might mitigate the damage done to the pensioners’ subjective legal positions, that public interest cannot be held to prevail over the intense sacrifice imposed on the private subjects in question, whose protectable expectable interests would be disproportionately affected, thereby violating the constitutional principle of the protection of trust (legal certainty).

Given the intensity of the effects on the private subjects’ legal positions, the legislator was under a special burden to substantiate its decisions. It is not

enough to generically invoke a goal of the sustainability of the public pension system. It is necessary to demonstrate that a pension-cutting measure based on the mere application of a percentile proportion of the monthly amount of each recipient’s pension or total pensions, objectively constitutes a means that is fitting in the light of the desired result, is apt to achieve that result, and is necessary to the extent that there are no other means that would achieve the same result in a way that was equally effective but less burdensome for the persons affected.

In the recent past the legislator had adopted other solutions that were especially designed to ensure the sustainability of the pension system, either by changing the way pensions are calculated, or by bringing in a sustainability factor in the shape of a mechanism for automatically adjusting the amount of pensions and the conditions governing their award in the first place to variations in the population’s life expectancy. In budgetary terms, merely cutting the value of pensions by a given percentage – as was the case with the earlier Extraordinary Solidarity Contribution (CES) – serves only to reduce short-term spending, without offering the ability to adapt to new circumstances resulting from demographic or economic changes; changes to which the future legislator can then only respond (unless it opts for a structural reform) with new one-off measures that increase the percentage of the cuts or expand the universe of beneficiaries affected by the contribution.

The Court took the view that in these circumstances, and when not accompanied by a justification capable of overcoming the doubts about the measure’s fitness and necessity, the interest in the sustainability of the public pension system was incapable of configuring a public interest strong enough to prevail over the intensity of the sacrifice imposed on private subjects. It therefore found the norms unconstitutional.

A more detailed summary can be found in the full text part of CODICES.

III. Three Justices dissented from the Ruling, while two more attached concurring opinions to it.

Cross-references:

- nos. 287/90, 30.10.1990; 349/91, 03.07.1991; 99/99, 10.02.1999 and 318/99, 26.05.1999;
- no. 509/02, 19.12.2002, *Bulletin* 2002/3 [POR-2002-3-009];

- nos. 675/05, 06.12.2005; 302/06, 09.05.2006; 128/09, 12.03.2009; 188/09, 22.04.2009 and 3/10, 06.01.2010;
- no. 187/13, 05.04.2013, *Bulletin* 2013/1 [POR-2013-1-006];
- no. 862/13, 19.12.2013, *Bulletin* 2014/1 [POR-2014-1-001];
- no. 572/14, 30.07.2014.

Languages:

Portuguese.



Identification: POR-2014-2-016

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 28.08.2014 / **e)** 578/14 / **f)** / **g)** *Diário da República* (Official Gazette), 177 (Series I), 15.09.2014, 4958 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach.**

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

Keywords of the alphabetical index:

Education, religion / Education, principle that public education must not be religious or faith-based / Religion, education, publicly-funded school / Religion, separation of church and state.

Headnotes:

The matter of constitutional rights, freedoms and guarantees, among them the freedom of religion and its institutional corollaries, is one of those in relation to which the level of the legislative competence reserved to the Assembly of the Republic is at its

highest. As such, it concerns all legislative regulation and not just the bases for, or general regime governing, a given domain.

The freedom of religion is one of the personal rights, freedoms and guarantees and is expressly enshrined in the Constitution, which attaches a specific importance and degree of sensitivity to it. This is a right that continues to be guaranteed even during a state of siege or emergency. In addition to its negative dimension, the freedom of religion also requires the state to guarantee the conditions needed for the freedom to be exercised. This duty is particularly sensitive when it comes to the openness of public schools to religious education. This is a manifestation that can trouble the principle of the separation between the state and churches, which is in turn linked to the principle that the state must be non-faith-based or neutral in religious matters. The latter principle applies to public education, which cannot have a religious orientation, although the state can authorise the different religious faiths to teach their religion at public schools.

Summary:

I. A norm contained in a Decree sent for signature to the Representative of the Republic for the Madeira Autonomous Region said that in order for students not to attend “moral and religious education activities” they needed an express declaration to that end from a parent or guardian, whether those activities involved classes in Catholic Moral and Religious Education or some other type of such education.

The first issue raised by the petitioner was that in his view this precept was organically unconstitutional, because the regime in question concerned rights, freedoms and guarantees – an area that falls within the Assembly of the Republic’s partially exclusive legislative competence.

The second issue raised was that the norm also suffered from material unconstitutionality.

II. The Constitutional Court considered that this violated the Assembly of the Republic’s partially exclusive legislative competence (legislation on constitutional rights, freedoms and guarantees), the right to freedom of conscience, religion and form of worship, and the principle that public education must not be religious or faith-based.

This prior review case was brought by the Representative of the Republic for the Madeira Autonomous Region (hereinafter, the “RAM”).

The 2004 Constitutional Revision made some elements of the legislative competence of the Autonomous Regions broader and more flexible, particularly by eliminating the general clause on “specific regional interest”, albeit while maintaining other limitations, such as the requirement that regional legislation cannot address matters which are the exclusive competence of the entities that exercise sovereignty (all of which are national).

Such matters necessarily include those that fall within either the absolute, or the partially exclusive, competence of the Assembly of the Republic. The Court emphasised that the Constitution expressly prohibits any authorisation of the Autonomous Regions to legislate on matters regarding constitutional rights, freedoms and guarantees.

The innovative and restrictive content the RAM sought to introduce in the field of rights, freedoms and guarantees thus configured the existence of an organic unconstitutionality.

The issue here was not one of merely executive details of the freedom of religion and religious education at public (in the sense of publically funded, or non-private or cooperative) schools – details that must indeed be seen as being outside the scope of the Assembly of the Republic’s partially exclusive legislative competence. The rule the RAM sought to introduce conflicted with both the state’s symbolic positioning in relation to religion, and the very way in which a negative freedom – in *casu* the freedom not to receive religious education – is exercised.

Nor was the question of whether these activities specifically concerned Catholic Moral and Religious Education (hereinafter, “EMRC”) or any other type of such education at issue.

However, religious education at public schools does primarily entail the academic subject ‘EMRC’. The Court recalled that the 2004 Concordat between the Portuguese State and the Vatican subjects attendance at Catholic religious and moral classes at public non-higher education establishments to a positive declaration of will by the interested party.

Turning to the petitioners second allegation – that the norm also suffered from material unconstitutionality – the Court emphasised the wide-ranging treatment given to religious freedom in international human rights law, referring specifically to the Universal Declaration of Human Rights, the International Covenant on Civic and Political Rights, the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the United Nations Declaration on the Rights of

Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, and the Framework Convention for the Protection of National Minorities.

The Court also recalled that the topic of religious education at public schools can be seen from various perspectives, ranging from radical prohibition (“militant secularism”) to compulsory, organised Catholic education funded and taught by the state.

In the present case the Court took the view that an obligation to expressly refuse activities linked to moral and religious education would mean obliging citizens to overtly state a desire which they might prefer to keep quiet and maintain strictly within the domain of their personal privacy. Any freedom not to do something – here, the negative aspect of the freedom of religion – is violated by the imposition of a positive *facere* as a condition for being able to enjoy that freedom. It may be permissible for the exercise of rights (the right to religion) to depend on taking some form of action (making a request or a declaration, etc.), but this is not true of the exercise of freedoms – a freedom not to do something, which consists of a freedom not to act – in relation to which any material requirement that conditions exercise of the freedom is unacceptable. As a negative freedom, the freedom of religion essentially consists of a freedom “not to do”: no one is obliged to possess or profess a religion, and no one is obliged to receive religious education. By modelling non-access to religious education at public schools in the form of a requirement to provide a negative declaration, the regional legislator sought to introduce the right to refuse religious education into the legal system; however, failure to provide such a declaration would mean that that education would have become a compulsory subject.

The Constitutional Court also found that the norm before it was in breach of the constitutional principle of the non-faith-based or religious nature of public education.

The Court said that the entry into force of the 1976 Constitution represented a change in the direction taken in the relations between the state and the different churches. A number of norms in the 1940 Concordat were rendered out of date, including the article under which: “The education given by the state at public schools shall be guided by the country’s traditional moral and Christian principles. Consequently, Catholic religion and morality shall be taught at public elementary, complementary and middle schools to students whose parents or whoever acts in their stead have not requested exemption”.

The academic discipline Moral and Religious Education is currently subject to a range of legislative acts. Of particular importance is the Law governing the Bases of the Education System. In accordance with the provisions of the Constitution, this says the state cannot give itself the right to programme education and culture in accordance with any philosophical, aesthetic, political, ideological or religious directives, and coherently with this, that public education cannot be religious or faith-based.

The Court noted that the bases of the education system fall within the Assembly of the Republic's exclusive legislative competence, and that once those bases had been fixed by the Assembly, the government had exercised its own legislative competence in the form of Executive Laws that were necessarily subordinated to the Law whose bases they sought to develop.

The Constitutional Court therefore found that the norm was also materially unconstitutional.

Cross-references:

- no. 423/87, 27.10.1987, *Special Bulletin Freedom of religion and beliefs* [POR-1987-R-001];
- no. 174/93, 17.02.1993, *Bulletin* 1993/1 [POR-1993-1-007];
- no. 246/05, 10.05.2005, *Bulletin* 2005/2 [POR-2005-2-005];
- nos. 258/07, 17.04.2007; 423/08, 04.08.2008; 613/11, 13.12.2011; 374/13, 28.06.2013; 793/13, 21.11.2013; 55/14, 20.01.2014.

European Court of Human Rights:

- *Lautsi v. Italy*, no. 30814/06, 18.03.2011, *Reports of Judgments and Decisions* 2011;
- *Folgerø v. Norway*, no. 15472/02, 29.06.2007, *Reports of Judgments and Decisions* 2007-III;
- *Zengin v. Turkey*, no. 1448/04, 09.01.2008.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2014-2-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 06.05.2014 / **e)** 265/2014 / **f)** Decision on the exception of unconstitutionality of the provisions of Article 5 of the Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 372, 20.05.2014 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
 3.4 General Principles – **Separation of powers**.
 4.5.2 Institutions – Legislative bodies – **Powers**.
 4.7.3 Institutions – Judicial bodies – **Decisions**.
 5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law**.

Keywords of the alphabetical index:

Law, criminal, retroactive effect.

Headnotes:

Specific determination of the more favourable criminal law concerns the application of the law and not the application of the more lenient provisions, as it is not possible to combine provisions of the old law with provisions of the new law because this would lead to a *lex tertia*, and therefore judges would be allowed to legislate. Provisions of the Criminal Code to the effect that “where several criminal laws have been enacted in the time interval between the perpetration of the offence and the final settlement of the case, the more favourable law shall be applied” are constitutional insofar as they do not allow the combination of provisions of successive laws in determining and applying the more favourable criminal law.

Summary:

I. Under Article 146.d of the Constitution, the Constitutional Court was asked by the High Court of Cassation and Justice, *ex officio*, to settle the exception of unconstitutionality of the provisions of Article 5 – Application of the more favourable criminal law until final settlement of the case – of the Criminal Code of 17 July 2009 (Law no. 286/2009), published in the Official Gazette of Romania, Part I, no. 510 of 24 July 2009.

The High Court of Cassation and Justice argued that the impugned provisions infringed the constitutional provisions of Article 61 on Parliament as sole legislative authority of the country. Although the provisions of Article 5 of the Criminal Code are themselves constitutional, their interpretation and application in practice by judicial bodies may generate violations of the Basic Law, leading to a combination of more favourable provisions of successive criminal laws, a circumstance likely to lead to a *lex tertia*.

Between the time when it was notified through the Interlocutory Order dated 27 March 2014 and the time of delivery of this decision, the High Court of Cassation and Justice — the Panel for Interpretation of Legal Issues pertaining to Criminal Law – delivered Decision no. 2 of 14 April 2014, published in the Official Gazette of Romania, Part I, no. 319 of 30 April 2014, stating that in the application of Article 5 of the Criminal Code, the statute of limitation of criminal liability is an autonomous concept with respect to the concept of punishment. Therefore, given its role as guarantor for the supremacy of the Constitution, as well as the legal effects of this decision, in accordance with Article 474.4 of the Code of Criminal Procedure, the Constitutional Court also adjudicated on issues related to the compatibility of Article 5 of the Criminal Code, as interpreted by the supreme court, with the provisions of the Constitution.

II. The Court noted previous case-law regarding the issue of the more favourable criminal law, where it had decided that application of criminal law in time must be construed as meaning all criminal legal norms arising from criminal policy reasons, regulating the modality of application of the *mitior lex* principle in relation to the time of perpetration of offences and the time of holding liable those who committed offences (Decision no. 841 of 2 October 2007, published in the Official Gazette of Romania, Part I, no. 723 of 25 October 2007). At the same time, determination of the more lenient criminal law does not imply an abstract activity but a concrete activity, as it is indissolubly linked to the offence committed and to its author (Decision no. 834 of 2 October 2007,

published in the Official Gazette of Romania, Part I, no. 727 of 26 October 2007).

In order to specifically identify the more favourable criminal law, account must be given to a series of criteria tending either towards removal of criminal liability or removal of the consequences of the conviction, or towards the application of a less severe punishment. These elements of analysis are primarily aimed at the conditions for incrimination, secondly at the conditions for holding someone criminally liable and, finally, at the criterion of punishment. As concerns the specific determination of the more favourable criminal law, the Constitutional Court held that “it concerns the application of the law and not the application of the more lenient provisions, as it is not possible to combine provisions of the old law with provisions of the new law because this would lead to a *lex tertia*, which would allow judges to legislate, thereby contravening the provisions of Article 61 of the Constitution” (Decision no. 1.470 of 8 November 2011, published in the Official Gazette of Romania, Part I, no. 853 of 2 December 2011).

Therefore, in line with the case-law of the Constitutional Court, courts may decide to apply the more favourable criminal law, on the grounds of Article 5 of the Criminal Code, in the time interval between the perpetration of the offence and the final settlement of the case. As the Constitution itself states under Article 15.2, the subject of the legislation concerned, Article 5 of the Criminal Code, concerns the more favourable “law” which lays down penal or administrative sanctions. To the same effect, the European Court of Human Rights, although it did not mention this *in terminis*, stated that compliance with the provisions of Article 7.1 ECHR presupposes, in case of successive criminal laws, global finding of the more favourable criminal law. Thus, in the Judgment of 18 July 2013, delivered in *Maktouf and Damjanović v. Bosnia and Herzegovina*, paragraph 70, the European Court of Human Rights, noting that both criminal codes enacted in the time interval between the perpetration of the offences and the final settlement of the case (the 1976 Criminal Code and the 2003 Criminal Code) “provide different sentencing brackets for war crimes”, held that “there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants’ disadvantage as concerns the sentencing”, and therefore “it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 ECHR”. Consequently, the European Court held, unanimously, that there has been a violation of Article 7 ECHR, mentioning, at the same time, that “this conclusion should not be taken to indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of

the 1976 Code [A/N: as a whole] should have been applied in the applicants' cases".

For the reasons set forth above, the Constitutional Court held that the provisions of Article 5 of the current Criminal Code, in the interpretation allowing courts, in finding the more favourable criminal law, to combine the provisions of the 1969 Criminal Code with those of the current Criminal Code, contravenes the constitutional provisions of Article 1.4 on separation and balance of powers, and those of Article 61.1 on the role of Parliament as sole legislative authority of the country.

By Decision no. 2 of 14 April 2014, the High Court of Cassation and Justice – the Panel for Interpretation of Legal Issues pertaining to Criminal Law – decided that, in the application of Article 5 of the Criminal Code, the statute of limitation of criminal liability is an autonomous concept with respect to the concept of punishment, thus conferring an unconstitutional meaning on Article 5 as interpreted. In earlier jurisprudence on these constitutional provisions, the Court has stated that the statutory provisions that govern the activity of courts and establish their position within the law, unanimously accept that "judges, as part of their duties, must carry out the identification of the applicable norm, the analysis of its contents, and a necessary adaptation thereof to the legal deeds established therein, so that, the legislator unable to foresee all legal situations, leaves to the judge, vested with the power to interpret the law, part of the initiative. Thus, in the interpretation of the law, the judge must achieve a balance between the spirit and the letter of the law, between drafting requirements and the aim pursued by the legislator, without having the power to legislate, by replacing the competent authority in this matter" (see Constitutional Court Decision no. 838 of 27 May 2009, published in the Official Gazette of Romania, Part I, no. 461 of 3 July 2009).

The Court found that the interpretation whereby the more favourable criminal law presupposes application of more favourable autonomous concepts is likely to breach constitutional requirements. Otherwise the organic link between concepts of criminal law belonging to each successive law would be broken, directly resulting in changes to the content and the meaning of normative acts adopted by the legislator. The Court also noted that the idea of autonomous concept is neither regulated in the two criminal codes nor in the law that governs the application of the current Criminal Code. Thus, even if the current legal language allows the idea of autonomous concept for certain legal categories, the autonomous nature thereof, as invoked in judicial practice and doctrine, presupposes an independent existence and it does

not depend of the normative body into which it is integrated in order to fulfil its purpose. However, such a conclusion is inadmissible; one cannot argue that a norm of the Criminal Code governing a certain criminal law concept (recidivism, concurrence of offences, statute of limitation, etc.) is independent from the law to which it belongs. This differentiation is particularly important for understanding the concept of law because this is the only way in which the concept of "more favourable criminal law" may acquire a constitutional meaning.

In its case-law, the Court has enshrined the possibility and the obligation to intervene when notified, if a statutory text may give rise to interpretations likely to infringe constitutional provisions. In its recent practice, the Court stated that "without denying the constitutional role of the supreme court, whose competence is circumscribed to the cases of non-uniform practice, the Constitutional Court holds that, where a statutory text may give rise to different interpretations, it is obliged to step in whenever those interpretations lead to violations of provisions of the Basic Law. The Constitution represents the framework and the scope within which the legislator and the other authorities may act; therefore, the interpretations of legal norms must take into account this constitutional requirement contained in Article 1.5 of the Basic Law, which states that observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania". (Decision no. 1.092 of 18 December 2012, published in the Official Gazette of Romania, Part I, no. 67 of 31 January 2013).

The Court therefore held that as of the publication of the present decision in the Official Gazette, the effects of Decision no. 2 of 14 April 2014 of the High Court of Cassation and Justice would cease in accordance with the provisions of Article 147.4 of the Constitution and those of Article 477 of the Code of Criminal Procedure.

Cross-references:

European Court of Human Rights:

- *Maktouf and Damjanovic v. Bosnia and Herzegovina*, no. 2312/08, 18.07.2013, *Reports of Judgments and Decisions* 2013.

Languages:

Romanian.



Identification: ROM-2014-2-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 02.07.2014 / **e)** 390/2014 / **f)** Decision on the objection of unconstitutionality of the provisions of Articles 38.1 and 42 of the Law regarding public-private partnerships / **g)** *Monitorul Oficial al României* (Official Gazette), 532, 17.07.2014 / **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.**
 4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements.**

Keywords of the alphabetical index:

European Union, directive, transposition.

Headnotes:

The legislature must adopt clear and precise rules and refer to regulations representing a mark of clarity, precision and predictability. Errors of appraisal in the drafting of normative acts should not be perpetuated so that they become a precedent in legislative activity; they must be corrected, to enable normative acts to contribute to more secure legal relations. Uncertainty arose due to the failure by the legislature to fulfil its obligation to indicate, in the wording of the disputed law, the acts of the European Union being transposed in this law.

Summary:

I. Pursuant to Article 146.a of the Constitution and Article 15.1 of Law no. 47/1992 on the organisation and operation of the Constitutional Court, the Court was asked to settle a question on the constitutionality of certain provisions of the Law regarding public-private partnerships, formulated by a number of 94 deputies belonging to parliamentary groups of the National Liberal Party and Liberal Democratic Party.

The applicants pointed out that Article 38 of the Law in question did not define or establish criteria for assessing “exceptional reasons related to national or local interest”, which allow a public partner to unilaterally amend or terminate the public-private partnership contract. The lack of sufficient clarity and precision in the text gave rise to a breach of the provisions of Article 1.5 of the Constitution. It was also argued that as Articles 72 and 73 of Directive 2014/24/EU provide for the manner in which public procurement contracts, including public-private partnership contracts, can be amended without the need for a new procurement procedure, national rules must adopt a legislative solution in order to comply with this directive and the obligations arising following the accession to the European Union. Alternatively, as the provisions did not faithfully transpose these regulations, Articles 20 and 148 of the Constitution were violated.

II. The Court allowed, by majority vote, the objection of unconstitutionality the applicants had formulated and found that the provisions of Article 38.1 of the Law regarding public-private partnerships were unconstitutional.

The Court held that the current regulation in force, the Law regarding public-private partnerships no. 178/2010, published in the Official Gazette of Romania, Part I, no. 676 of 5 October 2010, does not expressly provide for the possibility of the unilateral amendment of public-private partnership contract by the public partner, but only the generic possibility of its unilateral termination. It noted, however, that the measure of unilateral amendment of the contract during its period of validity is a useful and necessary tool for the public partner, allowing it to control the performance of the contract and to adjust it to allow for any unpredictable situations that may arise.

The Court noted that the introductory phrase of Article 38.1 of the Law contains the concept of “exceptional reasons” but does not define it. This means that it is the public partner who will determine whether a particular situation represents an exceptional reason allowing for unilateral amendment of the contract. Even if the public partner establishes this meaning *in concreto*, questions still arise over the elements forming the basis of its assessment. No such elements are given in the text, and assessment by the public partner can therefore only be subjective and, discretionary. The lack of clarity, precision and predictability in Article 38.1 of the Law leaves scope for a level of arbitrariness to arise in the performance of the contract.

Regarding the Government's arguments on the concept of "exceptional reasons" in the primary regulatory documents, the Court held that the adjective "exceptional" was and is currently used in the Romanian positive law, with provisions similar to the text of Article 38.1 of the Law under constitutional review, without the concept of "exceptional reasons" being defined. The legislature must however relate to regulations representing a mark of clarity, precision and predictability, and errors of appraisal in the drafting of normative acts should not be perpetuated so that they become a precedent in legislative activity; such errors must be corrected so that normative acts can contribute to more secure legal relations.

The Court then went on to examine the provisions of Article 38.1.a of the Law, which allowed for unilateral amendment by the public partner of "certain provisions of the public-private partnership contract". The provision in question only mentions that the possibility of unilateral amendment must be provided for in the award documentation in a clear, precise and unequivocal manner and without altering the generic nature of the initial contract. No specification is given as to the type of alteration which could be unilaterally made, or essential or non-essential requirements of the contract, and the text is therefore open to interpretation. Article 38.1 of the Law is equivocal because it does not determine contractual clauses and settle the value margins and limits which can form the object of unilateral amendment. It also fails to establish the obligations of the public partner in terms of the inclusion of a unilateral amendment clause into the award documentation.

The Court observed that the same questions arise over the concept of "exceptional reasons" in Article 38.1.b of the Law. It also noted that Article 38.1.a of the Law refers to the Government Emergency Ordinance no. 34/2006 and point b to "under the law". The Government had indicated that "the public-private partnership is not a public procurement contract", falling under the concession contracts, which means that reference from point a made to the Government Emergency Ordinance no. 34/2006 on public procurement is contradicted, and reference to "under the law" from point b seems to be made to the Government Emergency Ordinance no. 54/2006 on the regime of the concession contracts for public assets. The text clearly suffers from the perspective of clarity, precision and predictability.

The Court accordingly found Article 38.1 of the Law to be contrary to Article 1.5 of the Constitution in terms of the quality of the law; the recipients of the rule do not have the objective possibility to adapt their

conduct to the rule in question. The Court also held that Article 38.1 of the Law affects the positive obligation of public authorities to correctly inform the private partner, covered by Article 31.2 of the Constitution, and affects the possibility of any person to initiate and undertake an activity for profit, by its discriminatory support of certain economic operators. There could also be cases where, if this subsequent amendment had occurred from the outset, the private partner with which the contract had been concluded would not have won the auction. In this context, the impugned text contravenes Article 45 of the Constitution, which stipulates that economic freedom must be exercised under the law, (a Law which must not affect the substance of this right). As for the violation of Article 148 of the Constitution, the Court noted the existence of a dispute between the Government and the applicants regarding the directive applicable to the contractual and/or institutionalised public-private partnership. Uncertainty had arisen because the legislature did not fulfil the obligation to indicate within the law the documents of the European Union which were being transposed. This was inadmissible. Regardless of the applicable directive (Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts or Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and appealing Directive 2004/18/EC, both published in the Official Gazette of the European Union, series L no. 94 of 28 March 2014), the Court noted that both contained conditions that coincided almost to detail on unilateral amendment or termination of contract, while the text of Article 38.1 of the Law contained a normative solution tending to depart from these requirements.

The Court therefore held that the legislative solution within the impugned text represented a violation by Parliament of Article 148.4 of the Constitution, which regulates its role of guarantor regarding the fulfilment of obligations arising from the accession instrument.

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-2014-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 22.04.2014 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 98, 30.04.2014 / **h)**.

Keywords of the systematic thesaurus:

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

Keywords of the alphabetical index:

Road traffic, regulations, violation / Fines / Local context.

Headnotes:

The increase in fines for certain offences against road traffic regulations in Moscow and Saint-Petersburg is not unconstitutional.

Summary:

I. In 2012, provisions of the Administrative Code laying down penalties for violation of road traffic regulations were amended. Increased fines were introduced in Moscow and Saint-Petersburg for a number of offences.

The applicants contend that the impugned provisions treated citizens of the Federation for similar offences differently. In their view, these amendments violate the constitutional rules on equal treatment and the prohibition of arbitrary discrimination. They consider that the impugned provisions violate the principle of equality before the law established by the Constitution of the Russian Federation in Article 19 (part 2), taken together with Articles 6 (part 2), 55 and 62 (part 2).

II. Russia has uniform road traffic regulations. Consequently, only the federal legislature has the right to impose penalties for violation of road traffic regulations. In addition, the federal government has

the right to take measures to resolve regional problems by taking account of the local context. Consequently, it has the right to set higher fines for individual federal entities.

The cities of Moscow and Saint-Petersburg were chosen for objective reasons. They are the country's largest conurbations, centres of social, political and economic activity and major transport hubs. Objectively, traffic conditions are more difficult there and the risks to road safety are higher. Consequently, the impugned provisions pursue constitutional goals.

It should also be noted that the impugned provisions lay down more severe penalties for offences that may negatively impact traffic flow and disrupt the city's roads.

The impugned administrative penalties must be applied to everyone in the same way and under the same circumstances in Moscow and Saint-Petersburg. Accordingly, they do not violate the criteria of equality and proportionality by curtailing constitutional rights and freedoms. Consequently, the impugned provisions are consistent with the Constitution of the Russian Federation.

Languages:

Russian.



Identification: RUS-2014-2-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 20.05.2014 / **e)** 16 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 124, 04.06.2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Appeal, point of law / Appeal, point of fact / Safeguards, other / Criminal proceedings, juvenile / Criminal proceedings, federal / Jury, trial / Bench, composition.

Headnotes:

Restricting access to a jury for juveniles charged with an offence is not unconstitutional.

Summary:

I. The Code of Criminal Procedure was amended such that, cases previously decided at first instance by regional courts of the Russian Federation will henceforth be heard and determined by federal district courts. It should be noted that only federal regional courts have juries.

The applicant's case was to be heard by a federal regional court. As a result of the amendment, however, it was transferred to the district court. The applicant therefore lost the right to a trial by jury.

The applicant posits that the impugned provision of the retroactive legislation violates citizens' rights. Furthermore, the impugned provision discriminates juveniles charged with an offence, depriving them the right to a trial by jury. In the applicant's opinion, juveniles' rights require stronger safeguards. He considers that the impugned provision is inconsistent with Articles 1 (part 1), 2, 18, 19 (part 1), 38 (part 1), 54 (part 1) and 55 (part 2) of the Constitution of the Russian Federation.

II. The Russian Federation has placed a moratorium on capital punishment. It is replaced by life imprisonment. Persons charged with an offence have guarantees of legal protection, including the right to be tried by a jury.

Under the law, juveniles cannot be sentenced to life imprisonment. Consequently, the impugned provisions are not discriminatory, since they take account of the possible penalty. Guided by principles of international law, Russian law provides a number of safeguards for juveniles in judicial proceedings. Where a case is transferred for a jury trial, however, these safeguards cannot be implemented in an optimal manner.

The impugned provisions were enacted after an amendment to the Code of Criminal Procedure providing for the possibility of appealing against a verdict. The amendment suggests a new trial at which the Court of Appeal examines the case on the merits with the same procedural safeguards as in the court of first instance.

However, a verdict reached by a jury can only be challenged for procedural violations, not on points of fact.

In terms of the actual ability to perceive and evaluate information, this can be a very difficult choice for juveniles.

Trial by jury is not the only guarantee available for ensuring judicial protection of rights and freedoms. The law grants juveniles charged with an offence the right to have their case examined by a bench of three federal judges. They also have the right to appeal. Accordingly, the denial of access to a jury in these cases cannot be regarded as a measure reducing the safeguards afforded to juveniles.

Consequently, the impugned provisions are not unconstitutional. Federal law may, however, provide other safeguards.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2014-2-002

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 06.02.2014 / **e)** IUz-497/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 32/2014 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

4.7.4.1.1 Institutions – Judicial bodies – Organisation – Members – **Qualifications.**

4.7.4.1.3 Institutions – Judicial bodies – Organisation – Members – **Election.**

4.7.4.3.3 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Election.**

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

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

Keywords of the alphabetical index:

Judicial office, applicants, training, requirements.

Headnotes:

The requirements for election to judicial or public prosecutorial office are the subject matter of the laws which regulate such issues. Provisions requiring candidates to have completed training at the Judicial Academy are “reference norms”, indicating the necessity for other norms to be applied.

Summary:

I. The Constitutional Court received several requests to assess the constitutionality of certain provisions of the Law on the Judicial Academy (hereinafter, the “Law”).

The applicants contended that, in addition to the general and statutory conditions contained in the provisions relating to the possibility of being elected to the post of a judge in a basic or a misdemeanour

court or as deputy public attorney, another condition was prescribed, requiring candidates to have completed initial training at the Judicial Academy (hereinafter, the “Academy”). If none of the candidates have completed this training, the High Judicial Council (hereinafter, the “HJC”) and the State Prosecutors’ Council (hereinafter, the “SPC”) may appoint individuals who fulfil only the general conditions prescribed by the Law on Judges and the Law on Public Prosecution.

The applicants also pointed out that there was a specification that the number of recipients of the initial training would be determined by the HJC or the SPC once a year, on the basis of the assessed number of vacancies for judges in misdemeanour and basic courts and deputy prosecutors in the basic public prosecutor’s office, in the year following the year of the completion of the initial training, as increased by 30%. The applicants observed that on the basis of this provision, no one but candidates having completed their training at the Academy could be appointed. This represented an infringement of the constitutional right of access to public functions under equal conditions, along with the prohibition of discrimination and equality of citizens under the Constitution and the law, as guaranteed by the Constitution. It also posed a threat to the constitutionally determined position and function of the HJC and the SPC.

II. The Court noted that the Law was an “organisational” one, governing the setting-up of the Academy and regulating its status, activity, management bodies and financing, together with the initial and continuous training of judges, public prosecutors and deputy public prosecutors, judicial and prosecutorial assistants and junior clerks and judicial and prosecutorial staff. The prescription of requirements for election to a judicial or a public prosecutorial function was the subject matter of the laws which regulate such issues, namely the Law on Judges and the Law on Public Prosecution.

The requirement that the HJC and the SPC could only put forward candidates who had completed initial training at the Academy, as was the case under Article 40.8, effectively prescribed a special requirement for the election to judicial or prosecutorial office. Article 26.3 stipulates that the number of trainees at the Academy is to be determined on the basis of an assessment of judicial and deputy public prosecutor vacancies and under Article 40.9, the HJC, or the SPC can only nominate a candidate who meets the general requirements for election if none of the applicants have completed their initial training at the Academy. Article 40.7 provides that, having completed initial training, the beneficiary will be

obliged to apply for the post of a misdemeanour judge or a basic court judge, or a deputy basic public prosecutor. The Court therefore found that completed initial training was not only decisive in the evaluation of professional qualifications and specific knowledge as general requirements for election, but was also translated into a decisive requirement for accessibility of a judicial or a public prosecutorial function. The Court found the contested provisions to be in breach of the principle of equality of citizens who are in the same legal situation (fulfilling the requirements for election prescribed by the Law on Judges or the Law on Public Prosecution) under Article 21 of the Constitution and the right to assume public functions under equal conditions, as set out in Article 53 of the Constitution.

The Court also found that the contested provisions limited the powers of the HJC under Article 154 of the Constitution and those of the SPC under Article 165. These are independent government authorities with the role of nominating candidates and with the constitutional function of ensuring and safeguarding the independence and autonomy of judges (Article 153.1) and the autonomy of public prosecutors and their deputies (Article 164.1). The realisation of this function is disrupted by the fact that they are bound by the grades obtained by a candidate during the initial training given by the Academy.

The Court concluded that the provisions of the Law on Judges and of the Law on Public Prosecution prescribe criteria and standards for the evaluation of professional qualifications, specific knowledge and worthiness for election. However, these remain without legal relevance and may not be adequately applied in view of the legal significance of the initial training at the Academy established by the Law.

Provisions which prescribe that the HJC and the SPC when nominating candidates, shall nominate a candidate who has completed initial training at the Academy, in compliance with a separate law are, by their nature, "reference norms" that indicate that, in a certain legal situation, it is necessary to apply and/or another regulation.

The Court was also of the view that the disputed legal concepts also challenged the application of Article 77 of the Constitution, which guarantees equality to members of national minorities in the administration of public affairs.

The Court found that Article 26.3 of the Law was not, in itself, in contravention of the Constitution. The legislator is authorised, when regulating the introduction of initial training at the Academy, to regulate

the determination of the number of trainees. There will be a limit to this number, as the Academy's operations are financed from the budget, and it should be in compliance with actual needs.

Languages:

English, Serbian.



Identification: SRB-2014-2-003

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 26.03.2014 / **e)** UŽ-1285/2012 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 45/2014 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Double jeopardy, nature of the offence.

Headnotes:

Where there is a possibility that someone has been tried twice for the same offence, consideration must always be given as to whether both proceedings concerned acts which, by their nature, represented criminal offences, whether the offences were the same (*idem*) and whether the proceedings were doubled (*bis*).

Summary:

I. The applicant lodged a constitutional appeal alleging a violation of the right to legal certainty in penal law under Article 34 of the Constitution (and under Article 4 Protocol 7 ECHR). The applicant took issue with final court judgments where he was convicted of the criminal offence of insult in conjunction with the offence of minor bodily harm and sentenced to a single fine. He pointed out that he had been sentenced twice for the same offence: firstly by the Minor Offences Court, and subsequently by the Court of First Instance.

II. The Constitutional Court began by examining, against the background of the case-law and criteria of the European Court of Human Rights, whether both proceedings related to acts which, by their nature, represented criminal offences, whether the offences that were subject to prosecution were the same (*idem*) and whether the proceedings had been doubled (*bis*).

As to whether the minor offences proceedings concerned “criminal matters”, or whether the first sentence was “criminal” in nature, the Court noted that European Court of Human Rights jurisprudence sets out three criteria, known as the ‘Engel-criteria’ (from the Judgment *Engel and Others v. the Netherlands*). These are the legal qualification of offences according to domestic legislation; the nature of an offence which implies two cumulative sub-criteria (i.e. the scope of the infringed norm and the purpose of punishment); and the nature and level of gravity of punishment.

The European Court of Human Rights has, in several cases (including *Maresti v. Croatia* and *Muslija v. Bosnia and Herzegovina*) found by applying the “Engel-criteria” that some acts have a criminal connotation, but are regarded under the relevant domestic law as offences of minor social significance. The level and gravity of sanction is to be established according to the most severe penalty envisaged by the relevant law, regardless of the kind and scope of penalties imposed in the case in question.

In this case, the Court noted that the applicant in the minor offences proceedings was found guilty under the Law on Public Peace and Order of the offence of particularly violent and offensive behaviour. This attracts a fine or a sixty day prison sentence, with the aim of protecting human dignity, public peace and, to an extent, the physical integrity of individuals.

The Court observed that the minor offences proceedings conducted against the applicant were in respect of an offence which, due to its nature and gravity, and the purpose of the envisaged penalty, represented a punishable act. The key question here was the identification of an offence, taking into account the fact that a socially unacceptable behaviour may simultaneously jeopardise various protected values and manifest the features of two or more punishable acts, which may be under the jurisdiction of more than one law enforcement body.

It also noted that the facts included in the minor offences judgment by which the applicant was found guilty by final decision were identical to those representing the elements of the criminal offences of insult and minor bodily injury, for which he was found

guilty in the criminal proceedings, after the minor offences judgment had become final (*res judicata*).

The Court emphasised that the peculiarities and disadvantages of legislation and “wandering” of court case-law must not lead to a situation where the narrow interpretation of the criteria for the material identity of acts in the Judgment *Zolotukhin v. Russia*, and the protection of the principle of *ne bis in idem* jeopardises the most important obligations of every member state – the protection of the right to life under Article 2 ECHR and the protection of the right to physical and psychological integrity under Article 3 ECHR. In order to protect the prevailing interest, when somebody may have been prosecuted and sentenced twice for the same offence, consideration should be given to additional correctional criteria as well as the particular set of facts, namely the value that is being protected, the gravity of the consequences of the acts and the type of sanction to be imposed.

The sanction in this case was a fine reversible to punishment by imprisonment for violation of the Law on Public Peace and Order. Its aim is to ensure that individuals steer away from socially undesirable behaviour and that those who behave in an offensive and violent fashion are punished; something which all criminal sanctions have in common. The fact that the applicant was only sentenced to pay a fine does not detract from the criminal legal character.

In this case, on the basis of almost identical factual descriptions the courts passed almost identical sanctions.

The Court held that the criminal offence of an insult and minor bodily harm had been covered in this case by the stated breach of public peace and order, and that the acts for which the applicant was found guilty were the same (*idem*).

As to whether “doubling” of proceedings had taken place, the Court noted that the criminal proceedings were instituted when the minor offences proceedings were still ongoing; at one point both proceedings were running simultaneously. At the time the judgment in the minor offences proceedings became final and acquired the status of *res judicata*, criminal proceedings on that matter were still under way. The Court of First Instance ought to have halted the criminal proceedings once a final decision had been adopted in the minor offences proceedings.

The Court noted that the applicant had previously been sentenced in minor offences proceedings within the meaning of Articles 33.8 and 34.4 of the Constitution and that, after the minor offences

judgment became final he was declared guilty of the criminal offences which related to the same behaviour for which he had already been punished in the minor offences proceedings and which included essentially the same facts which have been established to be the same act. It therefore found that the principle of *ne bis in idem* had been violated.

Cross-references:

European Court of Human Rights:

- *Engel and Others v. the Netherlands*, no. 5370/72, 08.06.1976;
- *Zolotukhin v. Russia*, no. 14939/03, 10.02.2009, *Reports of Judgments and Decisions 2009*;
- *Maresti v. Croatia*, no. 55759/07, 25.06.2009;
- *Muslija v. Bosnia and Herzegovina*, no. 32042/11, 14.01.2014.

Languages:

English, Serbian.



Slovakia Constitutional Court

Important decisions

Identification: SVK-2014-2-002

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 11.12.2013 / **e)** PL. ÚS 99/2011 / **f)** Judges' remuneration IV / **g)** *Zbierka zákonov Slovenskej Republiky* (Official Gazette); *Zbierka nálezov a uznesení Ústavného súdu Slovenskej Republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

4.7.4.6 Institutions – Judicial bodies – Organisation – **Budget.**

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

Keywords of the alphabetical index:

Judge, remuneration, change / Independence, judiciary / Austerity measures, economic crisis.

Headnotes:

The acceptance that judges may be penalised because of the government's economic policy or the legislation responsible for budget management incorporates an arbitrary and non-foreseeable component into their remuneration. This is contrary to the principle of judicial independence and the principle of rule of law. "Penalising" for the situation of public finances must be distinguished from an acceptable temporary freeze of remuneration.

Summary:

I. Against the background of austerity measures due to the global economic crisis, the Parliament adopted a law which made as much as 15 % of the remuneration of constitutional authorities directly dependant on the amount of the budget deficit, to motivate the authorities to implement reasonable policy. Judges' remuneration was also calculated this way. This was challenged both by a group

of opposition Members of Parliament and the Prosecutor General (not by the judges themselves).

They argued that the amendment was out of line with the principle of judicial independence (Article 144.1 of the Constitution), with the independence of judges themselves (Article 141.1 of the Constitution) and the principle of a state governed by the rule of law. At the beginning of the case the Court suspended the relevant provision to prevent reduction of remuneration.

II. The Court began by observing that since the 1990's, judges' remuneration has been a lively topic for debate, in constitutional case-law and for legislation and academia, and not only in post-transition countries. It is the task of social scientists to answer questions about how this relates to the economic situation, to solidarity in society on the one hand and to judicialization and the emancipation of the judiciary on the other.

It then cited numerous UN and Council of Europe-based recommendation documents which suggest stability in the realm of judges' remunerations (such as the Magna Carta of Judges and the draft *amicus curiae* brief for the Constitutional Court of "the Former Yugoslav Republic of Macedonia" – CDL(2010)114-e). It emphasised, however, that its reference norm was the Slovak Constitution; these documents were at most "soft law".

In the comparative part citing the US Constitution, the Court stated that in the Slovak Constitution there is no explicit guarantee of judges' remuneration. It then cited Czech case-law based on a slightly more explicit constitutional guarantee. Although the Polish Constitution has a more explicit guarantee in Article 178.2 than the Slovak Constitution, its Court has accepted modifications of judges' remuneration (K 12/03, K 1/12, K 13/94, P 8/00). Finally the Court cited criticism of the Canadian decision *Provincial Judges Reference* [1] [1997] 3 S.C.R. 3 by Canadian academics.

The Court went on to summarise its previous case-law which originally stated that judges' remuneration is a sub-constitutional, not a constitutional matter (PL. ÚS 52/99). Later the Court included it within the scope of judicial independence (PL. ÚS 12/05), whereby on the one hand it accepted a temporary freeze on remuneration because of austerity measures, but on the other hand it did not accept arbitrary repeated postponing of the so-called 14th salary. It cited pre-war case-law from the first Czechoslovak Republic, highlighting the sensitivity of this topic.

The Court commented that from the comparative perspective Slovak judges have solid remuneration (CEPEJ report). However the acceptance that judges may be "punished" because of the government's economic policy or the legislation responsible for budget management incorporates an arbitrary and non-foreseeable component into their remuneration, and this is contrary to the principle of judicial independence (Article 144.1 of the Constitution) in connection with the principle of rule of law (Article 1.1 of the Constitution). (Thus, the unconstitutional part is not the amount of remuneration itself, but the idea of the Law. It is exactly the opposite situation to that in the nurses' salary case – PL. ÚS 13/2012, *Bulletin* 2014/1 [SVK-2014-1-001]). Besides, the Court considered judges' remuneration as a part of objective, institutional constitutional law, not as their subjective right.

III. The President of the Court (sharply) dissented from the decision. In addition to criticising formal aspects of the decision, the President stated that the Court should have decided that both single and repeated salary freezing is also unconstitutional. Judges' remuneration should be considered as a guarantee of individual independence, including legal certainty, not just part of institutional, objective guarantees. One judge based the dissent on historical truths on Federalist Paper 9. Another judge put the accent on the rule of law principle and also criticised the acceptance of salary freezing. One judge expressed a concurring opinion, arguing that overriding of old 1990s case-law should have been clearly declared and new rules for legislation outlined.

Cross-references:

- no. 24846, 18.09.1997, *Bulletin* 1997/3 [CAN-1997-3-005];
- no. PL. ÚS 13/2012, 19.06.2013, *Bulletin* 2014/1 [SVK-2014-1-001].

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 May 2014 – 31 August 2014

In this period, the Constitutional Court held 17 sessions – 8 plenary and 9 in panels: 4 in the civil, 1 in the administrative, and 4 in the criminal panel. It received 93 new requests and petitions for the review of constitutionality/legality (U-I cases) and 333 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 43 cases in the field of the protection of constitutionality and legality, as well as 240 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-2014-2-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 26.11.2010 / **e)** U-I-137/10 / **f)** / **g)** *Uradni list RS* (Official Gazette), 99/10 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

3.13 General Principles – **Legality.**

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

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

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

5.2 Fundamental Rights – **Equality.**

Keywords of the alphabetical index:

Legislative omission / Legislature, power, discretionary / Local self-government, citizen's right / Local self-government, implementation / Municipality, establishment, criteria.

Headnotes:

The right to local self-government is a constitutional right of the residents living in a certain territory who are connected by common needs and interests to govern their local affairs themselves. An integral part of this right is also the possibility to exercise this right in a municipality that they establish independently in accordance with statutory and constitutional conditions.

The National Assembly is completely autonomous and bound only by the Constitution when determining the conditions and the procedure for the establishment of municipalities. However, it does not enjoy such broad autonomy when adopting the law by which it decides on the establishment of a concrete municipality, as the principles of a state governed by the rule of law require that it respect the rules it has itself created. It must further observe the principle of equality and refrain from arbitrary actions.

Summary:

I. In the first stage of a procedure for the establishment of new municipalities, the National Assembly found that the settlements of Ankaran and Mirna

fulfilled the constitutional and statutory criteria for establishing a municipality. It called referenda in which the residents of both settlements supported the establishment of the new municipalities that were to secede from the existing municipalities of Koper and Trebnje. However, the National Assembly failed to adopt the law by which the new municipalities would have finally been established. Therefore, a number of petitioners initiated proceedings before the Constitutional Court. They claimed that the Establishment of Municipalities and Municipal Boundaries Act (hereinafter, the “challenged Act”) was inconsistent with the Constitution, as it did not contain the municipalities of Ankaran and Mirna. They also challenged the Decree Calling the Regular Elections of Municipal Councils and the Regular Elections of Mayors (hereinafter, the “Decree calling local elections”), as it was allegedly adopted on the basis of an unconstitutional law.

II. The Constitutional Court recalled that Articles 138 and 139 of the Constitution, which refer to local self-government, must be interpreted as ensuring the inhabitants of Slovenia the right to exercise local self-government in a municipality established in accordance with the conditions and according to the procedure determined by law. It further follows from the case law that the National Assembly is bound by the will of the voters expressed in a referendum on the establishment of a municipality or a change in its territory, except in two cases:

- when respecting the will of the voters expressed at a referendum would lead to the establishment of communities that do not meet the constitutional and statutory provisions on municipalities; and
- when it is objectively not possible to respect the will of the voters expressed at a referendum due to the conflicting results of referenda.

The Constitutional Court clarified that the constitutional right to local self-government does not ensure an abstract right to establish a municipality in whatever territory chosen. It does, however, ensure the right of the residents residing in a certain territory that are connected by common needs and interests to govern local affairs themselves. An integral part of this right is also the possibility that the residents of a certain territory exercise this right in a municipality that they establish independently in accordance with statutory conditions. This is the purpose of the constitutional provision that requires the National Assembly to establish the municipality on the basis of the prior determination of the will of the residents. At the end of this process, the National Assembly decides exactly on the exercise of this constitutional right, namely on the grounds of the determination that the constitutional and statutory conditions for

establishing a municipality as a fundamental self-governing local community are fulfilled.

An essential condition for the exercise of the constitutional right to local self-government is that a municipality be established in accordance with the constitutionally and statutorily defined procedure. Following the prescribed procedure municipalities are established by a law. While the National Assembly enjoys complete autonomy in adopting the laws by which it defines the conditions and the procedure for the establishment of municipalities in accordance with the Constitution, its autonomy is not so broad when adopting the law by which it decides on the establishment of concrete municipalities. With regard to such it must respect the statutory regulation of the conditions and the procedure for the establishment of municipalities and for ensuring judicial protection in this procedure it has itself created (Article 2 of the Constitution).

In addition, all citizens (petitioners) who wish to establish a municipality in a certain territory must be treated equally (Article 14.2 of the Constitution). The principle of equality undoubtedly requires that the National Assembly apply the prescribed conditions equally in all cases. If a territory meets the conditions, the National Assembly must proceed in the same manner as it has done in other cases where the conditions were met.

The Constitutional Court therefore held that the challenged Act was inconsistent with the Constitution, as, by failing to establish the municipalities of Ankaran and Mirna, the National Assembly acted in an arbitrary manner. By such it violated the general principle of equality (Article 14.2 of the Constitution), the principle of legality, and the principle of trust in the law (Article 2 of the Constitution). It requested that the National Assembly remedy the established inconsistency with the Constitution within a time limit of two months following the Decision's official publication.

In addition, the Court noted that the exercise of local self-government is ensured through the election of mayors and municipal councillors. It thus also established the unconstitutionality of the Decree calling local elections in the municipalities of Koper and Trebnje. These municipalities encompassed the territories of the settlements of Ankaran and Mirna, therefore the implementation of the Decree would only have perpetuated the unconstitutional state of affairs established by this Decision and the residents of the new municipalities would have been prevented from exercising their right to local self-government in the new municipalities.

III. The decision was adopted by seven votes against one. Judge Sovdat, who submitted a dissenting opinion, voted against. Judge Petrič submitted a concurring opinion.

Supplementary information:

The National Assembly's failure to implement this Decision led to Decision no. U-I-114/11, 9 June 2011 [SLO-2014-2-006].

Cross-references:

- no. U-I-13/94, 21.01.1994, *Bulletin* 1994/1 [SLO-1994-1-001];
- no. U-I-294/98, 12.10.1998, *Special Bulletin – Legislative Omission* [SLO-1998-M-002];
- no. U-I-163/99, 23.09.1999, *Bulletin* 1999/3 [SLO-1999-3-005].

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2014-2-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09.06.2011 / **e)** U-I-114/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 47/11 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
 3.9 General Principles – **Rule of law**.
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.
 5.2 Fundamental Rights – **Equality**.

Keywords of the alphabetical index:

Constitutional Court, decision, binding nature / Constitutional Court, decision, disregard / Constitutional Court, decision, manner of implementation.

Headnotes:

Constitutional Court decisions are binding. All state authorities must respect and implement decisions adopted by the Constitutional Court, as the highest body of judicial power for the protection of constitutionality and legality as well as human rights and fundamental freedoms.

As the National Assembly failed to respond to a Constitutional Court decision, the Court itself ensured to the petitioners effective constitutional protection against arbitrary conduct by the National Assembly by means of determining a new manner of implementation of its decision.

Summary:

I. By Decision no. U-I-114/11 the Constitutional Court decided on a petition for the review of the constitutionality of the Decree and the Act calling the regular local elections in the Urban Municipality of Koper. The petition was filed by the Ankaran Local Community, the Ankaran Italian Community, and others.

In its previous Decision no. U-I-137/10, dated 26 November 2010 [SLO-2014-2-005], the Constitutional Court had decided that the National Assembly acted arbitrarily in not establishing the municipalities of Ankaran and Mirna. Such conduct entailed a violation of the principles of a state governed by the rule of law and the general principle of equality before the law, and consequently a violation of the constitutional provisions which refer to local self-government. It determined a two-month time limit for the National Assembly to remedy the established inconsistency with the Constitution and imposed on the President of the National Assembly the duty to ensure that elections to the municipal councils and of the mayors of all four affected municipalities be called within twenty days following the establishment of the Municipalities of Ankaran and Mirna.

II. The Constitutional Court initially noted that the National Assembly responded to Constitutional Court Decision no. U-I-137/10 as regards the Municipality of Mirna. However, as regards the settlement of Ankaran, the National Assembly had not yet adopted a law by which the Municipality of Ankaran would have been established and thus the unconstitutional state of affairs remedied. This fact demonstrates that the National Assembly respected the Constitutional Court Decision in a selective and arbitrary manner. Due to the conduct of the National Assembly, the unconstitutional state of affairs regarding local self-government in Ankaran has continued and in fact deepened, as due to the failure to legislate to address the matter, elections in the

Municipality of Koper could not be carried out within the time limits determined in Decision no. U-I-137/10. Every additional postponement of the election of the authorities of the Municipality of Koper therefore also infringes upon the right to the exercise of local self-government of the residents of the Municipality of Koper.

The Constitutional Court emphasised that its decisions are binding. All state authorities must respect and implement decisions adopted by the Constitutional Court, as the highest body of judicial power for the protection of constitutionality and legality as well as human rights and fundamental freedoms. Only if Constitutional Court decisions are binding and as such, in fact, have effect, can the Constitutional Court ensure affected individuals effective protection of their constitutional position. Due to the fact that the National Assembly did not respond to Constitutional Court Decision no. U-I-137/10, the petitioners were left without effective constitutional protection against arbitrary conduct by the National Assembly.

The Constitutional Court could have ensured effective constitutional protection of the petitioners' rights in the case at issue by interfering with the elections called in the Municipality of Koper and abrogating the challenged Decree calling the local elections in this municipality. However, the Constitutional Court decided on an approach which effectively ensures not only the right to elections and the right to local self-government of the residents of the Municipality of Koper, but also the right to the exercise of local self-government of the petitioners (the residents of Ankaran). The Constitutional Court hence determined a new manner of implementing Decision no. U-I-137/10 and thereby ensured all affected persons exercise of their constitutional rights.

The Court explained that the substance of Constitutional Court Decision no. U-I-137/10 cannot be implemented in a different manner than by establishing the Municipality of Ankaran. As regards the fact that all hitherto legislative procedures for the implementation of Decision no. U-I-137/10 in the National Assembly were unsuccessful, the Constitutional Court itself decided that the Municipality of Ankaran be established and determined all the necessary elements for carrying out the first local elections in this municipality. With reference to such, the Constitutional Court reiterated that the establishment of the Municipality of Ankaran should be carried out by taking into consideration the criteria and established practice as regards establishing municipalities which had been applied at the relevant time.

By establishing the Municipality of Ankaran the Constitutional Court finally definitively the constitutional position of the petitioners and the residents of Ankaran. However, it deemed that establishing the Municipality of Ankaran does not also require the immediate operative constitution of the bodies of this municipality. The Constitutional Court determined that the first elections in the Municipality of Ankaran be carried out within the framework of regular local elections in 2014, as in the case of the establishment of a new municipality elections to a municipal council and the election of the mayor are namely carried out in the first regular elections following its establishment. Consequently, the Constitutional Court decided that the challenged Act and Decree are not inconsistent with the Constitution, which entailed that elections in the Municipality of Koper could be carried out. Until the first regular elections, the residents of Ankaran are to exercise their right to local self-government in the Municipality of Koper and the competent authorities will be able to prepare all the necessary measures for the commencement of the operation and financing of the Municipality of Ankaran.

The Constitutional Court also emphasised that in the new municipality of Ankaran the Italian national community and its members shall enjoy all rights which proceed from the international obligations of the Republic of Slovenia and all special rights of ethnic communities guaranteed in Article 64 of the Constitution.

III. Points 1 through 3 of the operative provisions of the Decision were adopted by seven votes against one. Judge Sovdat voted against. Point 4 of the operative provisions was adopted unanimously. Judge Sovdat submitted a partially dissenting and partially concurring opinion. Judges Deisinger and Petrič submitted concurring opinions.

Cross-references:

- no. U-I-137/10, 26.11.2010, *Bulletin* 2014/2 [SLO-2014-2-005];
- no. U-I-248/08, 11.11.2009, *Bulletin* 2010/1 [SLO-2010-1-003];
- no. U-I-294/98, 12.10.1998, *Special Bulletin – Legislative Omission* [SLO-1998-M-002];
- no. U-I-163/99, 23.09.1999, *Bulletin* 1999/3 [SLO-1999-3-005];
- no. U-I-246/02, 03.04.2003, *Special Bulletin – Legislative Omission* [SLO-2003-M-001].

Languages:

Slovenian, English (translation by the Court).

*Identification:* SLO-2014-2-007

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 17.01.2013 / **e)** Up-699/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 20/13 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi.**

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:

Capacity to bring legal proceedings / Legal interest, municipality, standing / Legal standing.

Headnotes:

The right to judicial protection determined by Article 23.1 of the Constitution guarantees the right to request from a court, in a particular dispute, a decision on the merits. The right also guarantees that judicial protection is effective, i.e. such that a party can efficiently defend its rights, interests, and legal benefits.

Summary:

I. The case concerned a constitutional complaint of the Municipality of Ankaran that was established by Constitutional Court Decision no. U-I-114/11, dated 9 June 2011 [SLO-2014-2-006]. In that Decision, however, the Constitutional Court also held that elections to the authorities of the municipality were to be carried out within the framework of the regular local elections in 2014. Until then, the residents of Ankaran were to exercise their right to local self-government in the Urban Municipality of Koper wherein the settlement of Ankaran lies. As a result, at the time in question, the Municipality of Ankaran has

been established, but it did not yet have any authorities that would have enabled it to function.

In the case at issue, the Municipality of Ankaran instituted non-litigious civil proceedings in order to determine its relations with the Urban Municipality of Koper regarding real properties in municipal ownership on the territory of the Municipality of Ankaran. It requested the court to declare that the alienation and encumbrance of these real properties would only be admissible if both municipalities gave their consent to such. The court of first instance rejected the application due to lack of legal interest. The Higher court, while confirming the rejection, deemed that the Municipality of Ankaran even lacked the capacity to be a party to proceedings. It argued that while the Municipality of Ankaran has already been established, it has not yet been constituted and, therefore, it has not yet attained the capacity to engage in legal transactions or proceedings. In its opinion the Municipality will attain legal capacity only after the creation of an appropriate organisational structure by means of which it will be able to function and fulfil its purpose.

II. The Constitutional Court initially dismissed the argument of the Municipality of Koper that the constitutional complaint should be rejected, as the complainant, i.e. the Municipality of Ankaran, cannot be a party to proceedings before the Constitutional Court. It recalled that the Municipality of Ankaran was established by Decision no. U-I-114/11 and its final constitution through the election of its authorities is a certain future fact. Therefore, the Constitutional Court recognised its capacity to be a party to proceedings in the case at issue.

The Court noted that the statutory regulation of self-government does not explicitly resolve a situation such as the one in the case at issue. It clarified that it would be false to interpret the Constitutional Court's position from Decision no. U-I-114/11 that until the final constitution of their municipality the residents of Ankaran are to exercise their right to local self-government within the Municipality of Koper, from which the new municipality will secede, as meaning that the authorities of the Municipality of Koper are the representatives of the new Municipality of Ankaran. It stressed that the authorities of the Municipality of Koper, who *inter alia* from the outset consistently opposed the establishment of the complainant as an individual municipality, could by no means diligently and adequately represent and protect the complainant's interests in the case at issue, as they would find themselves in an insoluble conflict of interest. The Constitutional Court thus held that the Ankaran Local Community, even though it is not formally an authority of the Municipality of

Ankaran, is to be recognised the possibility to represent the Municipality in the case at issue.

The Constitutional Court then emphasised that the right to judicial protection determined by Article 23.1 of the Constitution ensures the right to request from a court in a particular dispute a substantive decision on the merits. It further requires that judicial protection is effective, i.e. such that a party can efficiently defend its rights, interests, and legal benefits. It is of essential importance that acts that would compromise the possible subsequent success of the party in the proceedings do not occur. The Constitutional Court explained that the refusal to recognise the complainant's right to be a party to proceedings in which the relations between the two municipalities regarding the real properties in the complainant's territory are to be determined entails the actual postponement of judicial protection of the complainant's property interests regarding such real properties until its full legal personality is established. Such a decision cannot prevent interferences with the legal position of the complainant that would compromise the reasonableness of subsequent judicial proceedings of the complainant against the Urban Municipality of Koper. It stressed that the complainant fulfils all the major conditions for the recognition of its capacity to act as a party to the non-litigious civil proceedings at issue. The fact that the Higher Court did not recognise this capacity to the complainant thus entailed a violation of its right to judicial protection and to a decision on the merits regarding its rights and legal interests. Therefore, the Constitutional Court abrogated the challenged Decision and remanded the case for new adjudication.

III. The Decision was adopted by five votes against four. Judges Klampfer, Sovdat, Mozetič, and Petrič voted against. Judge Sovdat submitted a dissenting opinion.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2014-2-008

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 28.11.2013 / **e)** U-I-158/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 107/13 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

3.11 General Principles – **Vested and/or acquired rights.**

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

Keywords of the alphabetical index:

Crisis, economic and financial / Retroactivity, law / Retroactivity, required by public interest / Tax, retroactive effect.

Headnotes:

The legislature must especially substantiate the reasons for a law to have retroactive effect. It must not only demonstrate that the law pursues the public interest in general. The existence of a special public interest that justifies the retroactive effect, without which the objective pursued by the act could not be achieved, must be specifically established in the legislative procedure.

Summary:

I. The Decision concerned the constitutional review of Article 12 of the Act Introducing Additional Taxation of a Part of Managers' Incomes in the Period of Financial and Economic Crisis (hereinafter, the "challenged Act") upon the request of the Administrative Court. The challenged Act introduced an additional tax on the income of members of management and supervisory bodies of business entities who benefitted from a surety, guarantee, or financial aid from the state to mitigate the consequences of the financial and economic crisis on the basis of the so-called austerity measures. The Act entered into force on 6 October 2009, i.e. the day following its publication in the Official Gazette RS, but in accordance with the challenged Article it applied to income obtained since 1 January 2009.

II. The Constitutional Court reviewed the challenged Article 12 with regard to Article 155.1 of the Constitution (the principle of the prohibition of the retroactive effect of legal acts), which determines that laws, other regulations, and general legal acts cannot have retroactive effect. However, this prohibition is not absolute. An exemption from this fundamental prohibition is envisaged by Article 155.2 of the Constitution, on the basis of which only a law may establish that certain of its provisions have retroactive effect, if this is required in the public interest and provided that no acquired rights are infringed thereby.

The challenged Act imposed a new tax obligation on a particular group of taxpayers. In accordance with the challenged Article 12, the taxable amount included (also) parts of the income that the taxpayer obtained before the enactment of the Act, i.e. in the period between 1 January 2009 and 5 October 2009, when these had already been taxed, namely by personal income tax in accordance with the Personal Income Tax Act. Thereby the legislature retroactively and in an aggravating manner interfered with the legal positions of the affected taxpayers, because from the moment they obtained a specific taxable income they legitimately expected that the obtained income would only be burdened by the tax as prescribed by the tax laws in force at that moment, and that they would be able to freely use the rest of the income.

In accordance with Article 155.2 of the Constitution, retroactive effects of individual statutory provisions are admissible if such is required by the public interest and no acquired rights are infringed thereby. However, the Constitutional Court found that the legislature did not establish that the public interest required the retroactive effect of the challenged Act. No special justification of the public interest in the challenged statutory provision having retroactive effect could be found in the legislative materials. Therein the legislature should have specifically justified the public interest that requires a legal norm to have retroactive effect, as without it, the objective pursued by the regulation could not be attained. In addition, the National Assembly neither responded to the applicant's request, nor participated in the public hearing in the case at issue. The Constitutional Court thus assessed that already the condition of the existence of a public interest, which Article 155.2 of the Constitution prescribes for the exceptional admissibility of the retroactive effect of a law, was not fulfilled. It therefore abrogated Article 12 of the challenged Act.

The Constitutional Court also noted that the legislature's intent in adopting the challenged Act may be understood as an attempt to prevent any possibility that unsuccessful managers would collect unjustified bonuses, particularly in times of financial and economic crisis. It clarified, however, that such an intent cannot be a constitutionally admissible objective of a statutory regulation in the field of tax law and thus also not a public interest that could justify the retroactive effect of the challenged Act. The Court stressed that such an objective cannot prevent acts already committed, but can only entail the subsequent legal qualification of these acts. It emphasised that subjective responsibility of individuals may only be decided on in the appropriate judicial proceedings; they may not be

sanctioned by tax regulations, nor is such in the competence of the Constitutional Court.

III. The Decision was adopted by six votes against three. Judges Klampfer, Korpič-Horvat, and Deisinger voted against. Judges Sovdat and Zobec submitted concurring opinions, whereas Judges Klampfer, Korpič-Horvat, and Deisinger submitted dissenting opinions.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2014-2-009

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 13.02.2014 / **e)** Up-540/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 20/14 / **h)** CODICES (Slovenian, English).

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.**

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

Keywords of the alphabetical index:

Internet, anonymity, right / Internet, access provider / Internet, pornographic material, child, protection / Privacy, personal, right / Privacy, protection / Secrecy of correspondence.

Headnotes:

Article 37 of the Constitution protects communication regarding which an individual legitimately expects privacy by requiring a court order for interferences with such communication. This protection also applies to a dynamic Internet Protocol (hereinafter, "IP") address, unless the person in question by his or her conduct has waived the privacy of the communication at issue.

Summary:

I. During a criminal investigation the Swiss police obtained the dynamic IP address that the applicant had used to disseminate child pornography via the internet by using an application, which enables users to provide content to all interested parties. It sent the IP address to the Slovene police. With the assistance of the internet service provider the Slovene police established that the dynamic IP address had been assigned to the applicant's father. Subsequently the criminal investigation focused on the complainant as the suspect. The police obtained a court order and searched the complainant's home. The applicant's computers found during the search were seized and inspected. The material found during the inspection was used as evidence in the applicant's criminal trial. The applicant was found guilty of the criminal offence of the possession and distribution of pornographic material and sentenced to a six-month prison sentence.

The applicant claimed before the Constitutional Court that the evidence at his trial was inadmissible, on the basis that the police had failed to obtain a court order for obtaining his dynamic IP address as well as for the disclosure of the information on the user to whom the IP address had been assigned at the relevant moment.

II. The Constitutional Court rejected the constitutional complaint. The Court recalled that the subject of protection under Article 37 of the Constitution is communication regarding which an individual legitimately expects privacy. It then examined the circumstances of the case and noted that the applicant used the eMule application to exchange various files, including files that contained child pornography, with users of a specific network on the internet. The Court further noted that the applicant has not demonstrated that his IP address was in any way concealed or inaccessible to other users of the network and that anyone interested in exchanging the files containing child pornography shared by the applicant could have accessed these files. Thus, in the Court's opinion, the applicant himself by his conduct had waived his privacy and therefore could not have a legitimate expectation of privacy regarding his communications. As a result, obtaining information regarding the applicant's dynamic IP address did not interfere with his right to communication privacy guaranteed by Article 37.1 of the Constitution.

The Court continued by stressing that the identity of the communicating individual is an important aspect of communication privacy. Therefore, it is necessary to obtain a court order for its disclosure in accordance with Article 37.2 of the Constitution. In the case at

issue, however, the applicant himself had waived his legitimate expectation of privacy, and hence the information on the identity of the IP address user no longer enjoyed protection of privacy in terms of communication privacy. It only enjoyed protection in terms of the data privacy determined by Article 38 of the Constitution, which does not require a court order. Therefore, by obtaining the data regarding the given name, surname, and address of the dynamic IP address user that was used by the complainant to communicate, the police had not interfered with his communication privacy and a court order was not required for the disclosure of his identity.

With regard to the seizure of the complainant's computers and the inspection of the files stored thereon, the Court clarified that no additional court order specifically allowing the review of the files was required, because it was already clear from the initial search order that it was issued with the intent to review the data stored on the computer and other data storage media.

III. The Decision was adopted by seven votes against two. Judges Jadek Pensa and Sovdat voted against and submitted dissenting opinions.

Languages:

Slovenian, English (translation by the Court).

*Identification: SLO-2014-2-010*

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 03.07.2014 / **e)** U-I-65/13 / **f)** / **g)** *Uradni list RS* (Official Gazette), 54/14 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

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

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

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

3.16 General Principles – **Proportionality.**

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

Keywords of the alphabetical index:

Data, personal, protection / Data, personal, retention, blanket and indiscriminate nature / Privacy, invasion, proportionality.

Headnotes:

The obligation of mandatory and indiscriminate retention of traffic data by telecommunication service providers represents a severe interference with the right to the protection of personal data under Article 38.1 of the Constitution. While the prosecution of serious criminal offences, the protection of the state, and ensuring state security are constitutionally admissible objectives that may justify an interference with the right to the protection of personal data, measures adopted in order to attain these objectives must be proportionate.

Summary:

I. In this case the Information Commissioner submitted a request to initiate proceedings for the constitutional review of Articles 162 to 169 of the Electronic Communications Act (hereinafter, the “challenged Act”). The challenged provisions served the implementation of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (hereinafter, the “Data Retention Directive”). On 26 September 2013 the Constitutional Court stayed the proceedings until the Court of Justice of the European Union adopted the Decision in joined cases C-293/12 and C-594/12 regarding the validity of the Data Retention Directive.

II. The Constitutional Court clarified that following the Decision of 8 April 2014 by which the Court of Justice of the European Union declared the Data Retention Directive invalid, Member States are no longer obliged to implement the Directive into their national legal orders. However, data retention is still admissible under European Union law, provided that the interference with the right to protection of private

data is proportionate. The Constitutional Court thus reviewed whether the challenged Act satisfied the requirement of proportionality.

The Constitutional Court noted that due to the legislature’s determination of an obligation of mandatory and indiscriminate retention of traffic data regarding certain telecommunication services for a period of 14 or 8 months respectively the service providers created extensive collections of their users’ personal data. From these data it is possible to obtain very detailed findings regarding the private lives of individuals. The Constitutional Court stressed that in a time when the majority of all communication takes place on the basis of these services such processing of personal data represents a severe interference with the right to the protection of personal data of the entire population. It further warned that with the creation of such extensive collections of personal data operated by the individual service providers also the risk of illegal access to such data increases. As the affected individuals are not informed of the retention or any subsequent use of their data, this can result in a sense of constant surveillance that may affect the exercise of their other rights, particularly freedom of expression and the right to freely disseminate information.

The Constitutional Court continued by stressing that the prosecution of serious criminal offences, the protection of the state, and ensuring state security are constitutionally admissible objectives that may justify an interference with the right to the protection of personal data. However, the challenged measure did not pass the test of proportionality. While mandatory retention of traffic data is an appropriate measure for attaining the above-mentioned objectives, the Constitutional Court concluded that the measure is not necessary, as the legislature did not demonstrate that it could not have attained the objectives by means of a less invasive measure.

The Constitutional Court emphasised that mandatory (preventive) and indiscriminate retention of traffic data in a majority of cases entails an interference with the information privacy of individuals who have done nothing to give rise to such an interference with their rights. The challenged regulation did not restrict the retention of data to a certain period of time, a geographically defined area, or a group of persons who would have a certain connection with the objectives pursued by the measure. In addition, the legislature did not limit the use of these data only to serious criminal offences. By determining mandatory (preventive) and indiscriminate retention of traffic data the legislature severely interfered with the population’s right to privacy without in any way determining the circumstances on the basis of which

the measure would be restricted to what is absolutely necessary for the attainment of the outlined objectives. Therefore, the Constitutional Court found that the interference with the right to protection of personal data, determined in Article 38.1 of the Constitution, was disproportionate. It abrogated Articles 162 to 169 of the challenged Act and ordered service providers to destroy all data retained on the basis of the challenged provisions immediately after the publication of this Decision in the Official Gazette of the Republic of Slovenia.

III. The Decision was adopted unanimously.

Cross-references:

European Court of Human Rights:

- *Leander v. Sweden*, no. 9248/81, 26.03.1987, *Special Bulletin – Leading Cases* [ECH-1987-S-002];
- *Kopp v. Switzerland*, no. 13/1997/797/1000, 25.03.1998, *Bulletin* 1998/1 [ECH-1998-1-005];
- *Handyside v. United Kingdom*, no. 5493/72, 07.12.1976, *Special Bulletin – Leading Cases* [ECH-1976-S-003];
- *S. and Marper v. United Kingdom*, nos. 30562/04 and 30566/04, 04.12.2008, *Bulletin* 2009/1 [ECH-2009-1-003].

German Federal Constitutional Court:

- no. 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, 02.03.2010, *Bulletin* 2010/1 [GER-2010-1-005].

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2014-2-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 15.05.2014 / **e)** CCT 87/13 / **f)** Ngqukumba v. Minister of Safety and Security and Others / **g)** www.constitutionalcourt.org.za/Archimages/22275.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Motor vehicle, seizure, security / Possession, unlawful / Property, seizure, limits / Self-help, rule of law, contradiction.

Headnotes:

In terms of the *mandament van spolie*, or protection against spoliation, anyone unlawfully deprived of property is entitled to be restored to possession before anything else is debated or decided. Even an unlawful possessor is entitled to the *mandament's* protection. The *mandament* is consonant the rule of law: its purpose is to prevent the taking of possession otherwise than in accordance with the law. No one – neither an individual nor a government entity or functionary – should resort to self-help to obtain or regain possession.

While legislation enjoys precedence over the common law, it must, to the extent possible, be read in conformity with that law. Accordingly, legislation that renders the possession of motor vehicles unlawful where the engine and chassis numbers have been tampered with should not be read to oust the *mandament's* protections where the possession of the vehicle was not unlawful under all circumstances but where the vehicle could be possessed provided “lawful cause” existed under the legislation.

Summary:

I. Mr Ngqukumba was in possession of a motor vehicle he used as a taxi. In February 2010 members of the South African Police Service (hereinafter, "SAPS") suspected that the vehicle had been stolen. The vehicle was searched and seized without either a warrant or Mr Ngqukumba's consent. Upon inspection, the engine and chassis numbers of the vehicle were found to have been tampered with, indicating that the vehicle was likely to have been stolen. SAPS refused to restore possession of the vehicle to Mr Ngqukumba on the ground that the National Road Traffic Act (hereinafter, the "Act") prohibits and criminalises possession of tampered-with vehicles.

Mr Ngqukumba sought an order in the Eastern Cape High Court, Mthatha (hereinafter, the "High Court") declaring the search and seizure unlawful, as well as for the return of his vehicle under the common-law remedy of the *mandament van spolie* (protection against spoliation). This is a remedy for the restoration of possession of property to a person unlawfully deprived of possession.

The High Court declared the search and seizure of the vehicle unlawful. However, it found that the return of the vehicle to Mr Ngqukumba would conflict with the Act, which proscribes and criminalises possession of tampered-with vehicles. The High Court thus ordered SAPS to retain the vehicle until the irregularities had been cleared and the vehicle re-registered. The Supreme Court of Appeal dismissed Mr Ngqukumba's appeal.

Mr Ngqukumba persisted in seeking the return of his motor vehicle, relying on the *mandament van spolie*. He argued that the *mandament* requires that possession first be restored to a person who is unlawfully dispossessed, irrespective of whether possession is lawful at the time. SAPS argued that the *mandament* cannot override legislation enacted to deal with individuals possessing tampered-with vehicles. Further, a court cannot authorise criminal conduct or compel the police to perform an illegal act.

II. In a unanimous judgment, written by Madlanga J, the Constitutional Court ordered the return of the vehicle to Mr Ngqukumba. The Court reasoned that the essence of the *mandament* is the restoration of unlawfully deprived possession to the possessor. Its main purpose is to preserve public order and to prevent self-help. This, the Court found, applies equally whether the despoiler is an individual or a government entity. The *mandament* is consonant with the rule of law, a founding value of the Constitution.

The Court emphasised that the Act prohibits and criminalises possession of a tampered-with vehicle only "without lawful cause". Thus the return of the vehicle to the person deprived of its possession would not necessarily be unlawful. Where it is not unlawful in all circumstances to possess an article, the lawfulness of possession should not be enquired into. To do otherwise would defeat the essence of relief under the *mandament*. The Court noted that although SAPS plays an important role in combating and preventing crime, it too must act in terms of the law.

Supplementary information:

Legal norms referred to:

- Sections 1, 39.2, 39.3 and 205.3 of the Constitution of the Republic of South Africa, 1996;
- Sections 20 and 22 of the Criminal Procedure Act 51 of 1977;
- Sections 68.6.b and 89.1 of the National Road Traffic Act 93 of 1996.

Cross-references:

- *Ivanov v. North West Gambling Board and Others* [2012] ZASCA 92;
- *Municipality of George v. Vena and Another* [1988] ZASCA 166.

Languages:

English.



Identification: RSA-2014-2-009

a) South Africa / b) Constitutional Court / c) / d) 05.06.2014 / e) CCT 99/13 / f) Cool Ideas 1186 CC v. Hubbard and Another / g) www.constitutionalcourt.org.za/Archimages/22080.pdf / h) CODICES (English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
4.7.14 Institutions – Judicial bodies – **Arbitration**.

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

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

Keywords of the alphabetical index:

Access to courts, exclusion by arbitration agreement / Access to courts, meaning / Arbitration / Arbitration, access to courts, exclusion / Arbitration, court, decision, enforcement / Compensation, property / Property, deprivation / Property, private, right.

Headnotes:

The Housing Consumers Protection Measures Act requires the registration of a home builder in order to receive consideration for building works. The prohibition on receiving consideration does not infringe an unregistered home builder's rights to property.

Statutory prohibitions may preclude a court from making an arbitral award an order of court if granting an order enforcing the award would amount to sanctioning an illegality. In these circumstances, a refusal to enforce an arbitral award does not violate the right of access to courts.

Summary:

I. In February 2006 the applicant (hereinafter, "Cool Ideas") entered into a building contract with the first respondent (hereinafter, "Ms Hubbard"). Cool Ideas enlisted the services of a building construction company, Velvori Construction CC (hereinafter, "Velvori"), to undertake the construction. Velvori was registered as a home builder in terms of the Housing Consumers Protection Measures Act (hereinafter, the "Act"). Cool Ideas, a property developer, was not registered.

The building works were completed in October 2008, but Ms Hubbard took issue with the quality of the work and refused to make final payment. She instituted arbitration proceedings under the building contract, claiming the costs of remedial work. Cool Ideas counterclaimed for the balance of the contract price. The arbitrator found in favour of Cool Ideas. However, Ms Hubbard failed to comply with the arbitral award.

Cool Ideas approached the South Gauteng High Court, Johannesburg (High Court) for an order enforcing the arbitral award. Ms Hubbard opposed the application, contending that Cool Ideas was not a

registered home builder in terms of the Act. However, Cool Ideas later registered during the litigation proceedings. It argued this sufficed, and also that the construction was done by Velvori, which was registered. The High Court granted the order and made the arbitral award an order of court.

Ms Hubbard appealed to the Supreme Court of Appeal. The majority upheld her appeal, stating that the purpose of the Act is to protect consumers and therefore both Cool Ideas and Velvori were required to be registered before commencing with construction. Further, they held that enforcing the arbitral award would disregard a clear prohibition in law. The dissenting judgment found that Cool Ideas did not intentionally fail to register and that refusing to enforce the award would be unjust.

II. The Constitutional Court granted leave to appeal but dismissed the appeal. The majority judgment, written by Majiedt AJ (Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J concurring), held that a purposive reading of the Act makes it clear that Cool Ideas was prohibited from commencing building works without being registered and that by enforcing the arbitral award the Court would be condoning an illegality. The majority held further that neither Cool Ideas' right to property nor its right of access to courts was infringed.

III. A concurring judgment, written by Jafta J (Zondo J concurring) held that the order made by the majority was correct, but it disagreed that the underlying building contract remained valid.

The dissenting judgment, written by Froneman J (Cameron J, Dambuza AJ and Van der Westhuizen J concurring) held that in determining whether the enforcement of an arbitral award will be against public policy, it is necessary to take into account that the parties chose to engage in private arbitration. Public policy must embrace issues of fairness in the interpretation, application and enforcement of contracts. Froneman J further held that the Act should be interpreted in a manner that is less damaging to the right to property, including an applicant's right to payment for work fairly done.

Supplementary information:

Legal norms referred to:

- Sections 25 and 34 of the Constitution of the Republic of South Africa, 1996;
- Section 10 of the Housing Consumer Protection Measures Act 3 of 2000;
- Section 31 of the Arbitration Act 42 of 1965.

Cross-references:

- *First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance, Bulletin 2002/2 [RSA-2002-2-006];*
- *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another [2009] ZACC 6;*
- *National Credit Regulator v. Opperman and Others, Bulletin 2012/3 [RSA-2012-3-021].*

Languages:

English.

*Identification: RSA-2014-2-010*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 10.06.2014 / **e)** CCT 133/13 / **f)** Minister of Defence and Military Veterans v. Motau and Others / **g)** www.constitutionalcourt.org.za/Archimages/22131.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.13 General Principles – **Legality.**
 3.20 General Principles – **Reasonableness.**
 4.6.2 Institutions – Executive bodies – **Powers.**

Keywords of the alphabetical index:

Administrative act, judicial review / Executive, act / Executive power / Hearing, right / Procedural fairness, principle / Procedure, administrative, fairness / Rationality, principle.

Headnotes:

A decision by a Minister to dismiss board members of a state-owned entity that is obliged to carry out state policy is an executive, rather than an administrative, decision. This is because it is closely related to that Minister's policy formulation power, or is an adjunct to that power. The Promotion of Administrative Justice Act – legislation that provides for the review of administrative decisions – thus does not apply and

the decision cannot be reviewed under its provisions, though rationality review under the principle of legality still applies.

An executive decision must be exercised in accordance with other applicable statutory requirements. These include that the Minister's decision must be made on good cause and in a procedurally fair manner.

An executive decision also must be rationally related to the purpose for which the power was given, which is a requirement of the rule of law.

Summary:

I. In August 2013 the Minister of Defence and Military Veterans (Minister) terminated General Motau's and Ms Mokoena's (the first and second respondents') membership of the Board of the Armaments Corporation of South Africa SOC Ltd (hereinafter, "Arm Scor"), the armaments and technology procurement agency for the Department of Defence. They had served as Chairperson and Deputy Chairperson respectively. The termination was undertaken in terms of Section 8.c of the Armaments Corporation of South Africa Limited Act (Arm Scor Act), which permits the Minister to remove board members "on good cause shown". In justifying her decision, the Minister cited various procurement projects which had failed to progress; Arm Scor's failure to conclude a service level agreement with the Department of Defence as required by the statute; and complaints which she had received about Arm Scor from the defence industry.

General Motau and Ms Mokoena successfully challenged their dismissal in the High Court, which ordered their reinstatement. The High Court held that the Minister's decision was administrative action, and thus subject to the Promotion of Administrative Justice Act (hereinafter, "PAJA"). The decision was reviewable under PAJA as the Minister had made an error of law; had taken the decision in a procedurally unfair manner; and had acted for an ulterior purpose. The High Court also held that the Minister's decision to terminate Ms Mokoena's services was irrational.

II. The Constitutional Court granted the Minister leave to appeal directly to it and upheld the appeal in part. The majority judgment, written by Khampepe J, with whom seven judges concurred, concluded that the Minister's decision amounted to executive, rather than administrative, action. This was because the Minister's power to terminate the services of members of the Arm Scor Board is closely related to the formulation of policy and is an adjunct to her policy-making power. The decision could not,

therefore, be reviewed under PAJA, which applies only to administrative decisions.

The Court also found that the Minister had good cause to terminate the members' services and that her decision was rational. Under their leadership, Armscor and its Board had failed to fulfil effectively its statutory mandate. However, the Court held that in making her decision the Minister was required to comply with the process for the dismissal of directors set out in the Companies Act. Her failure to do so rendered her decision unlawful. Nevertheless, the majority held that it would not be just and equitable to set aside her decision. The lapse was purely procedural and the Board members had had notice of the Minister's dissatisfaction and proposed action. Besides, she had good cause for removing them, and in these very exceptional circumstances, they should not be reinstated.

III. A dissenting judgment, written by Jafta J, and concurred in by Madlanga J and Zondo J, concluded that the Minister's decision amounted to administrative action and that PAJA applied. It held that the decision had been taken in a procedurally unfair manner because General Motau and Ms Mokoena's membership was terminated without a hearing. The minority concluded that the decision was unlawful and should be set aside.

Supplementary information:

Legal norms referred to:

- Section 33 of the Constitution of the Republic of South Africa, 1996;
- Section 8.c of the Armaments Corporation of South Africa Ltd Act 51 of 2003;
- Section 71 of the Companies Act 71 of 2008;
- Sections 1, 3 and 6 of the Promotion of Administrative Justice Act 3 of 2000.

Cross-references:

- *Association of Regional Magistrates of Southern Africa v. President of the Republic of South Africa and Others*, Bulletin 2013/2 [RSA-2013-2-012];
- *Geuking v. President of the Republic of South Africa and Others*, Bulletin 2002/3 [RSA-2002-3-020];
- *Greys Marine Hout Bay (Pty) Ltd and Others v. Minister of Public Works and Others* [2005] ZASCA 43;
- *Masetlha v. President of the Republic of South Africa and Another* [2007] ZACC 2;

- *Minister of Health and Another v. New Clicks SA (Pty) Ltd and Others*, Bulletin 2005/3 [RSA-2005-3-009];
- *Permanent Secretary of the Department of Education, Eastern Cape and Another v. Ed-U-College (P.E) (Section 21) Inc.*, Bulletin 2000/3 [RSA-2000-3-019].

Languages:

English.



Identification: RSA-2014-2-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.08.2014 / **e)** CCT 127/13 / **f)** Florence v. Government of the Republic of South Africa / **g)** www.constitutionalcourt.org.za/Archimages/22275.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.7.12 Institutions – Judicial bodies – **Special courts**.
 5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Decision, court, discretion, range of results / Land, restitution / Property, market value, basis for compensation / Property, compensation, calculation / Property, real, restitution / Discrimination, restoration / Discrimination, redress, equitable / Property, seizure, compensation, adequate.

Headnotes:

Under the Restitution of Land Rights Act (hereinafter, the "Restitution Act") persons or communities dispossessed of a right in land because of past racially discriminatory laws or practices are entitled to equitable redress where restoration itself is not feasible. When a court awards equitable redress in the form of financial compensation, it exercises a wide discretion, and an appellate court will not disturb its award unless it has failed to exercise its discretion judicially. The choice of the

Consumer Price Index as an appropriate metric to convert past loss into present-day value is a sound exercise of this discretion.

Claimants of restitution are entitled only to “alternative relief” in terms of the Restitution Act in cases where the relief of restoration of a right in land or equitable redress is not appropriate or competent. Accordingly, alternative relief does not include compensation for the erection of a memorial plaque where equitable redress has been awarded.

Summary:

I. Ms Florence instituted a restitution claim under the Restitution Act for the forced dispossession of the Florence family’s home. The family had been forced to leave their home in 1970 after the area was classified a “white group area” under apartheid legislation. Ms Florence claimed equitable redress in the form of financial compensation for the loss of the home and compensation for the costs of erecting a memorial plaque on the property, to which the present owners of the property had agreed.

The Land Claims Court held that Ms Florence met the requirements for restitution and determined the amount of compensation due by escalating the value of the loss in 1970 to present-day monetary terms using the Consumer Price Index (hereinafter, the “CPI”). It also found that it lacked jurisdiction to make an order regarding the memorial plaque since the plaque was the subject of a private agreement between the present property owner and the Florence family.

On appeal, the Supreme Court of Appeal affirmed the Land Claims Court’s decision to use the CPI as an appropriate method of conversion. However, it overturned the Land Claims Court’s decision on the memorial plaque holding that the latter Court’s wide remedial discretion under the Restitution Act allowed it to order the state to pay for the plaque.

Ms Florence appealed against the Supreme Court of Appeal’s finding that the CPI was an appropriate metric, urging various investment measures as alternatives. The Government cross-appealed against the Supreme Court of Appeal’s order requiring it to bear the costs of the memorial plaque.

II. Writing for the majority, Moseneke ACJ, with whom six justices concurred, held that escalating historical loss in terms of an investment rate is likely to result in over-compensation, which is at odds with the purpose of the Restitution Act. In addition, the market value of the property is but one of the factors that must be taken into account when determining what would be

fair compensation. The exercise of discretion by the Land Claims Court and Supreme Court of Appeal can only be overturned if those Courts have exercised their discretion injudiciously or acted on a wrong principle of law. The Court held that, on a proper reading of Section 33 of the Restitution Act, both Courts had exercised their discretion properly in opting for the CPI to measure “changes over time in the value of money”. Therefore, Ms Florence’s appeal must fail.

In a separate majority judgment that dealt only with the cross-appeal, Zondo J, with whom five justices concurred, held that the Land Claims Court’s power under Section 35 to grant “alternative relief” is available only in cases where the relief of restoration of a right in land or equitable redress is not appropriate or competent. He found that this was not so here, as Ms Florence was granted equitable redress in the form of financial compensation. Accordingly, the majority upheld the Government’s cross-appeal and set aside the Supreme Court of Appeal’s order on the memorial plaque.

III. In a dissenting judgment, Van der Westhuizen J, with whom three justices concurred, rejected the use of the CPI in calculating equitable redress. Since the Restitution Act prioritises restoration of land, claimants who can only be compensated financially should, as far as possible, be put in the same position as if the land had been restored to them. If no accurate current market value is available, the value of the property at the time of the loss must be adjusted to present-day value. The CPI is not an appropriate tool for this adjustment because it measures the change in the value of money for the purpose of consumption, rather than returns on investment, and therefore does not adequately account for the loss of immovable property. Van der Westhuizen J preferred the 32-day notice deposit rate, an investment metric proposed by Ms Florence. While the measure was not without shortcomings, it was the most appropriate measure available on the evidence before the Court. Froneman J concurred in this outcome, but for different reasons.

On the cross-appeal, Van der Westhuizen J, with whom four justices concurred, found that the Supreme Court of Appeal did have the power to award Ms Florence the costs of erecting a memorial plaque. Section 33 of the Restitution Act affords courts wide remedial powers which are not affected by an agreement between private parties, especially since the agreement in Ms Florence’s case pertained to the display of the plaque at the property and not the costs thereof.

Supplementary information:

Legal norms referred to:

- Section 25 of the Constitution of the Republic of South Africa, 1996;
- Sections 33 and 35 of Restitution of Land Rights Act 22 of 1994.

Cross-references:

- *Department of Land Affairs and Others v. Goedgelegen Tropical Fruits (Pty) Ltd*, Bulletin 2007/2 [RSA-2007-2-008];
- *Farjas (Pty) Ltd v. Minister of Agriculture and Land Affairs and Others* [2012] ZASCA 173;
- *Haakdoornbult Boerdery CC v. Mphela and Others* [2007] ZASCA 69;
- *Mphela and Others v. Haakdoornbult Boerdery CC and Others* [2008] ZACC 5.

Languages:

English.



Switzerland

Federal Court

Important decisions

Identification: SUI-2014-2-003

a) Switzerland / **b)** Federal Court / **c)** First Civil Law Chamber / **d)** 20.05.2014 / **e)** 4A_62/2014 / **f)** Swiss Invalidity Insurance v. Swiss National Bureau of Insurance / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 140 III 221 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Lawyer, law firm / Judge, impartiality, conditions / Judge, recusal.

Headnotes:

Article 30.1 of the Federal Constitution (guarantee of an independent and impartial tribunal), Article 6.1 ECHR, Article 47 of the Code of Civil Procedure; bias of a judge.

Summary of the principles set out in the case law (para. 4). Appearance of bias on the part of a cantonal judge due to the closeness of her husband and brother-in-law to a person closely linked to a party to the proceedings (para. 5).

Summary:

The applicant, Swiss Invalidity Insurance, paid the claimant a certain sum following a traffic accident. The applicant then applied to recover 80% of the benefits paid from the Swiss National Bureau of Insurance, which covers damage and injuries caused by foreign motorists.

The applicant requested the withdrawal of a cantonal judge, an ordinary member of the 2nd civil division of the Zurich Cantonal Court, who had participated in the taking of the relevant decision. The applicant relied on the fact that the judge's husband was a lawyer who had for a long time represented the Zurich Insurance Company in civil liability cases, and the fact that his brother – her brother-in-law – also worked for the company. The latter was director of the company's regional head office in Zurich and a member of the governing board. It was the Zurich Insurance Company which had dealt with the claim and the judge's brother-in-law had been involved in the settlement of the claim. Although the Zurich Insurance Company was not strictly speaking a party to the proceedings, it was the representative of the Swiss National Bureau of Insurance and had also led the proceedings. The applicant argued that the close links between relatives of the judge and the Zurich Insurance Company gave an appearance of partiality to the judge.

Under Article 30.1 of the Federal Constitution and Article 6.1 ECHR, any person whose case is to be decided in judicial proceedings is entitled to a hearing by an independent and impartial tribunal. The purpose of this guarantee is to ensure that circumstances external to the case do not influence the judgment in a party's favour or to a party's detriment.

The guarantee of a lawful court is already violated when, objectively, there are facts which may create an appearance of bias or a risk of partiality. According to the case law, these are admissible when they are such as to raise doubts as to the judge's impartiality in the particular case. A party's subjective impression is not the decisive factor. It is enough that the circumstances create the appearance of bias and raise fears of partiality on the part of the judge. Only objectively established circumstances must be taken into account: actual bias on the part of the judge is unnecessary.

Article 47 of the Swiss Code of Civil Procedure lays down the statutory grounds for recusal. In addition to personal relations, which are sufficient in themselves to justify recusal, paragraph 1.f. refers generally to "other grounds"; judges are also required to withdraw if they have a personal interest in the case. General clauses similar to this may be found in the Federal Court Act. The principles deriving from Article 30.1 of the Federal Constitution should be observed in the application of these general clauses. Personal interests include not only those directly concerning the judge, but also those indirectly concerning him. This means that the judge must have a substantial personal connection to the object of the dispute. The

interest may be tangible or intangible and influence the legal or factual situation. However, it only jeopardises judicial independence if it affects the judge significantly in his sphere of personal interests more than that of other judges. A personal interest may also be a relationship with a third party who can secure an advantage or disadvantage for the judge depending on the outcome of the proceedings; it may also directly or indirectly concern a person to whom the judge is personally connected.

The Federal Tribunal has often given rulings in cases where a deputy judge was closely linked to a party to the proceedings owing to the fact that his main occupation was that of lawyer in a law firm. The Federal Tribunal has also accepted a close family relationship as a ground for recusal in a case where a judge was required to give a ruling in proceedings involving the husband of his wife's sister.

In the instant case, the applicant institution refers to the rules on family relationships, but, rightly, it does not argue that the husband or the brother-in-law represented the Zurich Insurance Company. These provisions are therefore not directly applicable. It relies on the principles set out in ATF 139 III 433.

The Zurich Insurance Company is not strictly speaking a party to the proceedings. The defendant is the Swiss National Bureau of Insurance, an association formed and jointly run by the insurance institutions licensed to operate in Switzerland in the field of civil liability insurance for motor vehicles, in order to cover civil liability for damage and injuries caused in Switzerland by foreign motor vehicles. Under the Road Traffic Act, the National Bureau of Insurance may entrust its members or third parties with the execution of its tasks and appoint a lead insurer. Since it was founded, the Zurich Insurance Company has performed this function. In the instant case, the documents in the file show that the Zurich Insurance Company handled the claim as if it were its own; among other things, it reached an agreement with the claimant on the payment of insurance benefits whereby she certified that she had been compensated for the consequences of the accident. Consequently, it cannot be denied that the Zurich Insurance Company had an interest in the settlement of the claim, of which these proceedings form part. The Zurich Insurance Company therefore constitutes a person closely linked to a party.

The fact that the judge's husband represented the Zurich Insurance Company in other cases can probably be taken to imply a long-term relationship between him and the insurance company. However, the question of whether there might be a personal interest for the judge in the fact that her husband's

long-term mandate with the insurance company might be affected by the outcome of the proceedings can be left open in the light of the other grounds.

The brother of the judge's husband had been admitted to the latter's law firm. He had been a member of the Zurich Insurance Company's governing board and the case file showed that he had been involved in settling the claim and had played a leading role in the agreement reached.

For its part, the defendant objects that the negotiations with the claimant on this agreement took place after the brother-in-law had left the Zurich Insurance Company. However that may be, the claim concerned previously incurred occupational retraining costs. The judge's brother-in-law, presented on the firm's website as being a specialist in civil liability law and social insurance benefits, was certainly aware that the applicant's retraining offer might result in an appeal. Even if he was not a party to these proceedings, he was responsible for benefits arising from the same facts and requiring similar conditions, so that he was probably familiar with the points at issue in the application.

In conclusion, the judge should have withdrawn owing to the closeness of her husband and brother-in-law to the defendant contesting the claim. The impugned judgment must be set aside and the case referred back to the lower court for rehearing by a bench formed in accordance with the Constitution and the law.

Languages:

German.



Identification: SUI-2014-2-004

a) Switzerland / **b)** Federal Court / **c)** Court of Criminal Law / **d)** 01.07.2014 / **e)** 6B_17/2014 / **f)** X. Central prosecution service of the Canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Official Digest), ATF 140 I 246 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Detention, unlawful, compensation / Detention, redress / Pre-trial detention, conditions / Pre-trial detention, compensation / Detention, rules / Detainee, treatment, poor conditions / Compensation, detention / Compensation, non-pecuniary damage.

Headnotes:

Article 3 ECHR; Article 431 of the Swiss Code of Criminal Procedure (unlawful coercive measures); prohibition of torture and inhuman or degrading treatment or punishment; unlawful coercive measure, redress.

Keeping a person in a windowless cell with a light switched on 24 hours a day constitutes, even for a limited period of around ten days, degrading treatment inconsistent with Article 3 ECHR (para. 2.4.2).

The finding of a violation is not sufficient redress (para. 2.5.2). Award of monetary compensation (para. 2.6.1), the question of whether another form of redress is conceivable in other cases being left open (para. 2.6.2).

Summary:

By judgment of 30 July 2013, the Lausanne District Criminal Court sentenced X. to 18 months' deprivation of liberty, minus the 357 days he had spent in pre-trial detention, for violation of the Federal Narcotics Act and the Federal Aliens Act. The Court ordered his continued detention on security grounds and awarded him compensation of 250 CHF for his conditions of detention from 10 to 20 August 2012.

The public prosecutor appealed against this judgment, seeking a ruling that no compensation be awarded to X. and, in the alternative, that such compensation be offset by the Court fees charged to him. X. lodged an interlocutory appeal, asking that his compensation for non-pecuniary damage be set at 50 CHF per day of detention in police custody.

By judgment of 18 November 2013, the criminal appeal court of the Vaud Cantonal Court allowed the public prosecutor's appeal and dismissed the appeal lodged by X. It revised the judgment of 30 July 2013, ruling that no compensation was awarded to X. for unlawful detention. The Court also noted that the judgment of 30 July 2013 was enforceable in respect of the criminal conviction. X. lodged a criminal-law appeal against this judgment with the Federal Court, seeking a ruling that the Canton of Vaud be ordered to pay him 550 CHF in damages for the unlawful conditions of detention to which he had been subjected. The Federal Court allowed the appeal.

The applicant submits that unlawful conditions of detention must necessarily result in compensation under Article 431 of the Swiss Code of Criminal Procedure, which provides for such compensation, and under the case-law of the European Court of Human Rights.

The Cantonal Court acknowledged that the applicant had been detained from 8 to 20 August 2012 in a police custody facility, namely in a windowless, constantly lit cell with few opportunities for outside exercise. It accepted that such conditions of detention were contrary to Article 3 ECHR as well as to several cantonal provisions stipulating that a person under pre-trial arrest may be held on police premises for no more than 48 hours and specifying in detail the conditions of detention. However, it considered that a mere finding of unlawfulness was sufficient in view of the short period of unlawful detention and the length of the sentence handed down against X.

In a recent judgment (ATF 140 I 125, due to be published in the *Bulletin on Constitutional Case-Law*), the Federal Court considered the conditions under which pre-trial detention might be viewed as inhuman or degrading treatment in breach of Article 3 ECHR, with particular reference to prison overcrowding; in particular, the material conditions of detention must exceed the level of humiliation and degradation normally involved in deprivation of liberty.

In the instant case, the applicant was detained for around ten days in a windowless cell in which the light was left switched on 24 hours a day. He was allowed limited daily exercise, (half an hour a day). As well as being contrary to the applicable cantonal regulations, the conditions of detention at issue are clearly incompatible with the inevitable degree of hardship inherent in any deprivation of liberty. Even if this type of detention only lasts for about ten days, the distress and humiliation experienced by the detainee considerably exceed those necessarily associated with deprivation of liberty. This undoubtedly constitutes degrading treatment and, as

noted by the Cantonal Court, such conditions of detention violate Article 3 ECHR.

The Court of First Instance actually awarded compensation on these grounds; the Cantonal Court held, however, that the finding of unlawfulness was sufficient. In the light of the paramount importance of the guarantee secured by Article 3 ECHR, it is hardly conceivable, in the event of a violation, to limit the redress to a finding, especially in view of the intolerable conditions of detention (windowless cell with light switched on 24 hours a day). The impugned judgment, which is limited to a finding, violates federal law and the appeal must be allowed in this respect.

As regards the amount of compensation, inspiration may be drawn from the general rules of the Code of Obligations relating to unlawful acts. The Court of First Instance had awarded the applicant compensation equivalent to 25 CHF per day of detention (roughly 20 euros). The amount of 50 CHF claimed by the applicant is not excessive, having regard to the conditions of detention, for the period after the first 48 hours allowed under the legislation of the Canton of Vaud. This sum constitutes compensation for non-pecuniary damage. The monetary compensation awarded in this case does not mean, however, that, generally, a cantonal court hearing a similar case cannot consider other forms of compensation, such as a reduced sentence.

Languages:

French.



Identification: SUI-2014-2-005

a) Switzerland / **b)** Federal Court / **c)** First public Law Chamber / **d)** 22.07.2014 / **e)** 1B_424/2013 / **f)** Blocher v. Public Prosecutor's Office III of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), ATF 140 IV 108 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.1.2 Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments**.
2.3.6 Sources – Techniques of review – **Historical interpretation**.

2.3.7 Sources – Techniques of review – **Literal interpretation.**

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

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

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

Keywords of the alphabetical index:

Investigation, criminal law / Informer, anonymity / Journalist, information, source / Journalist, refusal to testify, right / Journalist, sources, disclosure / Public prosecutor / Evidence, inadmissibility / Accused / Seizure, document / Secrecy, information, disclosure.

Headnotes:

Article 172 (protection of media sources) and Article 264.1.c of the Swiss Code of Criminal Procedure (restrictions on seizure), Article 17.3 of the Federal Constitution (guarantee of editorial secrecy), Article 10 ECHR; prohibition on seizing documents relating to contacts between an accused and media professionals.

The prohibition on seizure covers not only documents held by media professionals, but also those held by the accused or by third parties (para. 6).

Résumé:

Public Prosecutor's Office III of the Canton of Zurich (hereafter "the Public Prosecutor") opened a criminal investigation against Christoph Blocher, at the time a Member of Parliament, for complicity in and incitement to violation of bank secrecy. He was accused of having received at his home in December 2011 an employee of a private bank who possessed confidential information concerning the former President of the National Bank. It was alleged that the employee had allowed access to these documents and that Christoph Blocher had assured him of his support were he to lose his job. It was further alleged that Christoph Blocher had put him in touch with a journalist who was investigating the private banking affairs of the former Director of the National Bank.

On 20 March 2012, prosecutors searched Christoph Blocher's home and the premises of a limited company. They seized a number of documents and, at Christoph Blocher's request, put seals on them. The public prosecutor subsequently applied to the

Coercive Measures Court of the Canton of Zurich for removal of the seals.

On 27 November 2013, after eliminating from the investigation those documents under seal which were covered by legal professional privilege or official secrecy, the Cantonal Court removed the seals on the other documents, holding that they were outside the journalistic sphere (editorial premises, private premises, personal effects).

Article 264.1.c of the Swiss Code of Criminal Procedure (hereinafter, "CPP") deals with restrictions on seizure. Whatever the place or time, seizure is prohibited in the case of objects and documents relating to contacts between the accused and a person who has the right to refuse to testify under Articles 170-173 CPP, if that person is not an accused in the same case.

Article 172 CPP guarantees protection for media professionals' sources. Subject to exceptions not applicable in the instant case, persons who, in a professional capacity, participate in the publication of information in the editorial section of a periodical medium, and their assistants, can refuse to testify as to the author's identity and as to the content and source of their information.

The Federal Court partially allowed the appeal lodged by Christoph Blocher against removal of the seals; the Cantonal Court was obliged to remove from among the seized documents those connected with the relations between Christoph Blocher and the newspaper *Weltwoche* or with journalists working for it. This correspondence and related files cannot be used in the public prosecutor's investigation since they are covered by the rules on protection of media professionals' sources and, in principle, cannot be seized (Articles 172 and 264 CPP).

Wherever they are, whether in the hands of the media or in the hands of the accused or a third party, these objects and documents are protected by the prohibition on seizure. Moreover, the word "contacts" in Article 264.1.c CPP, which implies a two-way process, applies not only to documents which the accused has sent the journalist, but also to those which the journalist has sent the accused and which are at his home. The Federal Council's message on unification of criminal procedure shows that this is the intention in the legislation, and the historical interpretation accordingly precludes any departure from the actual text of the provision.

The media perform a "watchdog" function. Among other things, they must be able to cover irregularities in government and society without being denied

access to the necessary information. The right to refuse to testify and the prohibition on seizure facilitate their task. If the informer knows that his name will remain secret, he will disclose information to the media more readily than if he expects his name to be published, given the disadvantages of a legal and professional nature and in terms of his place in society. If the informer had to take into account the risk of his home being searched or his emails being communicated to a third party, he would be dissuaded from supplying information. The teleological interpretation also precludes any departure from the actual text of the provision.

Article 17.3 of the Federal Constitution guarantees editorial secrecy, which also derives from Article 10 ECHR. The Federal Court and the European Court of Human Rights attach particular importance to it as the cornerstone of freedom of the press. This militates in favour of extensive protection of sources and a narrow interpretation of Article 264.1.c CPP.

Lastly, legal writers stress that, through the inclusion of the words “wherever they may be” in the legislation, the scope of the prohibition on seizure was extended to include documents in the hands of the accused or third parties.

The Cantonal Court therefore violated federal law. The appeal is allowed on this point and the case is referred back to the lower court so that the objects and documents at issue can be removed.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2014-2-004

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 25.06.2014 / **e)** U.br.189/2012 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 106/2014 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Passport, withdrawal / Visa, denial / Right to leave one’s own country.

Headnotes:

Visa denial and revocation of travel documents of forcibly returned persons is a disproportionate and excessive restriction on the freedom of movement of the person and the right to travel abroad.

Persons to whom this measure applies are entirely deprived of their right to leave their country and to travel to another country. The automatic ban on these persons to travel anywhere abroad does not fall within the permissible restrictions of the freedom of movement under Article 27.3 of the Constitution.

Summary:

I. The case originated in two applications for constitutional review of Articles 37.1.6 and 38.4 of the Law on Travel Documents of Citizens of the Republic of Macedonia submitted by one MP and a lawyer (acting on behalf of several hundreds of Macedonian citizens of Roma ethnic origin).

Pursuant to Article 37.1.6 of the Law on Travel Documents, the filed request for issuing a passport or a visa will be refused and no passport or visa will be issued if the person is forcibly returned or expelled from another country for having violated that country's regulations for entry and stay. Pursuant to the disputed Article 38.4 of the same Law, the grounds for refusal of requests for issuing a passport or a visa laid down in Article 37.1.6 of this Law shall cease to exist after expiry of a period of one year from the day when the decision under Article 39 of this Law is made.

The applicants argued that these provisions were contrary to Article 27 of the Constitution, which guarantees the right to freedom of movement, because they introduced additional limitations of the citizen's right to leave his or her own country. The application of these measures in practice allowed for manipulation of the citizens on the border crossing, which mostly affected the members of the Roma community in Macedonia.

II. The Constitutional Court recalled that Article 27 of the Constitution and the corresponding provisions of international human rights treaties (Article 13.2 of the Universal Declaration of Human Rights, Article 12.2 of the International Covenant on Civil and Political Rights, Articles 2 and 5 of the UN Convention on the Elimination of All Forms of Racial Discrimination, Article 10.2 of the UN Convention on the Rights of the Child, Article 2.2 Protocol 4 ECHR) stipulate that the right of the citizen to leave the territory of his or her country, i.e. the right to travel abroad is one of the fundamental human rights arising from the freedom of movement, which is in turn an integral part of the larger context of freedom of the person, namely the overall freedom of action of the person and its activities in all areas of life. The enjoyment of this right is considered a precondition for enjoyment of other rights and freedoms (for example, the right to asylum).

The Court noted that this right is not absolute, i.e. it can be restricted, but under strictly defined conditions. The enjoyment of the right to freedom of movement and the right to leave the territory of the Republic, pursuant to Article 27.3 of the Constitution, can be restricted by Law only in cases when such a measure is necessary to protect the security of the Republic, to conduct criminal proceedings or to protect the public health. These restrictions however must be strictly interpreted, so that not to threaten and deny the very essence of the right to freedom of movement. In this sense the Court referred to United Nations Human Rights Committee General Comment no. 27 on the freedom of movement.

It also referred to the case law of the European Court of Human Rights (judgment in the case *Stamose v. Bulgaria*, 29713/05) in which the Court found a violation of Article 2 Protocol 4 ECHR (freedom of movement) with the explanation that it can never be considered as a proportionate measure to automatically prevent a person from traveling to any foreign country for having violated the immigration rules of a particular country. The European Court of Human Rights had considered that a normal consequence of the breach of a country's immigration laws would be for the person concerned to be removed from that country and be prohibited from re-entering its territory. However, that Court considered it disproportionate for the person's country of origin to multiply the measure by preventing the person from traveling to any other foreign country for a given period of time.

The Constitutional Court stated that the effective exercise of the right to leave one's country supposes the person to hold a valid passport or a visa, so the act of non-issuing a passport or its revocation (i.e. the non-issuing of a visa) represents indisputably a restriction of the right and an effectively prevents the person from leaving his or her home country.

The Court concluded that the measure by itself is disproportionate and that it imposes an excessive restriction on the freedom of movement of the person, namely on the right to travel abroad. This is because the persons affected by the disputed measure have been already deported i.e. forcibly returned to the Republic of Macedonia, which means that those persons already bear certain consequences, so it would be logical to ban re-entry into the state or states whose regulations for entry and stay they have violated, but by those states, and not by their own state. Instead, with the disputed measure which comprises revocation of the person's passport for a period of one year, these persons are entirely deprived of their right to leave their country and to travel to another foreign country, and that measure is applied by their own country. To automatically impose a ban on these persons to travel anywhere abroad is precisely what makes the measure disputable in relation to the principle of proportionality, as well as in relation to the principle of the rule of law.

The Court held that a state can restrict the right, i.e. the freedom to leave one's country to its own national who holds a valid travel document, under serious and exceptional circumstances, such as are those listed under Article 27 of the Constitution (“where it is necessary for the protection of the security of the Republic, criminal investigation or protection of people's health”). The disputed

limitation, although envisaged by the Law, is excessive and disproportionate and is not considered as part of the permissible restrictions of this right under Article 27.3 of the Constitution. Hence the Court repealed the disputed provisions of the Law on Travel Documents.

Cross-references:

European Court of Human Rights:

- *Stamose v. Bulgaria*, no. 29713/05, 27.11.2012.

Languages:

Macedonian, English (translation by the Court).



Turkey Constitutional Court

Important decisions

Identification: TUR-2014-2-001

a) Turkey / **b)** Constitutional Court / **c)** First Section / **d)** 23.01.2014 / **e)** 2013/2602 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 13.03.2014, 28940 / **h)** CODICES (Turkish).

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

Keywords of the alphabetical index:

Freedom of media / Freedom of expression, unpopular view / Reputation, respect, right / Criticism.

Headnotes:

A fair balance must be struck between freedom of expression of journalists and the reputation of public officials when courts decide defamation cases.

Summary:

I. The applicant is a journalist in a local newspaper and was sentenced to 7.080 TL judicial fine due to the offence of insulting a police chief in his article entitled, "Being Cheap (*Ucuz Olmak*)", which was published in a local newspaper; imposed ten months imprisonment for the felony of malicious prosecution; and given a 7.080 TL judicial fine due to the offence of insulting a government official in another article, entitled "Motorcycle Vagrants (*Motosikletli Zibidiler*)", which was published in the same newspaper. The local criminal court decided to suspend the

pronouncement of the judgment. The applicant lodged an objection against the court's decision but the objection was dismissed.

The applicant filed an individual application, claiming he did not explicitly mention the name of the concerned government official, he was only criticizing some events and it can clearly be seen by considering the articles as a whole that there had been no intention to damage somebody's reputation. The applicant argued that his trial and conviction violated his freedom of expression and press, even if the pronouncement of the judgment was suspended. In this context, the applicant alleged that the local court's decisions had violated his rights set forth in Articles 26 and 28 of the Constitution, and requested the finding of violation, re-trial and compensation for his damages.

II. The Constitutional Court addressed each of his arguments.

1. The Constitutional Court's assessment concerning the article titled "Being Cheap (*Ucuz Olmak*)":

The Constitutional Court noted that the sentencing for criminal libel and insult disseminated via the press with the penalty of imprisonment may cause pressure and self-censor on the press. So, an "imprisonment" sentence for libel should be avoided unless there are expressions including a call for violence or hatred, aimed at anti-democratic governance. The Court observed that the applicant was not sentenced to imprisonment but imposed a judicial fine, yet this punishment was also suspended. Considering the content and purpose of the article, the identity and position of the complainant official, context of the text, sexist language used in the article and the amount of the punishment, the Court found the interference with the applicant's freedom of expression as proportional and necessary in a democratic society.

As a result, the Court held that there was no violation of rights guaranteed by the Articles 26 and 28 of the Constitution.

2. The Court's assessment concerning the article titled "Motorcycle Vagrants (*Motosikletli Zibidiler*)":

The Constitutional Court, considering the reasoned decision and all the evidence in the case as a whole, stated that the sanction infringed on the applicant's freedom of expression and press, and it was necessary to assess the necessity of the intervention in a democratic society and its proportionality. The Court observed that in the article, the applicant demonstrated a critical approach, aiming to

contribute to a debate about public affairs. He did not use expressions that constituted a call for violence or a hate speech. Also the names of the complainants were not clearly stated in the text and there had been no intention to damage reputation of other people. The Court, considering the seriousness of the sanction decided by the local court, found the interference with the freedom of expression of the applicant was not necessary in a democratic society.

For these reasons, the Court held that there was a violation of rights guaranteed by the Articles 26 and 28 of the Constitution and decided that the judgment to be sent to the concerned court for retrial in order to redress the infringement and its consequences.

Languages:

Turkish.



Identification: TUR-2014-2-002

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 02.04.2014 / **e)** 2014/3986 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 03.04.2014, 28961 / **h)** CODICES (Turkish).

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.**

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

Keywords of the alphabetical index:

Social media, access, right.

Headnotes:

Banning access to twitter violates the freedom of expression of active twitter users.

Summary:

I. The applicants are active users of the social media platform "twitter.com". The Presidency of Telecommunication and Communication (*Telekomünikasyon İletişim Başkanlığı*, hereinafter "TİB") blocked "twitter.com" due to some court decisions. The TİB, observing that users were able to circumvent the prohibition by changing DNS settings, subsequently blocked access to Google DNS addresses. The applicants, claiming they shall not seek recourse from the administrative court because it is not an effective remedy that must be exhausted. As such, they directly applied to the Constitutional Court. In the meantime, some applications were filed before the administrative courts. The Ankara Administrative Court issued an injunction to stay the execution of the administrative act and ordered the ban on access to "twitter.com" to be lifted. The TİB, however, did not obey the injunction promptly.

The applicants noted TİB's justification for prohibiting the mentioned website, namely to uphold the privacy of private life, and that it was only concerned with blocking certain URL addresses. However, according to the applicants, a complete ban on "twitter.com" has no legal basis, violating their constitutional right of freedom of expression.

II. The Constitutional Court, first, assessed the admissibility of the application. It observed that even though government authorities must promptly establish the necessary procedure or act to enforce a judicial decision, the injunction decision of the administrative court to stay execution of the administrative act had not been fulfilled. The Court also considered that although the maximum period to execute court decisions had been set for 30 days, it is the duty of administrative bodies to fulfil the requirements of the decision promptly in a state governed by the rule of law. As such, the Court assessed that the application to the administrative courts to unblock the mentioned site is not an effective remedy. As a result, the Constitutional Court decided that the applicants' complaints in relation to Article 26 of the Constitution are not manifestly ill-founded and hence admissible.

The Court reiterated that the means of expression guaranteed under Article 26 of the Constitution include "speeches, writings, paintings or other ways". The Court considered that the internet and social media are essential means for the freedom of expression in modern democracies, and government authorities must be careful when interfering with them. The Court observed that court decisions TİB had depended on, namely to block certain URL addresses, do not give rise to the authority to block

the website completely. The law, moreover, does not grant TİB the power to block the whole website. The Court also observed, according to the law, that it is only within the power of the courts to decide whether access to a website can be entirely banned. As such, the Court concluded that banning access to "twitter.com" by the administrative act had no legal basis and hence gave rise to a serious violation of the freedom of expression of all users of the internet website "twitter.com".

For these reasons, the Court ruled that the applicants' freedom of expression guaranteed in Article 26 of the Constitution had been violated and that the judgment to be sent to the concerned authorities for the infringement and its consequences must be abolished.

Languages:

Turkish.



Identification: TUR-2014-2-003

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 03.04.2014 / **e)** 2013/1614 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 22.05.2014, 29007 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Privacy, personal, right / Sanction, disciplinary / Dismissal from office.

Headnotes:

Dismissal of a civil servant from his or her office because of private images published in the internet without his or her consent, constitutes a violation of the right to private life.

Summary:

I. A disciplinary proceeding was started against the applicant, a prison guard, on the grounds that her private images had been published on the internet. As a result of the disciplinary proceeding, she was dismissed from her duty as a prison guard.

The applicant filed a case against the disciplinary sanction, but the administrative courts dismissed the case. The applicant made a criminal complaint against the man in the images due to the offence of a threat; she claimed he had threatened to publish the images. The man was sentenced to 3.740 TL judicial fine. The court decided to suspend the pronouncement of the judgment.

The applicant lodged an individual application before the Constitutional Court, claiming her right to privacy was violated. She argued that the images were published on the internet without her consent. These images were not taken in the lodging building (buildings assigned to government officials by the government for living). Although assumed otherwise, the lodging building where she had been living should be regarded as her private space. The applicant claimed that she was punished because of her private affair, which was not related to her occupation. She also claimed that she was discriminated on the basis of her gender and marital status during all disciplinary and judicial proceeding. Apart from these claims, she mentioned that she had lost her job because of an act that does not constitute a crime. The applicant alleged that her rights of privacy, equality and presumption of innocence were violated.

II. The Constitutional Court noted that there is no doubt that sexual activity carried out behind closed doors falls within the scope of private life. The Court also stated that the right to privacy and protection of the secrecy of the information about this subject falls within the scope of Article 20 of the Constitution.

The Court noted that the right to private life is subject to limitations, but a fair balance should strike between the legitimate aim pursued and the limitation imposed on individual rights. There must be a fair balance between the general interest that the limitation intended to achieve and the personal interest. The Court also stated that the margin of appreciation entrusted in public authorities is not unlimited; it should even be interpreted more narrowly when privacy, identity or existence of the individual is at stake.

Considering the relationship between civil servants and administration, the Court noted it is natural for public authorities to have a wide margin of

appreciation. It also reiterated that private life is not only composed of the life behind closed doors, but also includes the other aspects of social life like the person's professional life. In this respect, a person's private life that integrated with his or her professional life may be subject to some restrictions. Nevertheless minimum standards must be guaranteed.

The Court noted the acts, which were subject to disciplinary and judicial proceedings, were in fact not related to the person's profession as a civil servant, but were private life acts inside private space. As a result, the Court concluded that there was not a fair balance between the aim pursued and the personal interest of the applicant considering the effect of dismissal from office on her economic and social status and the justifications submitted by public and judicial authorities.

For these reasons, the Court held that there had been a violation of the right to private life guaranteed by Article 20 of the Constitution and decided that the judgment to be sent to the concerned court for retrial in order to eradicate infringement and its consequences.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2014-2-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 15.05.2014 / **e)** 5-rp/2014 / **f)** On the constitutional petition of 101 People's Deputies of Ukraine regarding the official interpretation of the provisions of Article 103.1 and 103.5 of the Constitution in conjunction with item 16 of Chapter XV "Transitional Provisions" of the Constitution (case on the term for which the President of Ukraine is elected) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), /2014 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.4.3 Institutions – Head of State – Appointment – **Direct/indirect election.**

4.4.5.2 Institutions – Head of State – Term of office – **Duration of office.**

Keywords of the alphabetical index:

President, extraordinary election, term.

Headnotes:

The provisions of Article 103.1 and 103.5 of the Constitution should be understood as reading that the President of Ukraine is elected at extraordinary elections by the citizens of Ukraine for a five-year term as at regular elections.

Summary:

Under Article 102 of the Constitution the President of Ukraine is the Head of State and acts in its name. The President is the guarantor of state sovereignty and territorial indivisibility of Ukraine, the observance of the Constitution and human and citizens' rights and freedoms.

Article 103.1 of the Constitution determines that the President is elected by the citizens of Ukraine for a five-year term, on the basis of universal, equal and direct suffrage, by secret ballot. According to

Article 103.5, regular elections of the President are held on the last Sunday of March of the fifth year of the term of authority of the President. In the event of pre-term termination of authority of the President, elections of the President are held within ninety days from the date of termination of the authority. The President, elected at extraordinary elections, takes the oath within five days after the official announcement of the election results (Article 104.4 of the Constitution).

Proceeding from the Basic Law, the Head of State can be elected at extraordinary and regular elections. Article 103 of the Constitution and its other articles that define the constitutional and legal status of the President do not contain provisions that would set another period than five years, for which citizens of Ukraine may elect Head of State, regardless of the type of elections (regular or extraordinary).

Therefore, a five-year term enshrined in Article 103.1 of the Basic Law is the only constitutionally established term for which the President is elected. This term applies equally to both President elected at regular elections, and President elected at extraordinary elections.

According to Chapter XV.16 "Transitional Provisions" of the Constitution, "the presidential elections in Ukraine after the restoration of the Constitution as amended on 28 June 1996 by the decision of the Constitutional Court of 30 September 2010 no. 20-rp/2010 in the case on compliance procedures for amending the Constitution of Ukraine shall be held on the last Sunday of March 2015." This item supplemented Chapter XV "Transitional Provisions" of the Constitution in accordance with the Law "On Introducing Amendments to the Constitution on Holding Regular Elections of People's Deputies, the President, Deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, Local Councils and Heads of Village, Settlement, City" dated 1 February 2011 no. 2952-VI.

Chapter XV.16 "Transitional Provisions" was supplemented in order to regulate a particular situation that had arisen in view of the amendment of the Constitution with respect to legal regulation of the elections of the President of Ukraine and the need to set (after elections of the Head of State on 17 January 2010) the date of the next regular elections of the President, namely the last Sunday of March 2015. Analysis of the content of the provisions of this item gives grounds to conclude that they had fixed the date of the next regular elections of the President only, and these provisions do not apply to the legal relations related to extraordinary elections of the Head of State. Therefore, conducting extraordinary elections of the President of Ukraine before the last

Sunday of March 2015 prevents application of Chapter XV.16 “Transitional Provisions” of the Constitution, since its provisions lose their functional purpose and interconnection with the provisions of Article 103.1 and 103.5 of the Basic Law.

Languages:

Ukrainian.



Identification: UKR-2014-2-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.06.2014 / **e)** 6-rp/2014 / **f)** On the constitutional appeal of citizen Vasyl Vasylyovych Skorokhod concerning the official interpretation of the word combination “old-age pensioners” contained in Article 125.6 of the Housing Code of the Ukrainian SSR / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), /2014 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

Keywords of the alphabetical index:

Old-age pensioner / Dwellings, service, law.

Headnotes:

In the aspect of the constitutional appeal the word combination “old-age pensioners”, contained in Article 125.6 of the Housing Code of the Ukrainian SSR, pursuant to which old-age pensioners may not be expelled from service housing without providing other housing, should be understood as reading that old-age pensioners, apart from persons who, under the legislation of Ukraine, were granted a retirement pension, also includes persons who have retired at a reduced retirement age, set forth in Article 26 of the Law “On Mandatory State Pension Insurance” no. 1058-IV dated 9 July 2003 with amendments, in particular under Article 55 of the Law “On Status and Social Protection of Citizens Suffered from Chornobyl Catastrophe” no. 796-XII dated 28 February 1991 with amendments.

Summary:

I. Citizen Vasyl Skorokhod lodged a petition with the Constitutional Court seeking an official interpretation of the word combination “old-age pensioners” contained in Article 125.6 of the Housing Code of the Ukrainian SSR (hereinafter, the “Code”), which envisages the attribution of old-age pensioners to the list of persons who may not be expelled from service housing without other housing being provided, in terms of the question of whether old-age pensioners are persons who, under Article 55 of the Law on Status and Social Protection of Citizens Suffered from Chernobyl Catastrophe no. 796-XII dated 28 February 1991 with amendments (hereinafter, “Law no. 796”) are granted a pension with reduction of a retirement age fixed in Article 26 of the Law on Mandatory State Pension Insurance no. 1058-IV dated 9 July 2003 with amendments (hereinafter, “Law no. 1058”).

II. The right to housing is exercised by citizens in the manner stipulated by the Code, laws and other normative legal acts of Ukraine. In order to ensure this right, the housing legislation allows for the granting of service housing. Such housing is intended for the settlement of citizens, who in view of the nature of their employment relationships have to reside at the place of work or nearby (Article 118.1 of the Code). Article 124 of the Code provides that workers and employees who were laid off by a company, institution, organisation, are subject to expulsion from service housing with all other persons living with them, without other housing being provided. At the same time, Article 125.6 of the Code determines that old-age pensioners, in particular, may not be expelled without other housing being provided in the cases stated in Article 124.

The legislation of the USSR applied the term “old-age pension” and “old-age pensioner”, analysis of which would indicate that old-age pensioners were persons who had been granted a retirement pension, including those on preferential terms and with a reduced retirement age.

Legal regulation of pension provision is implemented on the basis of the Fundamental Law of Ukraine, according to which the forms and types of pension provision shall be determined by the laws of Ukraine only (Article 92.1.6 of the Constitution). Conditions and procedure for granting, recalculation and payment of pensions are stipulated by the Law “On Pension Provision” no. 1788-XII dated 5 November 1991 with amendments (hereinafter, “Law no. 1788”), Law no. 1058, Law no. 796 and other laws of Ukraine.

Another type of pension is a retirement pension (Article 2.a of Law no. 1788). According to Article 26.3 and 26.7 Chapter XV “Final Provisions” of Law no. 1058, Article 55 of Law no. 796 the condition for granting a retirement pension, including one with a reduced retirement age, is for a person having attained a particular age and having served the length of service required for obtaining insurance. Under Article 55.1 of Law no. 796 persons who worked or lived in areas of radioactive contamination, are provided with pensions with a reduced retirement age established by Article 26 of Law no. 1058.

Employees who have reached retirement age and who have the length of service required for insurance provided in the legislation acquire the status of a retirement pensioner. The Constitutional Court assumes that the change in legislation of the notion “old-age pension” to “retirement pension” will not impair the legal status of persons who require social protection, including pensioners who are not subject to expulsion from service housing without other housing being provided in accordance with Article 125.6 of the Code.

Thus, under Article 125.6 of the Code, old-age pensioners include persons who in accordance with the legislation of Ukraine were granted a retirement pension, including those with a reduced retirement age, pursuant to Article 55 of Law no. 796.

Languages:

Ukrainian.



United Kingdom Supreme Court

Important decisions

Identification: GBR-2014-2-001

a) United Kingdom / **b)** Supreme Court / **c)** / **d)** 26.10.2010 / **e)** / **f)** *Cadder v. Her Majesty's Advocate* / **g)** [2010] *UKSC 43* / **h)** [2010] *Weekly Law Reports* 2601; CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Police detention, right to a lawyer.

Headnotes:

Domestic authorities should follow the European Court of Human Rights consistent line of authority, culminating in *Salduz v. Turkey* (2008) *European Human Rights Reports* 421, that an individual detained in police custody is to be provided with access to their legal representative from, and at, their first interview. This requirement could only be derogated from where there were compelling circumstances in any specific case.

Summary:

I. Mr Cadder had been detained by the police on suspicion of serious assault. Whilst detained at the police station he was informed of his entitlement to have a lawyer informed of his detention. He did not avail himself of this right at that time. He was

subsequently interviewed by the police, and made a number of admissions, all without a lawyer being present. He was convicted at trial. He appealed the conviction on a number of grounds, including in respect of the use, at trial, of the content of his police interview. In a related case, a Mr McLean had been interviewed by police. He had informed a lawyer of his detention but had not been provided with legal advice prior to his police interview. It was, at the time and since 1980, accepted practice that a suspect could be interviewed by police absent without a lawyer being present to provide legal advice to the suspect and that anything said in the course of such an interview could be relied on at trial. The UK Supreme Court held that this approach, used in Scotland, was incompatible with Article 6 ECHR.

II. In his judgment Lord Hope DPSC, noted that the rationale underpinning the right to have a lawyer present during a police interview was to protect against self-incrimination; this was clear from paragraph 55 of it's the European Court's decision in *Salduz v. Turkey* (2008) *European Human Rights Reports* 421. The rationale and the right to legal advice during interview had been confirmed in a consistent line of the court's jurisprudence. Furthermore, it was clear that as a consequence of this line of authorities a number of Convention States were reforming their criminal process to ensure that suspects were afforded the right to a lawyer during police interview: see paragraph 49 of Lord Hope's judgment. The countries being: "Belgium, France, the Netherlands and Ireland". In the light of this it was clear that the position in Scotland was no longer permissible. It was not permissible notwithstanding the fact that the interview process, under Sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995, was predicated upon interviews being able to take place on such a basis. The process was inconsistent with the Article 6 ECHR right and as a consequence had to be revised so as to be compatible with it.

III. Lord Hope DPSC, with whom Lord Mance JSC agreed, gave the leading judgment. Lords Rodger, Walker, Brown, Kerr and Sir John Dyson SCJ gave concurring judgments.

Cross-references:

European Court of Human Rights:

- *Salduz v. Turkey*, no. 36391/02, 27.11.2008, *European Human Rights Reports* 421.

Languages:

English.



Identification: GBR-2014-2-002

a) United Kingdom / **b)** Supreme Court / **c)** / **d)** 01.12.2010 / **e)** / **f)** R v. Chaytor / **g)** [2010] UKSC 52 / **h)** [2011] 1 *Appeal Cases* 684; CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Parliament, member / Parliamentary privilege / Parliament, member, criminal prosecution.

Headnotes:

Members of Parliament do not have immunity from criminal prosecution on the grounds of Parliamentary privilege arising under Article 9 of the Bill of Rights 1689 for the submission of false expenses claims to parliamentary authorities.

Summary:

I. Three members of the House of Commons and one member of the House of Lords were charged with committing the crime of false accounting under the Theft Act 1968 in respect of expenses claims they had submitted to the parliamentary authorities. The expenses were claimed under an expenses and allowances scheme operated by the Parliamentary authorities that applied to expenses incurred whilst carrying out parliamentary duties. The Members of Parliament sought declarations that the criminal prosecutions could not be brought against them.

The Members of Parliament challenged the right to bring criminal proceedings against them on two grounds: first, that to do so would infringe Article 9 of the Bill of Rights 1689 in that the expenses claims were 'proceedings in Parliament' and were accordingly not capable of being made subject to

court proceedings; and secondly, that Parliament has exclusive jurisdiction over its own affairs and as such the courts cannot interfere with its management of those affairs.

II. The declarations were not granted. The courts did have jurisdiction to try Members of Parliament for criminal offences in such circumstances.

In his judgment Lord Phillips PSC rejected both arguments. In so far as the Article 9 point was concerned, it was a long-established principle that it was a matter for the courts to determine the ambit of parliamentary privilege, which where it applied was absolute in nature. The privilege's purpose was to protect the freedom of speech of Parliamentarians in carrying out the central activities of Parliament. Where it applied neither civil nor criminal proceedings could lie against Members of Parliament. In assessing the ambit of the privilege it was necessary to assess the link between the matter in hand and the 'core or essential business of Parliament'. Applying this test it is clear that court scrutiny of parliamentary expenses claims does not have an 'adverse impact' on that core business. It will 'not inhibit debate or freedom of speech' within Parliament. Furthermore it was apparent that the Speaker of the House of Commons did not assert that the criminal prosecution would infringe Parliamentary privilege, and moreover it was clear that public policy supported the conclusion that the privilege should, given its absolute nature and the fact it could not be waived, be given a narrow ambit.

In so far as the exclusive jurisdiction point i.e., that it was a matter that only Parliament could deal with, was concerned Lord Phillips held that unlike Parliamentary privilege it was not absolute: it could be waived or relinquished by Parliament. In this case Parliament had not asserted it had exclusive jurisdiction; the exclusive jurisdiction was not something that individual Parliamentarians could assert. Furthermore, in respect of administrative matters Parliament had over time relinquished its exclusive jurisdiction. The present matter arose from administrative matters in that it arises from the administration of expenses claims. The prosecutions thus concern matters not subject to the exclusive jurisdiction. Moreover, Parliament has never sought to challenge the application of the criminal law for matters that occur within Parliament. In some cases however a criminal offence committed within the precincts of Parliament may also amount to contempt of Parliament. Where a criminal prosecution is brought in respect of such a matter Parliament 'will suspend any disciplinary proceedings.'

III. Lord Phillips PSC gave the leading judgment. Lords Hope DPSC, Rodger, Brown, Mance, Collins, Kerr, Clarke and Lady Hale concurred.

Languages:

English.



Identification: GBR-2014-2-003

a) United Kingdom / **b)** Supreme Court / **c)** / **d)** 13.07.2011 / **e)** / **f)** Home Office v. Tariq / **g)** [2011] UKSC 35 / **h)** [2012] 1 Appeal Cases 452; CODICES (English).

Keywords of the systematic thesaurus:

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

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

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:

Fair trial, closed material proceedings / Security, national, court hearing, material presented, limitation.

Headnotes:

There is no absolute requirement under Article 6 ECHR to provide a litigant with sufficient detail of allegations concerning them in order for the provision of effective instructions to be given to the litigant's legal team. This had been established by a line of Strasbourg authorities i.e., *Leander v. Sweden* (1987), *Esbester v. United Kingdom* (1994) and *Kennedy v. United Kingdom*, no.26839/05, 18 May 2010 (unreported, BAILII: [2010]). That same line of authorities established that, in cases involving national security, the establishment of a system where material is kept from a litigant may be justified. The use of a process of closed material proceedings, where a litigant is denied access to material presented by the opposing party to the Court in proceedings to which

neither the litigant, the litigant's legal team or the public have access, was justified, albeit a special advocate could be present to test the evidence.

Summary:

I. Mr Tariq was employed by the Home Office as an immigration officer. In 2006, his security clearance was withdrawn. As a consequence he was suspended from his post. The basis for this was an investigation into the activities of his brother, who it was believed was involved in terrorist activities. His brother was convicted of such in 2008. There was no basis however to suspect Mr Tariq was involved. Mr Tariq brought proceedings for direct and indirect discrimination against his employer in the Employment Tribunal. Rule 54.2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, made under Section 10.6 Employment Tribunals Act 2006, permits the use of a 'closed material proceeding' in such proceedings. Such a proceeding was to be used. The validity of those proceedings was challenged by Mr Tariq. The Court of Appeal held that Article 6 ECHR required Mr Tariq to be provided with the 'gist' of the allegations against him i.e., sufficient detail of the allegations to enable him to give effective instructions to his lawyers.

The central thrust of the Home Office's argument before the Supreme Court on the question of gisting was that Article 6 ECHR could not require gisting as an absolute requirement in all cases. If it did it would require it in cases where gisting would be contrary to the interests of national security.

The central thrust of Mr Tariq's argument before the Supreme Court on the question of the compatibility of closed material proceedings with EU law and Article 6 ECHR was that the introduction of closed material proceedings did not provide him with effective legal protection and that, in any event, such proceedings were not justified on grounds of necessity.

II. The Supreme Court overturned that decision and held that Article 6 ECHR did not provide an absolute requirement that such material be provided. It further rejected an appeal brought by Mr Tariq, which sought a declaration that closed material proceedings were contrary to both European Union law and Article 6 ECHR.

Concerning the Home Office's argument, Lord Mance JSC noted that the question raised the following dilemma: without disclosure of the security material the Home Office could not defend the claim, but with disclosure national security would be compromised. As such was there an 'absolute requirement that a claimant should him – or herself see and know the

allegations forming the basis of the state's defence in sufficient detail to give instructions to the defence legal team to enable the allegations to be challenged effectively.' He noted that non-disclosure would mark a 'very significant inroad' into judicial procedure. It was accepted by the Home Office that such an inroad should only be permitted where it was 'essential' to the case at hand. In the light of the decision in *Kennedy v. United Kingdom* it was clear that Article 6 ECHR did not require the provision of the gist of material in every case. EU law would be guided by the Strasbourg court in this regard. As such the decision to require gisting should be such as is necessary in the case 'having regard to (a) the nature of the relevant allegations and of the national security interest in their non-disclosure and in the light of its best judgment as to (b) the significance of such.

Concerning Tariq's argument, Lord Mance held that the *Leander*, *Esbester* and *Kennedy* decisions established that national security could require the introduction of a system through which a litigant would not be provided with material upon which their claim was determined. The question for Article 6 ECHR was whether the system devised was necessary and if so whether it provided sufficient safeguards. In respect of the 'necessity' question, he held that neither domestic or European Court of Human Rights law would require a situation where a party was put in the position of making a disclosure injurious to national security or conceding a claim it could otherwise defend. Such cases called for a balance to be struck between claimants and defendants' procedural rights, to enable a litigant to defend a claim through relying on material not disclosed to the other party. Given the creation of a system of special advocates, who could test the closed material, thereby representing the interests of the party not privy to the closed material albeit not instructed by them, provided a sufficient procedural safeguard.

III. Lord Mance JSC gave the leading judgment. On the question of 'gisting': Lords Phillips, Hope, Brown, Clarke and Dyson and Lady Hale gave concurring judgments. Lord Kerr dissented. On the question of compatibility with EU law and Article 6 ECHR the court unanimously was unanimous.

In his dissenting judgment, Lord Kerr held that withholding information, determinative of a claim, from a litigant was a breach of both the common law right to fair trial and was equally a breach of that right as guaranteed by Article 6 ECHR. The 'right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process.': see *Kanda v. Government of Malaya* [1962] Appeal Cases 322. It

was the 'essence' of the Article 6 ECHR right that a litigant knows the case put against them. The decision in *Kennedy* was not applicable.

Cross-references:

- *Al Rawi v. The Security Service*, [2011] UKSC 34, [2012] *Appeal Cases* 531; *Bulletin* 2014/2 [2014-2-004];
- *Kanda v. Government of Malaya*, [1962] UKPC 2, [1962] 2 WLR 1153, [1962] AC 322.

European Court of Human Rights:

- *Leander v. Sweden*, no. 9248/81, 26.03.1987; 9 *European Human Rights Reports* 433;
- *Esbester v. United Kingdom*, no. 18601/91, 02.04.1993; 18 *European Human Rights Reports* CD72;
- *Kennedy v. United Kingdom*, no. 26839/05, 18.05.2010.

Languages:

English.



Identification: GBR-2014-2-004

a) United Kingdom / **b)** Supreme Court / **c)** / **d)** 13.07.2011 / **e)** / **f)** *Al-Rawi v. The Security Service* / **g)** [2011] UKHL 34 / **h)** [2012] 1 *Appeal Cases* 531; CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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:

Fair trial, closed material proceedings / Security, national, court hearing, material presented, limitation.

Headnotes:

The use of closed material proceedings, i.e., where a litigant is denied access to material presented by the opposing party to the court in proceedings to which neither the litigant, the litigant's legal team or the public have access, albeit a special advocate could be present to test the evidence, is contrary to the common law to fair trial in civil proceedings. It is not permissible to develop the common law to permit the use of such a process. Such a process could only be introduced by Parliament.

Summary:

I. The proceedings arose out of allegations that the Security Service had been complicit in the removal to and detention in Guantanamo Bay of various individuals. Those individuals issued civil proceedings seeking damages on a number of different grounds. The allegations were denied and the claims were contested. The defendant however wished to rely on material that was said to be essential to its case, but which it could not properly disclose to the claimants for reasons of national security. Absent reliance the claim would, it was said, fail. At first instance directions were given that closed material proceedings could be used, as they had in previous civil cases, in respect of the sensitive information. The Court of Appeal however held that the use of such a process was incompatible with the common law right to fair trial.

The Security Service (the appellants) argued that the right to fair trial was an absolute right. That right however was, in certain circumstances, capable of derogation. This could occur where such derogation was necessary to achieve 'real justice and a fair trial'. The respondents argued that open justice was a fundamental feature of the civil justice system. They further argued that the introduction of closed material proceedings was such a 'fundamental change' to the civil process that only Parliament could introduce it.

II. The Supreme Court upheld that decision.

In his judgment Lord Dyson JSC held that open justice was a fundamental feature of the civil process. This was long-established and uncontroversial. It was also long-established that the court had an inherent power at common law to develop its processes. The development of a closed material process at common

law would however be such a far-reaching and fundamental change that it was outside the scope of the common law.

III. Lord Dyson JSC gave the leading judgment, with whom Lords Hope, Brown and Kerr agreed. Lord Phillips agreed with the result for different reasons. Lord Mance, Lady Hale and Lord Clarke dissented.

In his concurring judgment, Lord Kerr held that the right to know the case put against you was a basic prerequisite of the right to fair trial. The ability of parties to know and challenge evidence is necessary for there to be an adversarial process. Untested evidence 'may positively mislead' and as such the ability to test it is 'central to the concept of a fair trial'.

In his judgment, Lord Phillips PSC held that the common law can only develop incrementally. The nature of the proposed development was so fundamental that it could only be effected by Parliament.

In his dissenting judgment, Lord Clarke, while he doubted whether there could ever be circumstances where a civil court could properly utilise a closed material proceeding held that the common law could develop so as to permit such a form of process. It could do so by analogy with, and through the development of the public interest immunity process.

Cross-references:

- *Home Office v. Tariq*, [2011] UKSC 35 [2012] 1 Appeal Cases 452; *Bulletin* 2014/2 [2014-2-003].

Languages:

English.



United States of America Supreme Court

Important decisions

Identification: USA-2014-2-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 05.05.2014 / **e)** 12-696 / **f)** Town of Greece v. Galloway / **g)** 134 *Supreme Court Reporter* 1811 (2014) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Prayer, legislative / Religion, establishment.

Headnotes:

The constitutional proscription against establishment of religion must be interpreted by reference to historical practices and understandings.

It is not necessary to define the precise boundary of the constitutional proscription against establishment of religion where history shows that the specific practice is permitted; instead, the Court's inquiry in a particular case must be to determine whether a governmental practice fits within long-followed tradition.

The constitutional proscription against establishment of religion does not require that the content of a prayer delivered at the opening of a legislative session be neutral.

In determining the compatibility of a prayer delivered at the opening of a legislative session with the constitutional proscription against establishment of religion, a court should not evaluate the content of a particular prayer; instead, a practice of legislative prayer will be compatible unless it is indicative of a pattern of prayers that over time denigrate, proselytise, coerce, or betray an impermissible governmental purpose.

Summary:

I. In 1999, the Town of Greece, a municipality in the State of New York, began the practice of opening meetings of its legislative body, the Town Board, with a prayer. The prayers were delivered during the ceremonial portion of the Board's meeting, before Board members engaged in policymaking.

Two residents of the town, Susan Galloway and Linda Stephens, filed suit in federal court, alleging that the Town's practice violated the Establishment Clause of the First Amendment to the U.S. Constitution by preferring Christians over other prayer givers and by sponsoring sectarian prayers. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." The First Amendment is incorporated against the States through the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution.

Galloway and Stephens did not seek to stop the prayer practice. Instead, they asked the court to issue an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the Town government with any one faith or belief.

The federal District Court upheld the Town's prayer practice as consistent with the First Amendment. It did not find an impermissible preference for Christianity, and ruled that legislative prayer does not have to be nonsectarian. The federal Court of Appeals for the Second District reversed this decision, holding that some aspects of the prayer practice, viewed in their totality by a reasonable observer, conveyed the message that the Town was endorsing Christianity.

II. The U.S. Supreme Court agreed to review the decision of the federal Court of Appeals, and reversed it. A crucial consideration for the Court was its observation that delivery of a prayer before the opening of a legislative session, even though religious in character, has long been understood in the United States to be compatible with the Establishment Clause. This was recognized in the 1983 decision in *Marsh v. Chambers*, in which the Court upheld the use of such legislative prayer by the legislature of the State of Nebraska. The Court also noted that the federal legislature always has employed the practice, and a majority of the States also consistently have used legislative prayer.

Because history shows that this practice has been permitted, the Court stated, it is not necessary for the judiciary to define the precise boundary of the Establishment Clause. Any test that the Court would

adopt must acknowledge a practice that was accepted by the framers of the Constitution and has withstood the critical scrutiny of time and political change. A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.

Simply because the use of legislative prayer might resemble the historical practice, however, does not mean that such an activity will automatically be compatible with the Establishment Clause. Instead, in regard to the prayer practice in the Town of Greece, the judicial inquiry must be to determine whether that practice fits within the tradition long followed in Congress and the state legislatures. The "Establishment Clause" must be interpreted by reference to historical practices and understandings.

In this regard, the legislative prayer must be delivered in a limited context. This limited context is found in the prayer's place at the opening of a legislative session, where it is intended to lend gravity to the occasion and reflect values of tolerance and devotion long part of the heritage of the United States. The prayer opportunity may not be exploited to proselytise or advance any particular faith or belief or to disparage another faith or belief.

So long as it is offered within the permissible limited context, this tradition does not require that legislative prayers be nonsectarian. In addition, the constitutionality of legislative prayer does not depend on the neutrality of its content. The content of a prayer is not of concern to the courts. Thus, the Court concluded, a challenge based solely on the content of particular prayers will not likely establish a constitutional violation unless the prayers are part of a pattern of prayers that over time denigrate, proselytise, coerce, or betray an impermissible governmental purpose.

The Court also concluded that a fact-sensitive inquiry into both the setting in which the Town of Greece's prayers take place and the audiences to whom they are directed shows that the Town did not coerce its citizens to engage in religious observance. The Court presumed that a reasonable observer would be acquainted with the historical tradition of legislative prayer in the United States and would understand that its purposes are to lend gravity to public proceedings and to acknowledge the place that religion holds in the lives of many private citizens. In addition, the Court observed that the principal audience for the invocations was not the public, but the lawmakers themselves. Galloway and Stephens claimed that the prayers gave them offense and made them feel excluded and disrespected, but the Court stated that offense does not equate to coercion.

III. Five Justices signed onto the Court's judgment. Four Justices also joined the Court's opinion, authored by Justice Kennedy, except that Justices Thomas and Scalia did not join Part II-B of the opinion. Justice Alito authored a separate concurring opinion. Justice Thomas authored a separate opinion, concurring in the Court's judgment and concurring in part in the Court's opinion, which included his view that the Establishment Clause should not be mechanically incorporated against the States through the Fourteenth Amendment. Four Justices dissented from the Court's decision, and Justices Breyer and Kagan authored separate dissenting opinions.

Cross-references:

- *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983).

Languages:

English.



Identification: USA-2014-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 27.05.2014 / **e)** 12-1117 / **f)** *Plumhoff v. Rickard* / **g)** 134 *Supreme Court Reporter* 2012 (2014) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.12 Fundamental Rights – Civil and political rights
– **Security of the person.**

Keywords of the alphabetical index:

Force, excessive, law enforcement officials / Seizure, law enforcement.

Headnotes:

Under the constitutional guarantee against unreasonable seizures, the court's determination of the objective reasonableness of a particular seizure requires a careful balancing of the nature and quality of the intrusion on the individual's protected interests against the countervailing governmental interests at stake.

Under the constitutional guarantee against unreasonable seizures, a judicial inquiry into the reasonableness of a particular seizure requires an analysis of the totality of the circumstances, using the objective standard of a reasonable law enforcement officer on the scene of the incident.

Rights asserted under the constitutional guarantee against unreasonable seizures are personal rights, and may not be asserted vicariously.

Summary:

I. An officer in the Police Department of the City of West Memphis, State of Arkansas, pulled over an automobile because it had only one operating headlight. Donald Rickard was the driver of the automobile, and Kelly Allen was in the passenger seat. When the officer asked Rickard to get out of the automobile, Rickard did not comply with the request. Instead, he sped away. The officer began driving his automobile in pursuit, and soon was joined by officers driving five other police vehicles. Rickard's automobile and the police vehicles were being driven on a major highway toward the City of Memphis, State of Tennessee, at very high speeds, swerving through traffic and passing at least twenty-five vehicles.

Rickard eventually exited the highway and ended up in a parking lot where his automobile made contact with three of the police vehicles. Rickard continued to attempt to operate his automobile, making it rock back and forth. At that point, an officer fired three gunshots into Rickard's automobile. Rickard manoeuvred his automobile into a street, and as he was driving rapidly down that street, two other officers fired twelve gunshots toward the automobile. Rickard then lost control of the automobile and crashed into a building. Rickard and Allen both died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase.

Rickard's surviving minor daughter, Whitne Rickard, sued the six individual police officers and the mayor and chief of police of West Memphis, claiming that the officers used excessive force in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. The U.S. District Court ruled that the officers' conduct violated the Fourth Amendment. The federal Court of Appeals for the Sixth Circuit affirmed the District Court's decision.

II. The U.S. Supreme Court agreed to review the decision of the Court of Appeals. The question presented to the Court was whether the law enforcement officers had used excessive force to effect a seizure.

The Court stated that such an inquiry is governed by the Fourth Amendment's "reasonableness" standard. The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." According to the Court, determining the objective reasonableness of a particular seizure under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. The inquiry requires an analysis of the totality of the circumstances. The Court stated that the analysis should be made from the perspective of "a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." This allows for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

The Court addressed two arguments advanced by Whitne Rickard: that the Fourth Amendment did not allow the police to use deadly force to terminate the chase; and, even if the officers were permitted to fire their weapons, they went too far when they fired as many rounds as they did. As to the first, the Court observed that Rickard's reckless driving posed a grave public safety risk. Given Rickard's attempt to escape the parking lot, it was evident that the chase was not over. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. The police acted reasonably in using deadly force to end that risk.

The Court also rejected Whitne Rickard's argument that the police acted unreasonably in firing a total of fifteen gunshots. If police officers are justified in firing at a suspect in order to end a severe threat to public safety, the Court reasoned, the officers need not stop shooting until the threat has ended. The Court noted that, during the ten-second span when all the shots were fired, Rickard never abandoned his attempt to flee. It would have been a different case, the Court stated, if the police had initiated a second round of gunshots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what occurred.

In arguing that too many gunshots were fired, Whitne Rickard relied in part on the presence of Kelly Allen in the front seat of the automobile. But the Court

rejected this argument as not relevant, noting that under its case law Fourth Amendment rights are personal rights that may not be asserted vicariously. The question before the Court was whether the police violated Rickard's Fourth Amendment rights, not Allen's.

III. The Court's decision on the judgment was unanimous. All the Justices joined the Court's opinion, except that Justices Ginsburg and Breyer did not join certain sections of the opinion.

Languages:

English.



Identification: USA-2014-2-006

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.2014 / **e)** 13-132 and 13-212 / **f)** Riley v. California / **g)** 134 *Supreme Court Reporter* 2473 (2014) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Digital information / Search, law enforcement / Telephones, cell / Warrant, judicial.

Headnotes:

The constitutional guarantee against unreasonable searches generally requires that law enforcement officers obtain a judicial warrant before undertaking a search to discover evidence of criminal wrongdoing.

In the absence of a warrant, a search will be reasonable only if it falls within a specific judicially-recognised exception to the constitutional warrant requirement.

In deciding whether to exempt a given type of search from the constitutional warrant requirement, a court must assess the degree to which the search intrudes upon an individual's privacy, and the degree to which it is needed for the promotion of legitimate governmental interests.

Legitimate governmental interests justifying a warrantless search are the protection of police officer safety and prevention of the destruction of evidence.

The constitutional guarantee against unreasonable searches requires that law enforcement officials first obtain a judicial warrant before searching digital information in a cell phone seized from the person of an individual who has been arrested.

Summary:

I. In two unrelated cases, consolidated into a combined proceeding at the U.S. Supreme Court, local police searched digital information in cell (mobile) telephones found on the persons of individuals who had been lawfully arrested for reasons that were not related to the cell phones themselves. In both cases, the police did not seek to obtain judicial warrants to search the digital information.

In one of the cases, a police officer stopped David Riley because he was driving an automobile with expired registration tags. After the police searched Riley's automobile, they arrested him for possession of concealed and loaded firearms that they found under the automobile's hood. The police also conducted a body search on Riley, and seized a cell phone that they found in his pants pocket. Partly on the basis of clues gathered in searches of the cell phone's digital information, they pursued an investigation that eventually resulted in the filing of charges against Riley for several crimes in connection with a shooting that had occurred a few weeks earlier. Prior to his trial Riley moved to suppress all evidence that the police had obtained from his cell phone, claiming that the searches had been performed without a warrant and therefore violated the Fourth Amendment to the U.S. Constitution. The trial court denied Riley's motion. Riley was convicted of the crimes at trial. The California Court of Appeal affirmed the trial court's verdict and the California Supreme Court denied Riley's petition for review.

In the other case, a police officer performing routine surveillance observed Brima Wurie making an apparent sale of illegal narcotics. Officers subsequently arrested Wurie and took him to the police station. At the station, the officers seized a cell phone

from Wurie's person. They traced digital information found on the phone to Wurie's apartment. After obtaining a warrant to search the apartment, they found evidence that led to the filing of charges against him for narcotics and firearms offenses. Wurie moved for suppression of the evidence, claiming that it was the product of an unconstitutional search of his cell phone. The federal District Court denied his motion, and at trial he was convicted on the charges. On appeal, the federal Court of Appeals for the First Circuit reversed the District Court's denial of the motion to suppress and vacated the convictions.

II. The U.S. Supreme Court agreed to review the decisions of the California Court of Appeal and the federal Court of Appeals. The question presented to the Court was whether the Fourth Amendment permits the police, without a judicial warrant, to search digital information on a cell phone seized from an individual who has been arrested.

The Fourth Amendment states in full: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." According to the Court, the central focus of a Fourth Amendment inquiry is "reasonableness," and under the Court's case law when law enforcement officials undertake a search to discover evidence of criminal wrongdoing, reasonableness generally requires that they obtain a judicial warrant. Such a warrant ensures that the inferences to support a search are drawn by a neutral and detached magistrate. In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. In circumstances such as the instant case, where precise guidance from the historical setting of the Fourth Amendment's adoption is absent, the Court stated that it will determine whether to exempt a given type of search from the warrant requirement by assessing:

1. the degree to which it intrudes upon an individual's privacy; and
2. the degree to which is it needed for the promotion of legitimate governmental interests.

In the instant case, the specific warrant requirement exception at issue was the category recognised in the Court's case law for certain searches conducted incident to a lawful arrest. After examining the characteristics of cell phones and their storage of digital information, the Court concluded that a search of such information in a cell phone cannot qualify as a

categorical exception to the Fourth Amendment's warrant requirement. It determined that cell phones differ from other objects that might be carried on an arrestee's person. For example, the Court pointed to the immense storage capacity of modern cell phones. As a result, a search of their digital information implicates substantially greater individual privacy interests than does a brief physical search, and does not further the governmental interests identified in the Court's case law of protecting the safety of police officers or preventing the destruction of evidence.

The Court stated that its decision reflected its general preference to provide clear guidance to law enforcement officials through the adoption of categorical rules. It also emphasised that it was not ruling that digital cell phone information is immune from search, but instead only that a judicial warrant is generally required before such a search. In addition, the Court noted that in particular cases, a justification for a warrantless search might exist under the Court's recognised "exigent circumstances" exception, which requires a court to conduct a fact-specific inquiry into whether an emergency justified a warrantless search.

The Court reversed the judgment of the California Court of Appeal in the *Riley* case and remanded the case for further proceedings. It affirmed the judgment of the Court of Appeals in the *Wurie* case.

III. The Court's judgment was unanimous. However, Justice Alito wrote a separate opinion, concurring in the judgment but concurring in the Court's opinion only in part.

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2014-2-005

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 20.11.2013 / **e)** Series C, no. 270 / **f)** Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

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:

Community, ties, harm / Conflict, armed, non-international / Displacement, assistance, measure / Displacement, forced / Displacement, protection, obligation / Displacement, protection, positive obligation / Integrity, personal, right / Land, collective, ownership / Property, collective, exploitation / Reparation, entitlement, right / Reparation, programme, administrative / Reparation, women, family, position, criterion / Truth and justice, measure / Victim, group, reparation / Victim, treatment, psychological, specific / Vulnerability, state, positive obligation.

Headnotes:

Since the events of this case took place in the context of a non-international armed conflict, it is appropriate to interpret the scope of the treaty-based obligations in a way that is complementary with international humanitarian law, bearing in mind the latter's specificity in this area.

The measures of basic assistance provided by a State during a period of displacement are insufficient if the physical and mental conditions that those

displaced have to face for a period of time are not in keeping with the minimum standards required in such cases. The overcrowding, the food, the supply and management of water, as well as the failure to adopt measures with regard to health care, may reveal non-compliance with the State's obligation to provide protection following a displacement, with the direct result of the violation of the right to personal integrity of those who suffered the forced displacement.

Overcrowded conditions, lack of privacy, and harm to the family structures reveal that, while a situation of displacement lasts, the State did not take the positive measures required to ensure the due protection and integrity of the displaced families, whose members were split up or separated.

If the State fails to take sufficient positive measures in favour of children in a context of greater vulnerability, in particular while they are from their ancestral territories, it is responsible for the violation of the rights of the child.

The illegal exploitation of the collective property of a community and the failure of the authorities to protect the right to collective property, as well as the lack of rectification by domestic administrative and judicial remedies constitutes a violation of Article 21 of the American Convention on Human Rights (hereinafter, "ACHR").

The failure to guarantee that the decisions of domestic courts that protect the rights of the communities to their collective property are complied with fully, constitutes a violation to the right of judicial protection recognised in Article 25.2.a and 25.2.c ACHR.

It is pertinent to establish a measure of reparation that seeks to reduce psychosocial problems insofar as it has been verified that the harm suffered by the victims relates not only to aspects of their individual identity, but also to the loss of their roots and their community ties. When providing the psychological treatment, the specific circumstances and needs of each person must be considered, so that they are provided with collective, family and individual treatment as agreed with each of them, and following an individual evaluation.

International law establishes the individual entitlement of the right to reparation. Nevertheless, in scenarios of transitional justice in which States must assume their obligations to make reparation on a massive scale to numerous victims, which significantly exceeds the capacities and possibilities of the domestic courts, administrative programs of reparation constitute a legitimate way of satisfying the right

to reparation. In these circumstances, such measures of reparation must be understood in conjunction with other measures of truth and justice, provided that they meet a series of related requirements, including their legitimacy – especially, based on the consultation with and participation of the victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons given to provide reparations by family group and not individually; the distribution criteria among members of a family (succession order or percent-ages); parameters for a fair distribution that take into account the position of the women among the members of the family or other differentiated aspects, such as whether the land and other means of production are owned collectively.

Summary:

I. From 24 to 27 February 1997, the Colombian military carried out "Operation Genesis" in the area of the Salaquí River and the Truandó River, a zone near the territories of the Afro-descendant communities of the Cacarica River basin, in the department of El Chocó. At the same time, paramilitary groups of the United Self-Defense Forces of Córdoba and Urabá advanced from the north, uniting with the military on the banks of the Salaquí and Truandó. This resulted in the death and dismemberment of Marino López Mena and the forced displacement of several hundreds of people, many of whom were members of the Afro-descendant communities that lived on the banks of the Cacarica River, to Turbo, Bocas de Atrato, and Panama. The operation also led to the destruction of individual and collective property. Additionally, the forced displacement suffered by the communities of the Cacarica led to the disuse of their property and to illegal exploitation of their territories on the part of logging companies, with the tolerance of the State.

On 25 July 2011, the Inter American Commission on Human Rights submitted the case, alleging violations to Articles 4, 5, 8.1, 19, 21, 22 and 25 ACHR.

II. On the merits, the Court found Colombia internationally responsible for the violation of Articles 5.1 and 22.1 ACHR, with relation to Article 1.1 ACHR, to the detriment of the members of the Afro Descendant Communities of the Cacarica River. It further declared Colombia to be internationally responsible for violations of Articles 4.1, 5.1 and 5.2 ACHR, with relation to Article 1.1 ACHR, for the death of Marino López Mena. It also declared a violation to Article 5 ACHR with relation to Articles 19 and 1.1 ACHR, to the detriment of the children of the Afro Descendant Communities. The State was also found responsible

for the violation of the communities' collective property under Articles 21 and 1.1 ACHR. Finally, the Court declared Colombia responsible for violating Articles 8.1 and 25.1 ACHR, in relation to Article 1.1 ACHR, to the detriment of the next of kin of Marino López and the Community Council of the Communities of the Cacarica River Basin.

The Court declared that the Colombia had violated its obligations under the right to personal integrity and right to movement, contained in Articles 5.1 and 22.1 ACHR, due to:

1. the forced displacement to the detriment of the Communities of the Cacarica Basin due to paramilitary action in the framework of "Operation Genesis"; and
2. the in compliance of the State of its obligation to guarantee humanitarian assistance and a safe return to the forcefully displaced members of the community, for about three to four years.

The Court also determined the violation of Colombia's obligation to prevent, protect and investigate the death of Marino Lopez Mena, under Article 4.1 ACHR, and further determined that there was collaboration between public officials and paramilitary units in the implementation of Operation Cacarica, during which Mr. Lopez was killed.

The Court further found that the State violated Articles 5 and 19 ACHR for the lack of positive actions for the benefit of the children of the displaced community, and of those that were born in displacement, due to their particular vulnerability, especially while they were outside their ancestral territories, where they suffered overcrowding, lack of access to education, health and adequate food.

Furthermore, the Court declared a violation of the right of collective property of the Afro Descendant Community, protected under Article 21 ACHR, due to the illegal dispossession of their ancestral lands. The Court also declared Colombia's international responsibility for the lack of investigation of the case, especially with regard to the state officials with ties to paramilitary structures, which constituted a violation of Articles 8.1 and 25.1 ACHR.

Finally, the lack of an effective remedy against the illegal wood exploitation held within the lands of the communities within the Cacarica basin, and the lack of effectiveness of those decisions that sought to protect the collective rights of the community over their property, constituted violations to Article 25.2.a and 25.2.c ACHR.

Accordingly, the Court ordered, *inter alia*, that the State: carry out a public act of acknowledgement of international responsibility; continue the investigation of the case; provide adequate and priority treatment to the victims of the case; return the lands of the Communities of the Basin of the Cacarica River; guarantee that the conditions of the territory are adequate for security and a decent life for those returning from displacement and for those who have already returned; and guarantee that the victims of the case receive the compensation provided for under domestic law.

Languages:

Spanish, English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2014-2-006

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 19.01.2010 / **e)** C-555/07 / **f)** Seda Küçükdeveci v. Swedex GmbH & Co. KG / **g)** *European Court Reports*, I-00365 (ECLI:EU:C:2010:21) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.

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

Keywords of the alphabetical index:

Employment, dismissal, notice-period, calculation, age, discrimination.

Headnotes:

1. European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, must be interpreted as precluding national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.

2. It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle. The optional

nature of such a reference is not affected by the procedural conditions of national law under which a court may disapply a national provision which it considers to be contrary to the Constitution.

Summary:

I. Ms Küçükdeveci had been employed by Swedex since the age of 18. At the age of 28, she was dismissed by that company, with one month's notice. The company calculated the notice period as if she had three years' length of service, although she had worked for it for ten years: in accordance with the German legislation, no account was taken of the periods of employment completed before Ms Küçükdeveci was 25. She brought proceedings to challenge her dismissal, claiming that the legislation constituted discrimination on grounds of age, prohibited by European Union law. In her view, the notice period should have been four months, corresponding to ten years' service.

The Higher Labour Court, Düsseldorf, hearing the case on appeal, put questions to the Court of Justice on the compatibility of such a rule on dismissal with European Union law, and the consequences of any incompatibility.

II. The Court of Justice examines those questions on the basis of the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression by Directive 2000/78.

As the dismissal of Ms Küçükdeveci took place after the date on which Germany had to transpose the directive into national law, the directive had the effect of bringing the German rule on dismissal within the scope of European Union law.

The Court finds that the rule on dismissal contains a difference of treatment based on age. The rule gives less favourable treatment to employees who have entered the employer's service before the age of 25. It thus introduces a difference of treatment between persons with the same length of service, depending on the age at which they joined the undertaking.

While the aims of the rule clearly belong to employment and labour market policy, and are therefore legitimate objectives, the rule is not appropriate or necessary for achieving them.

In particular, as regards the objective mentioned by the national court of giving employers greater flexibility of personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree

of personal or occupational mobility, the Court states that the rule in question is not appropriate for achieving that aim, because it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal.

The Court therefore concludes that European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78, precludes national legislation such as the German rule which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.

The Court then points out that a directive cannot of itself impose obligations on an individual, and cannot therefore be relied on as such against an individual. However, Directive 2000/78 merely gives expression to the principle of equal treatment in employment and occupation. Moreover, the principle of non-discrimination on grounds of age is a general principle of European Union law. It is therefore for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78 to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.

Finally, after referring to the national court's entitlement to make a reference to the Court for a preliminary ruling on the interpretation of European Union law, the Court states that the national court, hearing proceedings between individuals, must ensure that the principle of non-discrimination on grounds of age as given expression in Directive 2000/78 is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement to ask the Court for a preliminary ruling on the interpretation of that principle.

Cross-references:

Court of Justice of the European Communities:

- no. C-144/04, 22.11.2005, *Mangold*, Reports, I-09981; *Bulletin* 2007/3 [ECJ-2007-3-006].

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-007

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 26.01.2010 / **e)** C-118/08 / **f)** Transportes Urbanos y Servicios Generales v. Administración del Estado / **g)** Reports, I-635 (ECLI:EU:C:2010:39) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

3.26 General Principles – **Principles of EU law.**

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

Keywords of the alphabetical index:

European Union, law, violation by a Member State, due to legislation / Damages, State, compensation, conditions / National procedural autonomy, equivalence of EU law, principle.

Headnotes:

European Union law precludes the application of a rule of a Member State under which an action for damages against the State, alleging a breach of that law by national legislation which has been established by a judgment of the Court of Justice of the European Communities given pursuant to Article 226 EC, can succeed only if the applicant has previously exhausted all domestic remedies for challenging the validity of a harmful administrative measure adopted on the basis of that legislation, when such a rule is not applicable to an action for damages against the State alleging breach of the Constitution by national legislation which has been established by the competent court.

The principle of equivalence requires that all the rules applicable to actions apply without distinction to actions alleging infringement of European Union law and to similar actions alleging infringement of national law. In the light of their purpose and their essential characteristics, the two actions for damages

concerned may be regarded as similar since, first, they have exactly the same purpose, namely compensation for the loss suffered by the person harmed as a result of an act or an omission of the State and, second, the only difference between the two actions concerned is the fact that the breaches of law on which they are based are established, in respect of one, by the Court in a judgment given pursuant to Article 226 EC and, in respect of the other, by a judgment of the competent national court. That fact, in the absence of other factors demonstrating that there are further differences between those actions, cannot suffice to establish a distinction between those two actions in the light of the principle of equivalence. Accordingly, the principle of equivalence precludes the application of such a rule.

Summary:

I. The main proceedings originate in a Spanish law restricting taxable persons' right to deduct valued added tax (VAT) relating to the purchase of goods or services financed through subsidies and obliging them to routinely report and pay the amount of VAT owing (automatic settlement of amounts due). Taxable persons nevertheless have the right to ask for the rectification of such automatic payments and, where appropriate, to demand reimbursement of undue payments provided they do so within four years.

The Court of Justice held that this restriction on the possibility of deducting VAT was incompatible with some of the provisions of the Sixth Directive 77/388/EEC. The applicant, who had made automatic settlements for the financial years 1999 and 2000 and whose right to rectification and recovery of the undue amounts was already time-barred when the Court of Justice handed down its decision, subsequently brought an action for damages against the Spanish state on grounds of violation of the Sixth Directive 77/388/EEC.

The Council of Ministers dismissed her application for damages, holding that the applicant's failure to challenge the automatic payments within the stipulated four year time-limit meant that there was no causal link between the disputed violation of EU law and the alleged damages.

The applicant then lodged an appeal with the Spanish Supreme Court (Tribunal Supremo), which decided to ask the Court of Justice to hold whether the fact of subjecting the claim for damages against the state to different procedures, depending on whether the claim was based on a legislative violation of a constitutional provision or of an EU law, was in keeping with the Community principles of equivalence and effectiveness.

II. The Court first pointed out that the principle of state liability for damages caused to individuals by violations of EU law was intrinsic to the system of treaties on which the latter was based. The Court then considered whether the principle of equivalence had been respected. In the instant case, the Court held that EU law precluded procedural rules such as the one at issue in the dispute.

Cross-references:

Court of Justice of the European Communities:

- nos. C-46/93 and C-48/93, 05.03.1996, *Brasserie du pêcheur*, [ECJ-1996-S-001].

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-008

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 23.02.2010 / **e)** C-310/08 / **f)** Ibrahim and Secretary of State for the Home Department / **g)** *European Court Reports*, I-01065 (ECLI:EU:C:2010:80) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26.1 General Principles – Principles of EU law – **Fundamental principles of the Common Market.**
 5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

Migrant worker, right, child, residence / Education, access, migrant worker, child / Migrant worker, family member, residence, right.

Headnotes:

1. The children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation no. 1612/68 on freedom of movement for workers within the Community. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union, and the fact that that parent has ceased to be a migrant worker in the host Member State are irrelevant in this regard.

2. The children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation no. 1612/68 on freedom of movement for workers within the Community, as amended by Regulation no. 2434/92, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State.

Summary:

I. Ms Nimco Hassan Ibrahim, a Somali national, arrived in the United Kingdom in February 2003 to join her husband, Mr Yusuf, a Danish citizen, who worked there from October 2002 to May 2003. The couple have four children of Danish nationality, aged from 1 to 9. The three eldest arrived in the United Kingdom with their mother and the fourth was born in the United Kingdom. The two eldest have attended State schools since their arrival.

From June 2003 to March 2004 Mr Yusuf claimed incapacity benefit. After being declared fit to work in March 2004, he left the United Kingdom. Between ceasing work and leaving the United Kingdom, Mr Yusuf ceased to satisfy the conditions for lawful residence there under Community law.

Ms Ibrahim separated from Mr Yusuf after his departure. She was never self-sufficient, and depends entirely on social assistance. She does not have comprehensive sickness insurance cover and relies on the National Health Service. In January 2007 she applied for housing assistance for herself and her children. The application was rejected on the ground that only persons with a right of residence under European Union law could make such an application, and neither Ms Ibrahim nor her husband were resident in the United Kingdom under European

Union law. Ms Ibrahim appealed to the national courts against that decision.

II. The Court points out that Article 12 of Regulation 1612/68 allows the child of a migrant worker to have an independent right of residence in connection with the right of access to education in the host Member State. Before the entry into force of the directive on freedom of movement for citizens of the Union, when Article 10 of the regulation concerning the right of residence was still in force, the right of access to education laid down by Article 12 of the regulation was not conditional on the child retaining, throughout the period of education, a specific right of residence under Article 10. Once the right of access to education has been acquired, the right of residence is retained by the child and can no longer be called into question. Article 12 of the regulation requires only that the child has lived with at least one of his or her parents in a Member State while that parent resided there as a worker. That article must therefore be applied independently of the provisions of European Union law which expressly govern the conditions of exercise of the right to reside in another Member State. That independence was not called into question by the entry into force of the new directive. The Court points out that Article 12 of the regulation was not repealed or even amended by the directive, unlike other articles of the regulation. Furthermore, the legislative history of the directive shows that it was designed to be consistent with the *Baumbast* judgment.

Next, the Court observes that the grant of the right of residence for the children and the parent is not conditional on self-sufficiency. That interpretation is supported by the directive, which provides that the departure or death of the citizen does not entail the loss of the right of residence of the children or the parent. Consequently, the Court finds that that the right of residence of the parent who is the primary carer of a child of a migrant worker who is in education is not conditional on that parent having sufficient resources not to become a burden on the social assistance system of the host Member State.

Cross-references:

Court of Justice of the European Communities:

- no. C-413/99, 17.09.2002, *Baumbast and R*, Reports, I-07091.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2014-2-009

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 23.02.2010 / **e)** C-480/08 / **f)** Maria Teixeira v. London Borough of Lambeth, Secretary of State for the Home Department / **g)** *European Court Reports*, I-01107 (ECLI:EU:C:2010:83) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26.1 General Principles – Principles of EU law – **Fundamental principles of the Common Market.**
 5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

Migrant worker, right, child, residence / Education, access, migrant worker, child / Migrant worker, family member, residence, right.

Headnotes:

1. The children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation no. 1612/68 on freedom of movement for workers within the Community. The fact that the parents of the children concerned have meanwhile divorced and the fact that the parent who exercised rights of residence as a migrant worker is no longer

economically active in the host Member State are irrelevant in this regard.

2. A national of a Member State who was employed in another Member State in which his or her child is in education can claim, in the capacity of primary carer for that child, a right of residence in the host Member State on the sole basis of Article 12 of Regulation no. 1612/68 on freedom of movement for workers within the Community, as amended by Regulation no. 2434/92, without being required to satisfy the conditions laid down in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation no. 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96.

3. The right of residence in the host Member State of the parent who is the primary carer of a child exercising the right to pursue his or her education in accordance with Article 12 of Regulation no. 1612/68 on freedom of movement for workers within the Community, as amended by Regulation no. 2434/92, is not conditional on that parent having sufficient resources not to become a burden on the social assistance system of that Member State during the period of residence and having comprehensive sickness insurance cover there.

4. The right of residence in the host Member State of the parent who is the primary carer of a child of a migrant worker, where that child is in education in that State, is not conditional on one of the child's parents having worked as a migrant worker in that Member State on the date on which the child started in education.

5. The right of residence in the host Member State of the parent who is the primary carer of a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.

Summary:

Ms Maria Teixeira, a Portuguese national, arrived in the United Kingdom in 1989 with her husband, also a Portuguese national, and worked there until 1991. Their daughter Patricia was born there on 2 June 1991. Ms Teixeira and her husband were subsequently divorced, but they both remained in the United Kingdom. From 1991 to 2005 Ms Teixeira worked for intermittent periods in the United Kingdom, and Patricia went to school there.

In June 2006 a court ordered that Patricia should live with her father, but could have as much contact with her mother as she wished. In November 2006 Patricia enrolled on a child care course at the Vauxhall Learning Centre in Lambeth. In March 2007 Patricia went to live with her mother.

On 11 April 2007 Ms Teixeira applied for housing assistance for homeless persons. Her application was rejected on the ground that she did not have a right of residence in the United Kingdom, since she was not in work and was not therefore self-sufficient. She challenged that refusal before the national courts, arguing that she had a right of residence because Patricia was continuing her education.

II. As in the case *Ibrahim and Secretary of the State for the Home Department* (C-310/08), *Bulletin* 2014/2 [ECJ-2014-2-008], the Court pointed out that under Article 12 of Regulation 1612/68 the child of a migrant worker could, in connection with his right of access to education in the host member state, be granted an independent right of residence, and found that the granting of the right of residence to children and their parent was not subject to financial self-sufficiency. Consequently, the Court finds that that the right of residence of the parent who is the primary carer of a child of a migrant worker who is in education is not conditional on that parent having sufficient resources not to become a burden on the social assistance system of the host Member State.

Finally, in answer to a further question raised in the *Teixeira* case, as to whether the parent's right of residence ends when the child reaches the age of majority – the question was raised because in 2009 Ms Teixeira's daughter reached the age of 18, thus coming of age under the law of the United Kingdom – the Court observes that there is no age limit for the rights conferred on a child by Article 12 of the regulation: the right of access to education and the child's associated right of residence continue until the child has completed his or her education.

In addition, although children who have reached the age of majority are in principle assumed to be capable of meeting their own needs, the right of residence of the parent may nevertheless extend beyond that age, if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education. It is for the national court to assess whether that is actually the case.

The Court concludes that the right of residence of the parent who is the primary carer for a child of a migrant worker, where that child is in education in the host Member State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.

Cross-references:

Court of Justice of the European Communities:

- no. C-413/99, 17.09.2002, *Baumbast and R*, *Reports*, I-07091;
- no. C-310/08, 23.02.2010, *Ibrahim et Secretary of the State for the Home Department*, *Recueil*, I-01065, *Bulletin* 2014/2 [ECJ-2014-2-008].

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-010

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 02.03.2010 / **e)** Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 / **f)** Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland / **g)** *Report* 2010, I-01493 (ECLI:EU:C:2010:105) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**

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

Keywords of the alphabetical index:

Refugee, status, revocation / Persecution, country of origin / Refugee, status, new circumstances / Asylum, originating country, safe.

Headnotes:

Article 11.1.e of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:

- refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2.c of Directive 2004/83, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2.c of Directive 2004/83;
- for the purposes of assessing a change of circumstances, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7.1 of Directive 2004/83 have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status;
- the actors of protection referred to in Article 7.1.b of Directive 2004/83 may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory.

Summary:

I. Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, his wife Hamrin Mosa Rashi and Dler Jamal, Iraqi nationals, were granted refugee status in Germany in 2001 and 2002. In support of their applications, they relied before the German Federal Office for Migration and Refugees on a variety of reasons which made them fear being persecuted in Iraq by the regime of Saddam Hussein's Baath Party. In 2005, as a result of the changed circumstances in Iraq, their recognition as refugees was revoked.

Citing a fundamental change in the situation in Iraq, the higher administrative courts in Germany ruled that the parties concerned were now safe from the

persecution suffered under the previous regime and that they were not under any significantly likely new threat of further persecution on any other grounds. It is against that background that the *Bundesverwaltungsgericht* (Federal Administrative Court), before which the disputes had been brought, referred to the Court of Justice questions on the interpretation of the provisions in the 2004 Directive which relate to the loss of refugee status.

II. The Court states first that, in order to be classified as a refugee, the national must, by reason of circumstances existing in his country of origin, have a well-founded fear of being himself persecuted on the basis of race, religion, nationality, political opinion or membership of a particular social group. Those circumstances form the reason why it is impossible for the person concerned, or why he justifiably refuses, to avail himself of the protection of his country of origin in terms of that country's ability to prevent or punish acts of persecution.

As regards the revocation of refugee status, the Court holds that a person loses that status when, following a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which had justified the person's fear of persecution no longer exist and he has no other reason to fear being persecuted.

The Court points out that, in order to reach the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities must verify that the actor or actors of protection of the third country have taken reasonable steps to prevent the persecution. They must therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and ensure that the national concerned will have access to such protection if he ceases to have refugee status.

The Court points out that the change in circumstances will be of a 'significant and non-temporary' nature when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated. That implies that there are no well-founded fears of being exposed to acts of persecution amounting to 'severe violations of basic human rights'. The Court states that the actor or actors of protection with respect to which the reality of a change of circumstances in the country of origin is to be assessed are either the State itself or parties or organisations, including international organisations, which control the State or a part of the territory of the State. As regards the latter point, the Court acknowledges that the Directive does not preclude the protection guaranteed by international organisations

from being ensured through the presence of a multinational force in the territory of the third country.

The Court then goes on to analyse the situation in which a finding has been made that the circumstances on the basis of which refugee status was granted have ceased to exist, and the conditions in which the competent authorities must verify, if necessary, whether there are other circumstances which may give rise to a well-founded fear of persecution on the part of the person concerned. In the context of this analysis, the Courts states, *inter alia*, that, both at the stage of the granting of refugee status and at the stage of examination of the question of whether that status should be maintained, the assessment relates to the same question of whether or not the circumstances established constitute such a threat of persecution that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution. Consequently, the Court holds that the standard of probability used to assess that risk is the same as that applied when refugee status was granted.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-011

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 23.03.2010 / **e)** Joined Cases C-236/08, C-237/08 and C-238/08 / **f)** Google France SARL and Google Inc. v. Louis Vuitton Malletier SA and Others / **g)** Report, I-02417 (ECLI:EU:C:2010:159) / **h)** CODICES (English, 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:

Internet, search engine, “sponsored link”, trade mark, display / Internet, trade mark, display, origin, ambiguous.

Headnotes:

1. Article 5.1.a of Directive 89/104 relating to trade marks and Article 9.1.a of Regulation no. 40/94 on the Community trade mark must be interpreted as meaning that the proprietor of a trade mark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical to that trade mark which that advertiser has, without the consent of the proprietor, selected in connection with an internet referencing service, goods or services identical to those for which that mark is registered, when that advertisement does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.

When a third party’s ‘ad’ suggests that there is an economic link between that third party and the proprietor of the trade mark, the conclusion must be that there is an adverse effect on the function of indicating origin.

When the ‘ad’, while not suggesting the existence of an economic link, is to such an extent vague as to the origin of the goods or services at issue that normally informed and reasonably attentive internet users are unable to determine, on the basis of the advertising link and the commercial message attached thereto, whether the advertiser is a third party vis-à-vis the proprietor of the trade mark or, on the contrary, economically linked to that proprietor, the conclusion must also be that there is an adverse effect on that function of the trade mark.

2. Since the course of trade provides a varied offer of goods and services, the proprietor of a trade mark may have not only the objective of indicating, by means of that mark, the origin of its goods or services, but also that of using its mark for advertising purposes designed to inform and persuade consumers.

Accordingly, the proprietor of a trade mark is entitled to prohibit a third party from using, without the proprietor’s consent, a sign identical with its trade mark in relation to goods or services which are identical to those for which that trade mark is registered, when that use adversely affects the

proprietor's use of its mark as a factor in sales promotion or as an instrument of commercial strategy.

Summary:

I. Google operates an internet search engine. When an internet user performs a search on the basis of one or more key words, the search engine will display the sites which appear best to correspond to those keywords, in decreasing order of relevance. These are referred to as the 'natural' results of the search.

In addition, Google offers a paid referencing service called 'AdWords'. That service enables any economic operator, by means of the reservation of one or more keywords, to obtain the placing – in the event of a correspondence between one or more of those words and that/those entered as a request in the search engine by an internet user – of an advertising link to its site, accompanied by a commercial message. That advertising link appears under the heading 'sponsored links', which is displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above those results.

The *Cour de cassation* (French Court of Cassation), ruling as a court of final instance in the sets of proceedings which the trade mark proprietors have brought against Google, has referred questions to the Court of Justice on whether it is lawful to use, as keywords in the context of an internet referencing service, signs which correspond to trade marks, where consent has not been given by the proprietors of those trade marks.

II. The Court notes that, by purchasing the referencing service and selecting, as a keyword, a sign corresponding to another person's trade mark, with the purpose of offering internet users an alternative to the goods or services of that proprietor, an advertiser uses that sign in relation to its goods or services. That is not the case, however, where a referencing service provider permits advertisers to select, as keywords, signs identical with trade marks, stores those signs and displays its clients' ads on the basis of those keywords.

The Court states that the use, by a third party, of a sign which is identical with, or similar to, the proprietor's trade mark implies, at the very least, that that third party uses the sign in its own commercial communication. A referencing service provider, however, allows its clients, namely the advertisers, to use signs which are identical with, or similar to, trade marks, but does not itself use those signs.

If a trade mark has been used as a keyword, the proprietor of that trade mark cannot, therefore, rely, as against Google, on the exclusive right which it derives from its mark. By contrast, it can invoke that right against those advertisers which, by means of a keyword corresponding to its mark, arrange for Google to display ads which make it impossible, or possible only with difficulty, for average internet users to establish from what undertaking the goods or services covered by the ad originate.

In such a situation – which is characterised by the fact that the ad in question appears immediately after the trade mark has been entered as a search term by the internet user concerned and is displayed at a point when the trade mark, in its capacity as a search term, is also displayed on the screen – the internet user may err as to the origin of the goods or services in question. The function of the trade mark, which is to guarantee to consumers the origin of goods or services (the trade mark's 'function of indicating origin'), is thus adversely affected.

It is for the national court to assess, on a case-by-case basis, whether the facts of the dispute before it point to an adverse effect, or a risk thereof, on the function of indicating origin.

With regard to the use, by internet advertisers, of a sign corresponding to another person's trade mark as a keyword for purposes of the display of advertising messages, the Court also takes the view that that use is liable to have certain repercussions on the advertising use of that mark by its proprietor and on the latter's commercial strategy. Those repercussions of third parties' use of a sign identical with the trade mark do not of themselves, however, constitute an adverse effect on the 'advertising function' of the trade mark.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-012

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 13.04.2010 / **e)** C-73/08 / **f)** Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté française / **g)** Report, I-02735 (ECLI:EU:C:2010:181) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26 General Principles – **Principles of EU law.**
 5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

European Union, free circulation of persons, limitation, justification / Education, access, citizenship, condition, student, non-resident / Education, higher, access, condition.

Headnotes:

1. The situation of students who are Union citizens but not regarded as residents by the legislation of the host Member State and who may not, for that reason, enrol in that State's higher education courses, may be covered by Article 24.1 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which applies to every Union citizen who resides in the territory of the host Member State in accordance with that directive.

The fact that those students do not exercise, if that be the case, any economic activity in the host Member State is irrelevant, for Directive 2004/38 applies to all citizens of the Union irrespective of whether they exercise an economic activity as an employee or as a self-employed person in the territory of another Member State or whether they do not exercise any economic activity there.

2. Articles 18 and 21 TFEU preclude national legislation of a Member State that limits the number of students, not regarded as residents of that State, who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the national court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health.

3. The competent authorities of a Member State may not rely on Article 13.2.c of the International Covenant on Economic, Social and Cultural Rights if a national court holds that legislation of that Member State regulating the number of students in certain programmes in the first two years of undergraduate studies in higher education is incompatible with Articles 18 and 21 TFEU.

Summary:

I. Considering that the number of those students attending those courses had become too large, the French Community adopted the decree of 16 June 2006, according to which universities and schools of higher education are obliged to limit the number of students not considered as resident in Belgium who may register for the first time in one of those nine courses.

The total number of non-resident students is in principle limited, for each university institution and for each course, to 30 % of all enrolments in the preceding academic year. Once that percentage has been reached, the non-resident students are selected, with a view to their registration, by drawing lots.

In that context, the Constitutional Court (Belgium), before which an action was brought seeking annulment of the decree, refers questions to the Court of Justice for a preliminary ruling.

II. First, the Court of Justice holds that the legislation in question creates a difference in treatment between resident and non-resident students. Such a difference in treatment constitutes indirect discrimination on the ground of nationality which is prohibited, unless it is objectively justified.

According to the Court, in the light of the method of financing of the system of higher education of the French Community of Belgium, the fear of an excessive burden on the financing of higher education cannot justify that unequal treatment.

In addition, it follows from the case-law that a difference in treatment based indirectly on nationality may be justified by the objective of maintaining a balanced high quality medical service open to all, in so far as it contributes to achieving a high level of protection of health.

Thus, it must be determined whether the legislation at issue is appropriate for securing the attainment of that legitimate objective and whether it goes beyond what is necessary to attain it. In that regard, it is ultimately

for the national court, which has sole jurisdiction to assess the facts of the case and interpret the national legislation, to determine whether and to what extent such legislation satisfies those conditions.

In the first place, it is for the referring court to establish that there are genuine risks to the protection of public health. In that regard, it cannot be ruled out *a priori* that a reduction in the quality of training of future health professionals may ultimately impair the quality of care provided in the territory concerned. It also cannot be ruled out that a limitation of the total number of students in the courses concerned may reduce, proportionately, the number of graduates prepared in the future to ensure the availability of the service in the territory concerned, which could then have an effect on the level of public health protection.

In assessing those risks, the referring court must take into consideration, first, the fact that the link between the training of future health professionals and the objective of maintaining a balanced high-quality medical service open to all is only indirect and the causal relationship less well-established than in the case of the link between the objective of protecting public health and the activity of health professionals who are already present on the market.

In that context, it is for the competent national authorities to show that such risks actually exist. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health.

In the second place, if the referring court considers that there are genuine risks to the protection of public health that court must assess, in the light of the evidence provided by the national authorities, whether the legislation at issue in the main proceedings can be regarded as appropriate for attaining the objective of protecting public health.

In that context, it must in particular assess whether a limitation of the number of non-resident students can really bring about an increase in the number of graduates ready to ensure the future availability of public health services within the French Community.

In the third place, it is for the referring court to ascertain, in particular, whether the objective in the public interest relied upon could not be attained by less restrictive measures which aim to encourage students who undertake their studies in the French Community to establish themselves there at the end of their studies or which aim to encourage professionals educated outside the French Community to establish themselves within it.

Equally, it is for the referring court to examine whether the competent authorities have reconciled, in an appropriate way, the attainment of that objective with the requirements of European Union law and, in particular, with the opportunity for students coming from other Member States to gain access to higher education, an opportunity which constitutes the very essence of the principle of freedom of movement for students.

Cross-references:

Constitutional Court of Belgium:

- n° 12/2008, 14.02.2008, *Bulletin* 2008/1 [BEL-2008-1-002].

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-013

a) European Union / **b)** Court of Justice of the European Union / **c)** Third Chamber / **d)** 01.07.2010 / **e)** C-211/10 PPU / **f)** Doris Povse v. Mauro Alpagó / **g)** *Report*, I-06673 (ECLI:EU:C:2010:400) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction**.
5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.

Keywords of the alphabetical index:

Child, custody, removal, unlawful, order to return.

Headnotes:

1. Article 10.b.iv of Regulation no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and

the matters of parental responsibility, repealing Regulation no. 1347/2000, must be interpreted as meaning that a provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.

2. The second subparagraph of Article 47.2 of Regulation no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation no. 1347/2000, must be interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional custody rights and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child.

3. Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child.

Summary:

I. Doris Povse and Mauro Alpago, an unmarried couple, lived together until the end of January 2008 with their daughter Sofia, who was born in Italy in December 2006. Notwithstanding the fact that, by an interim judgment issued as a matter of urgency on 8 February 2008 on the application of the father, the *Tribunale per i Minorenni di Venezia* (Venice Court for matters concerning minors, Italy) prohibited the mother (who had since left the shared home) from leaving the country with the child, Ms Povse and her daughter went to Austria in February 2008, where they have lived ever since.

On 23 May 2008, the *Tribunale per i Minorenni di Venezia* made an order provisionally awarding custody to both parents, but stating that the child could reside in Austria with her mother pending delivery of the court's final judgment. By the same interim order, the Italian court ordered that the father was required to contribute to the child's living costs, laid down rules for access by the father and ordered that an expert's report be obtained from a social worker in order to assess the relationship between the little girl and the two parents. Notwithstanding that order, the social worker stated in a report that the task could not be completed or conducted in the

child's interest because the mother had allowed the father only minimal and insufficient access.

In November 2008, the *Bezirksgericht* Leoben (District Court, Leoben, Austria) dismissed an application lodged by Mr Alpago in April 2008 for Sofia to be returned to Italy, on the ground of the Italian court's decision that she could provisionally remain with her mother. Following Ms Povse's application of 26 May 2009 for custody of the child, the *Bezirksgericht* Judenburg (District Court, Judenburg, Austria), in whose jurisdiction she was living with her daughter, accepted jurisdiction and asked the *Tribunale per i Minorenni di Venezia* to decline its own jurisdiction.

However, Mr Alpago had already applied to the Italian court on 9 April 2009, in the context of the pending custody proceedings, for an order requiring that the child be returned to Italy. At a hearing arranged by that court on 19 May 2009, Ms Povse stated that she was in a position to adhere to the schedule of father-daughter meetings drawn up by the social worker. She did not, during this hearing, disclose the action she had taken before the *Bezirksgericht* Judenburg.

On 10 July 2009, the *Tribunale per i Minorenni di Venezia* asserted its own jurisdiction since, in its view, the requirements for a transfer of jurisdiction were not met, and stated that the social worker's report that it had commissioned had not been able to be completed because the mother had not adhered to the access schedule drawn up by the social worker. Moreover, it ordered the immediate return of the child to Italy in order to restore contact between Sofia and her father, which had been disrupted as a result of the attitude of the mother. That judgment was certified in accordance with the Regulation.

On 25 August 2009, the *Bezirksgericht* Judenburg made an interim order, provisionally awarding custody of Sofia to Ms Povse.

On 22 September 2009, Mr Alpago applied to the Austrian courts for enforcement of the judgment requiring Sofia to be returned to Italy. The case came before the *Oberster Gerichtshof* (Austrian Supreme Court) which, having certain doubts about the interpretation of the Regulation, referred a number of questions to the Court of Justice.

II. As a preliminary point, the Court notes that the main proceedings concern the wrongful removal of a child and that, according to the Regulation, the court having jurisdiction, at least at the time of the child's abduction, was the *Tribunale per i Minorenni di Venezia*, the Court for the place where the child was habitually resident before her wrongful removal.

In that context, the Court finds that only a final judgment made on the basis of a full examination of all the relevant information and by which the court having jurisdiction rules on the child's custody arrangements which are not subject to further administrative or judicial decisions may result in the transfer of jurisdiction to another court. If an interim judgment were to result in the loss of jurisdiction on the question of custody of the child, the court having jurisdiction in the Member State of earlier habitual residence might be deterred from issuing such an interim judgment notwithstanding the fact that the interests of the child demanded it. The Court adds that the decision of the *Tribunale per i Minorenni di Venezia* of 23 May 2008 provisionally awarding custody to both parents does not in any way constitute final judgment on rights of custody.

Next, the Court finds that a judgment of the court having jurisdiction which is certified in accordance with the Regulation, and which requires the return of the child, is enforceable, even if it is not preceded by a final judgment on rights of custody of the child. The Court observes that, so as not to delay the return of a child who has been wrongfully removed, such a judgment enjoys procedural autonomy.

Lastly, the Court finds that the enforcement of a certified judgment which requires the return of the child may not be refused on account of a judgment delivered subsequently by a court of the Member State of enforcement. Furthermore, this enforcement can also not be refused on the grounds that it would constitute a serious risk to the best interests of the child on account of a change of circumstances after its delivery.

Cross-references:

Court of Justice of the European Communities:

- no. C 195/08, 11.07.2008, *Rinau*, *Report*, I-5271.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-014

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 21.09.2010 / **e)** Joined Cases C-514/07 P, C-528/07 P and C-532/07 P / **f)** Kingdom of Sweden and Others v. Association de la presse internationale ASBL (API) and European Commission / **g)** *Reports*, I-8533 (ECLI:EU:C:2010:541) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Document, right of access, scope, exception / Justice, sound administration, principle / Court, pleading, disclosure / Fair trial, access to pleading of the parties, limits.

Headnotes:

1. Pleadings lodged before the Court of Justice in court proceedings are wholly specific, for they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission, those latter activities not requiring, moreover, the same breadth of access to documents as the legislative activities of a European Union institution. Those pleadings are drafted exclusively for the purposes of those court proceedings and constitute the essential element thereof.

It is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents and the objectives of the relevant European Union rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents.

The protection of court proceedings implies, in particular, that observance of the principles of equality of arms and the sound administration of justice must be ensured.

It is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4.2 of Regulation no. 1049/2001, while those proceedings remain pending. If third parties were able, on the basis of Regulation no. 1049/2001, to obtain access to those pleadings, the system of procedural rules governing the court proceedings before the European Union Courts would be called into question.

Such a general presumption does not exclude the right of an interested party to demonstrate that a given document, disclosure of which has been applied for, is not covered by that presumption.

2. It cannot be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment on the basis of Article 226 EC undermines investigations which could lead to proceedings being brought under Article 228 EC.

It follows that, once the Court of Justice has held, by a judgment delivered on the basis of Article 226 EC, that a Member State has failed to fulfil its obligations, the continuation of negotiations between that Member State and the Commission is no longer designed to establish the existence of the infringement – which is precisely what the Court of Justice has found – but to determine whether the necessary conditions for the bringing of an action under Article 228 EC are met.

3. There are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court, for those activities come to an end with the closure of the proceedings. Admittedly, it is not impossible that disclosure of pleadings relating to court proceedings, closed but connected to other proceedings still pending, may create a risk that the later proceedings could be undermined, especially when the parties to the pending case are not the same as those to the case which has been closed. In such a situation, if the Commission were to use the same arguments in support of its legal position in both sets of proceedings, disclosure of its arguments in the pending proceedings could give rise to the risk that they might be undermined.

Nevertheless, such a risk depends on a number of factors, such as the degree of similarity between the arguments put forward in the two cases. If the Commission's pleadings are repeated only in part, partial disclosure could be sufficient to prevent any risk of undermining the pending proceedings. Accordingly, only a specific examination of the documents to which access is requested can enable

the Commission to establish whether their disclosure may be refused on the basis of the second indent of Article 4.2 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents.

Summary:

I. By letter of 1 August 2003, API – a non-profit-making organisation of journalists – applied to the Commission for access to the written pleadings lodged in certain cases before the General Court or the Court of Justice. By decision of 20 November 2003, the Commission refused the request.

API challenged the Commission's decision by application lodged at the Registry of the Court of First Instance on 2 February 2004. The Grand Chamber of the Court of First Instance delivered the judgment under appeal on 12 September 2007.

In its judgment, the Court of First Instance held that the Commission could deny access to written pleadings in all cases where oral argument had not yet been presented. However, where the denial of access was based on the connection between a closed case and a second case which remained pending, the Commission could not refuse access without giving specific reasons as to why disclosure would undermine the proceedings in the open case. As to infringement proceedings, the Court of First Instance held that the interest in reaching a settlement with the Member States could justify a blanket refusal to disclose documents only so long as the judgment had not yet been delivered.

Appeals against the judgment of the Court of First Instance were filed by the Commission (C-532/07), API (C-528/07) and the Kingdom of Sweden (C-514/07).

II. The Court first held that judicial activities are as such excluded from the scope, established by EU rules, of the right of access to documents. It further held that there is a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, while those proceedings remain pending, but such a general presumption does not exclude the right of an interested party to demonstrate that a given document is not covered by the presumption. On the other hand, where the judicial activities of the Court have come to an end, there are no longer grounds for presuming that disclosure of the pleadings would undermine those activities, and a specific examination of the documents to which access is requested is then necessary to establish whether

their disclosure may be refused because it would undermine the protection of court proceedings and legal advice.

Cross-references:

Court of First Instance (Grand Chamber):

- no. T-36/04, 12.09.2007, *API v. Commission, Reports*, II-03201; *Bulletin* 2009/3 [ECJ-2009-3-010].

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-015

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 12.10.2010 / **e)** C-45/09 / **f)** Gisela Rosenblatt v. Oellerking Gebäudereinigungsges. mbH / **g)** *Reports*, I-09391 (ECLI:EU:C:2010:601) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Employment, termination, age, discrimination / Employment, contract, termination, retirement.

Headnotes:

1. Article 6.1 of Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that it does not preclude a national provision

under which clauses on automatic termination of employment contracts on the ground that the employee has reached the age of retirement are considered to be valid, in so far as, first, that provision is objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market and, second, the means of achieving that aim are appropriate and necessary.

2. Article 6.1 of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that it does not preclude a measure such as the automatic termination of employment contracts of employees who have reached retirement age, set at 65, provided for by a framework collective agreement for employees in the commercial cleaning sector.

Summary:

I. Gisela Rosenblatt worked as a cleaner for 39 years. Her employment contract, in accordance with the collective agreement for the commercial cleaning sector, ends at the end of the calendar month in which she may claim a retirement pension, or, at the latest, at the end of the month in which she reaches the age of 65. When she reached the age of 65, which was retirement age, her employer gave her notice of the termination of her employment contract. Ms Rosenblatt brought an action before the *Arbeitsgericht Hamburg* (Hamburg Labour Court), claiming that the termination of her employment contract constituted discrimination on grounds of age.

The referring court asks, essentially, whether the automatic termination of an employment contract at normal retirement age is consistent with the prohibition on discrimination on grounds of age laid down by Directive 2000/78/EC.

II. The Court finds, first, that a clause on automatic termination of an employment contract on the ground that an employee is eligible to retire creates a difference of treatment based directly on age. The Court then considers whether there is any justification for that difference of treatment. In that regard, the Court considers that such a measure does not establish a regime of compulsory retirement but allows employers and employees to agree, by individual or collective agreements, on a means, other than resignation or dismissal, of ending employment relationships on the basis of the age of eligibility for a retirement pension.

As regards the aim of the legislation at issue, the Court observes that the mechanism is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations

and the choice to be made between prolonging people's working lives or, conversely, providing for their early retirement.

The Court notes that such clauses on automatic termination have been part of the employment law of many Member States for a long time and are in widespread use in employment relationships. By guaranteeing workers a certain stability of employment and, in the long term, the promise of foreseeable retirement, while offering employers a certain flexibility in the management of their staff, the clause on automatic termination of employment contracts is thus the reflection of a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment. Those aims must, in principle, be considered to justify 'objectively and reasonably', 'within the context of national law', as provided in Directive 2000/78, a difference in treatment on the ground of age prescribed by Member States.

Next, the Court holds that it does not appear unreasonable for the authorities or the social partners of a Member State to take the view that clauses on automatic termination of employment contracts may be appropriate and necessary in order to achieve those legitimate aims. In that regard the Court points out that the clause applicable to Ms Rosenblatt is not based solely on a specific age but also takes account of the fact that the persons concerned are entitled to financial compensation in the form of a retirement pension, and does not authorise employers to terminate an employment relationship unilaterally. Moreover, the fact that it is based on an agreement makes for considerable flexibility in the use of the mechanism, allowing the social partners to take account of the overall situation in the labour market concerned and of the specific features of the jobs in question. In addition, the German legislation contains a further limitation in that it requires employers to obtain or confirm the consent of workers to any clause on automatic termination of an employment contract on the ground that the employee has reached the age at which he is eligible for a pension, where that age is less than the normal retirement age.

Finally, the Court observes that the German Law prevents a person who intends to continue to work beyond retirement age from being refused employment, either by his former employer or by a third party, on a ground related to his age.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-016

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 16.11.2010 / **e)** C-261/09 / **f)** Gaetano Mantello / **g)** Reports, I-11477 (ECLI:EU:C:2010:683) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

European Arrest Warrant, "same act" / European Arrest Warrant, "final judgment" / European Arrest Warrant, ground for non-execution, *ne bis in idem* / Judgment, final, notion.

Headnotes:

1. For the purposes of the issue and execution of a European arrest warrant, the concept of 'same acts' in Article 3.2 of Council Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States constitutes an autonomous concept of European Union law. In addition, that concept of the 'same acts' also appears in Article 54 of the Convention implementing the Schengen Agreement and has, in that context, been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. In view of the shared objective of Article 54 of the Schengen Convention and Article 3.2 of the Framework Decision, which is to ensure that a person

is not prosecuted or tried more than once in respect of the same acts, an interpretation of that concept given in the context of the Schengen Implementing Convention is equally valid for the purposes of Framework Decision 2002/584.

2. In circumstances in which, in response to a request for information within the meaning of Article 15.2 of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as set forth in Article 3.2 of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3.2 of the Framework Decision.

A requested person is considered to have been finally judged in respect of the same acts within the meaning of Article 3.2 of Framework Decision 2002/584 when, following criminal proceedings, further prosecution is definitively barred or when the judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts. Whether a person has been 'finally' judged for the purposes of Article 3.2 of the Framework Decision is determined by the law of the Member State in which judgment was delivered. Thus, a decision which, under the law of the Member State which instituted criminal proceedings against a person, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union.

Summary:

I. In 2005 Mr Gaetano Mantello was convicted by the *Tribunale di Catania* (Catania District Court, Italy) of unlawful possession of cocaine intended for onward sale. He subsequently served a prison sentence of 10 months and 20 days.

In 2008, that court issued a European arrest warrant in respect of Mr Mantello, alleging that between 2004 and 2005 he had participated in organised drug trafficking in a number of Italian towns and in Germany.

Having become aware, towards the end of 2008, of the arrest warrant on the Schengen Information System (SIS), the German authorities had Mr Mantello arrested. The *Tribunale di Catania* – in its capacity as the judicial authority which issued the arrest warrant – informed the *Oberlandesgericht* (Higher Regional Court) Stuttgart that the judgment delivered in 2005 was not a bar to executing the warrant.

The *Oberlandesgericht* nevertheless made a reference to the Court of Justice, asking whether it may oppose execution of the arrest warrant in application of the *ne bis in idem* principle, since, at the time of the investigation which led to Mr Mantello's conviction for possession of cocaine, the Italian investigators already had enough evidence to prosecute him for participating in the organised trafficking of narcotic drugs. In the interests of their investigation, the investigators did not pass on to the investigating judge all the information and evidence in their possession and did not, at that time, request the prosecution of those acts.

II. In response to the first question concerning the interpretation of "the same acts", the Court states that its interpretation of that concept in previous cases in relation to the Schengen Implementing Convention is equally valid for the purposes of the Framework Decision. However, in its view, the national court's questions in actual fact relate more to the concept of "finally judged". Thus, this case raises the question whether the fact that the Italian investigating authorities had, at the time of the conviction for possession of narcotic drugs (2005), evidence concerning the accused's participation in a criminal organisation, but did not submit that evidence for consideration by the *Tribunale di Catania* in order not to jeopardise the smooth running of the investigation, meant that there was already a decision which could be regarded as a final judgment in respect of the acts set out in the arrest warrant.

The Court notes that a requested person is considered to have been finally judged in respect of the same acts where, following criminal proceedings, further prosecution is definitively barred or the person is finally acquitted. Whether a person has been 'finally' judged is determined by the law of the Member State in which judgment was delivered. Consequently, a decision which, under the law of the Member State which instituted criminal proceedings, does not definitively bar further prosecution at national level in respect of certain acts does not constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts in one of the Member States of the European Union.

When, in response to a request for information made by the executing judicial authority, the authority that issued the arrest warrant has expressly stated on the basis of its national law that the earlier judgment delivered under its legal system is not a final judgment covering the acts referred to in the arrest warrant issued by it, the executing judicial authority cannot as a general rule refuse to execute the European arrest warrant.

Langues:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2014-2-017

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 30.11.2010 / **e)** C-550/07 P / **f)** Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission / **g)** Reports, I-08301 (ECLI:EU:C:2010:512) / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.7.15.1.3 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Role of members of the Bar.**

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

Keywords of the alphabetical index:

Lawyer, client, communication, equality of treatment / Lawyer, professional privilege, protection / Lawyer, in-house, professional privilege, protection.

Headnotes:

1. The benefit of legal professional privilege with respect to communications between lawyers and their clients is subject to two cumulative conditions. First, the exchange with the lawyers must be connected to the client's rights of defence and, second, the exchange must emanate from independent lawyers,

that is to say, lawyers who are not bound to the client by a relationship of employment. The concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship.

It follows that the requirement of independence means that there should exist no employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

2. In the years that have passed since the judgment in Case 155/79 *AM & S Europe v. Commission* was delivered, no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers may be discerned in the legal systems of the 27 Member States of the European Union. The legal situation in the Member States of the European Union has not evolved to an extent that would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege.

3. The uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the Commission in anti-trust proceedings may be carried out in conditions in which the undertakings concerned are treated equally. If that were not the case, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.

Summary:

I. By decision of 10 February 2003, the Commission ordered Akzo Nobel Chemicals and its subsidiary Akros Chemicals to submit to an investigation aimed at seeking evidence of possible anti-competitive practices. The investigation was carried out by Commission officials assisted by representatives of the Office of Fair Trading ('OFT', the British competition authority), at the applicants' premises in the United Kingdom.

During the examination of the documents seized a dispute arose in relation, in particular, to copies of two e-mails exchanged between the managing director and Akzo Nobel's coordinator for competition law, an Advocaat of the Netherlands Bar and a member of Akzo Nobel's legal department employed by that company. After analysing those documents, the

Commission took the view that they were not covered by legal professional privilege.

II. The Court had the opportunity to give a ruling on the extent of legal professional privilege in *AM & S Europe v. Commission*, holding that it is subject to two cumulative conditions. First, the exchange with the lawyer must be connected to 'the client's rights of defence' and, second, that the exchange must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'. As regards the second condition, the Court, in its judgment today, observes that the requirement that the lawyer must be independent is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

The Court considers that an in-house lawyer, despite his enrolment with a Bar or Law Society and the fact that he is subject to the professional ethical obligations, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Notwithstanding the professional ethical obligations applicable in the present case, an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence. Furthermore, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer.

Furthermore, the Court, responding to the argument put forward by Akzo Nobel and Ackros that national laws have evolved in the field of competition law, considers that no predominant trend towards protection under legal professional privilege of correspondence within a company or group with in-house lawyers may be discerned in the legal systems of the Member States. Accordingly, the Court considers that the current legal situation in the Member States does not justify consideration of a change in the case law towards granting in-house

lawyers the benefit of legal professional privilege. Similarly, the evolution of the legal system of the European Union and the amendment of the rules of procedure for competition law are also unable to justify a change in the case-law established by the judgment in *AM & S Europe v. Commission*.

Akzo Nobel and Akcros also argued that the interpretation by the General Court lowers the level of protection of the rights of defence of undertakings. However, the Court considers that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions.

Cross-references:

Court of Justice of the European Communities:

- no. 155/79, 18.05.1982, *AM & S Europe v. Commission*, Reports, 1575.

Court of First Instance:

- nos. T-125/03 and T-253/03, 17.09.2007, *Akzo Nobel Chemicals and Akcros v. Commission*, Reports, II-03523.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2014-2-002

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 27.05.2014 / e) 4455/10 / f) Margus v. Croatia / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Amnesty / War crime / Human rights, core.

Headnotes:

There is a growing tendency in international law to see amnesties for acts which amount to grave breaches of fundamental human rights such as the intentional killing of civilians as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish such acts. Accordingly, Article 4 Protocol 7 ECHR, which provides the right not to be tried or punished twice, is not applicable where a defendant who has been granted an amnesty in respect of offences under the ordinary criminal law is subsequently convicted of war crimes arising out of the same set of facts.

Summary:

I. The applicant, a member of the Croatian army, was indicted for murder and other serious offences committed in 1991 during the war in Croatia. Some of the charges were subsequently dropped. In 1997 the trial court terminated the proceedings in respect of the remaining charges pursuant to the General Amnesty Act, which granted amnesty for all criminal offences committed in connection with the war in Croatia between 1990 and 1996, except for acts

amounting to the gravest breaches of humanitarian law or war crimes. In 2007 the Supreme Court, on a request for the protection of legality lodged by the State Attorney, found the decision to terminate the proceedings against the applicant to be in violation of the General Amnesty Act. It noted in particular that the applicant had committed the alleged offences as a member of the reserve forces after his tour of duty had terminated, so that there was no significant link between the alleged offences and the war, as required by the Act. In parallel, in a second set of criminal proceedings the trial court convicted the applicant of war crimes and sentenced him to fourteen years' imprisonment. On appeal, the Supreme Court upheld the conviction finding, *inter alia*, that the matter had not been *res judicata* because the factual background to the offences in the second set of proceedings was significantly wider in scope than that in the first set, as the applicant had been charged with a violation of international law, in particular the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The applicant filed a constitutional complaint, which was ultimately dismissed.

II. The applicant complained of a violation of his right not to be tried twice. The Court acknowledged that in both sets of proceedings the applicant had been prosecuted for the same offences. There were, however, two distinct situations as regards the charges brought in the first set of proceedings: the prosecutor had withdrawn the charges concerning two alleged killings, whereas the proceedings in respect of two further alleged killings and a charge of serious wounding had been terminated by a County Court ruling adopted on the basis of the General Amnesty Act.

a. Dropped charges – In respect of the charges that had been withdrawn by the public prosecutor in the first set of proceedings, the Court reiterated that the discontinuance of criminal proceedings by a public prosecutor did not amount to either a conviction or an acquittal, such that Article 4 Protocol 7 ECHR was not applicable.

It was accordingly inadmissible.

b. Termination of proceedings under General Amnesty Act – As regards the termination of the first set of proceedings on the basis of the General Amnesty Act, the Court observed that the applicant had been improperly granted an amnesty for acts that amounted to grave breaches of fundamental human rights protected under Articles 2 and 3 ECHR. The States were under an obligation to prosecute acts such as torture and intentional killings. Moreover, there was a growing tendency in international law to

see the granting of amnesties in respect of grave breaches of human rights as unacceptable. In support of this observation, the Court relied on several international bodies, courts and conventions, including the United Nations Human Rights Committee, the International Criminal Tribunal for the former Yugoslavia and the Inter-American Court on Human Rights. Further, even if it were to be accepted that amnesties were possible where there were some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there was nothing to indicate that there were any such circumstances. The fresh indictment against the applicant for war crimes in the second set of proceedings was thus in compliance with the requirements of Articles 2 and 3 ECHR, such that Article 4 Protocol 7 ECHR was not applicable.

The Article 4 Protocol 7 ECHR was accordingly not applicable.

Languages:

English, French.



Identification: ECH-2014-2-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Section V / **d)** 26.06.2014 / **e)** 65192/11 / **f)** *Menesson v. France* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Child / Child, best interests / Child, family tie / Descendance / Descent, child, interests / Descent, interest of the child / Surrogate gestation.

Headnotes:

Failure to recognise, under French law legal, parent-child relationship between children born as the result of a surrogacy arrangement and the couple having recourse to that method did not have insurmountable practical consequences for their family life.

However, having regard to the importance of biological parentage as a component of a person's identity, it could not be said to be in a child's interests to be deprived of a legal relationship of that nature where the biological reality had been established and the child and parent concerned demanded full recognition thereof. That serious restriction undermined the identity and right to respect for private life of the applicant children.

Summary:

I. The first and second applicants, Mr and Mrs Mennesson, who are husband and wife, are French nationals. The third and fourth applicants, Ms Mennesson and Ms Mennesson, are twins, born in 2000 (hereafter "the applicant children"). They are US nationals.

As Mrs Mennesson is infertile, the applicants had recourse to a surrogacy arrangement in the United States by which embryos were implanted in the uterus of another woman, obtained from the gametes of Mr Mennesson. The applicant children were born as the result of that surrogacy arrangement. Judgment was delivered in California indicating that Mr and Mrs Mennesson were the twins' parents.

Suspecting a surrogacy arrangement, the French authorities refused to record the particulars of the birth certificates in the French register of births, marriages and deaths. The particulars of the birth certificates were subsequently recorded, however, on the instructions of the public prosecutor's office, which then instituted proceedings against the first and second applicants for annulment of the relevant entries.

The applicants' claim was ultimately dismissed by the Court of Cassation on 6 April 2011 on the grounds that registration of the birth particulars would give effect to a surrogacy arrangement, which was null and void on public-policy grounds under the French Civil Code. It found that there had been no infringement of the right to respect for private and family life because annulling the relevant entries in the register had not deprived the children of the legal father-child and mother-child relationship recognised under Californian law or prevented them from living with Mr and Mrs Mennesson in France.

II. There had been interference in the exercise of the right guaranteed by Article 8 ECHR under its “family life” and “private life” heads. The impugned measures had had a basis in domestic law and that law had been accessible to the persons concerned and foreseeable as to its effects.

The reason why France refused to recognise a legal parent-child relationship between children born abroad as the result of a surrogacy agreement and the intended parents was that it sought to deter its nationals from having recourse to methods of assisted reproduction outside the national territory that were prohibited on its own territory with the aim of protecting children and surrogate mothers. Accordingly, the interference pursued two legitimate aims: the “protection of health” and “the protection of the rights and freedoms of others”.

There was no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. That lack of consensus reflected the fact that recourse to a surrogacy arrangement raised sensitive ethical questions. Accordingly, States must be afforded a wide margin of appreciation in their legislative choices regarding surrogacy. That margin of appreciation had to be reduced, however, where the legal parent-child relationship was concerned since this brought into play an essential aspect of an individual’s identity. The Court had the task of determining whether a fair balance had been struck between the competing interests of the State and those of the individuals directly affected, having regard to the essential principle according to which, whenever the situation of a child was in issue, the best interests of the child were paramount.

a. The applicants’ right to respect for their family life: the lack of recognition under French law of the legal parent-child relationship between the applicants affected their family life in a number of respects. The applicants were obliged to produce – non-registered – US civil documents accompanied by an officially sworn translation each time access to a right or a service required proof of the legal parent-child relationship. Moreover, the applicant children had not to date been granted French nationality, which complicated travel as a family and raised concerns regarding the applicant children’s right to remain in France once they attained their majority and accordingly the stability of the family unit. To that must be added the concerns regarding the protection of family life in the event of the death of the applicant genetic father or the couple’s separation.

However, whatever the degree of the potential risks for the applicants’ family life, the Court considered that it had to determine the issue having regard to the practical obstacles which the family had had to overcome on account of the lack of recognition in French law of the legal parent-child relationship between the applicant genetic father and the applicant children. The applicants did not claim that it had been impossible to overcome the difficulties they had referred to and had not shown that the inability to obtain recognition of the legal parent-child relationship under French law had prevented them from enjoying in France their right to respect for their family life. In that respect they had all four been able to settle in France shortly after the birth of the applicant children, were in a position to live there together in conditions broadly comparable to those of other families and there was nothing to suggest that they were at risk of being separated by the authorities on account of their situation under French law.

In dismissing the grounds of appeal submitted by the applicants under the Convention, the Court of Cassation had duly carried out an actual examination of the situation, since the judges had considered, implicitly but necessarily, that the practical difficulties that the applicants might encounter in their family life on account of not obtaining recognition under French law of the legal parent-child relationship established between them abroad did not exceed the limits required by compliance with Article 8 ECHR.

Accordingly, in the light of the practical consequences for their family life of the lack of recognition under French law of the legal parent-child relationship between the applicants and having regard to the margin of appreciation afforded to the respondent State, the situation brought about by the Court of Cassation’s conclusion in the present case struck a fair balance between the interests of the applicants and those of the State in so far as their right to respect for family life was concerned.

The Court therefore found no violation of Article 8 ECHR.

b. Right of the applicant children to respect for their private life: although aware that the applicant children had been identified in another country as the children of the intended parent applicants, France nonetheless denied them that status under French law. A contradiction of that nature undermined the children’s identity within French society. Whilst Article 8 ECHR did not guarantee a right to acquire a particular nationality, the fact remained that nationality was an element of a person’s identity. Although their biological father was French, the applicant children faced a worrying uncertainty as to the possibility of

obtaining recognition of French nationality. That uncertainty was liable to have negative repercussions on the definition of their personal identity. Furthermore, the fact that the applicant children were not identified under French law as the children of the intended parent applicants had consequences for their rights to inherit under the latter's estate.

The Court could accept that France might wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that were prohibited on its own territory. Having regard to the foregoing, however, the effects of non-recognition under French law of the legal parent-child relationship between children thus conceived and the intended parents were not limited to the situation of the parents, who alone had chosen a particular method of assisted reproduction prohibited by the French authorities. They also affected the situation of the children themselves, whose right to respect for their private life – which implied that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – was substantially affected. Accordingly, a serious question arose as to the compatibility of that situation with the children's best interests, respect for which had to guide any decision in their regard.

That analysis took on a special dimension where, as in the present case, one of the intended parents was also the child's biological parent. Having regard to the importance of biological parentage as a component of identity, it could not be said to be in a child's interests to deprive him or her of a legal relationship of that nature where the biological reality of that relationship had been established and the child and parent concerned demanded full recognition thereof. Not only had the relationship between the applicant children and their biological father not been recognised when registration of the details of the birth certificates had been requested, but formal recognition by means of a declaration of paternity or adoption or through the effect of *de facto* enjoyment of civil status would fall foul of the prohibition established by the Court of Cassation in its case-law in that regard. The Court considered, having regard to the consequences of that serious restriction on the identity and right to respect for private life of the applicant children, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State had overstepped the permissible limits of its margin of appreciation. Having regard also to the importance to be given to the child's interests when weighing up the competing interests at stake, the applicant children's right to respect for their private life had been infringed.

The Court therefore found a violation of Article 8 ECHR.

Languages:

English, French.



Identification: ECH-2014-2-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 01.07.2014 / **e)** 43835/11 / **f)** S.A.S. v. France / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Discrimination / Public place / Justification, objective / Justification, reasonable / Proportionality / Religion / Religion, headscarf, symbol / Religion, wearing of niqab / Security, national.

Headnotes:

The question whether or not the wearing of the full-face veil in public places was acceptable constituted a choice of society; the State was thus afforded a wide margin of appreciation in this matter, especially as there was no European consensus as to the banning of such veils in public places. Consequently, the ban could be regarded as proportionate to the aim pursued, namely to preserve the conditions of “living together” as an element of the “protection of the rights and freedoms of others” under Articles 8.2 and 9.2 ECHR.

Summary:

I. The applicant is a practising Muslim and said that she wore the burqa and niqab, which covered her whole body except for her eyes, to live in accordance

with her religious faith, culture and personal convictions. She added that she wore this clothing of her own accord in public and in private, but not systematically. She was thus content not to wear it in certain circumstances, but wished to be able to wear it when she chose to do so. Lastly, her aim was not to annoy others but to feel at inner peace with herself. Since 11 April 2011, the date of the entry into force of Law no. 2010-1192 of 11 October 2010 throughout French territory, it has been against the law to conceal one's face in a public place.

II. The ban on the wearing, in public places, of clothing designed to conceal one's face raised issues with regard to the right to respect for the private life (Article 8 ECHR) of women who wished to wear the full-face veil for reasons relating to their beliefs; and to the extent that the ban was complained of by individuals such as the applicant who were thus prevented from wearing in public places clothing that they were required to wear by their religion, it particularly raised an issue with regard to the freedom to manifest one's religion or beliefs (Article 9 ECHR).

The Law of 11 October 2010 confronted the applicant with a dilemma: either she complied with the ban and thus refrained from dressing in accordance with her approach to religion, or she refused to comply and would face criminal sanctions. There had thus been an "interference" or a "limitation" prescribed by law as regards the exercise of rights protected by Articles 8 and 9 ECHR.

The Government had argued that the interference pursued two legitimate aims: "public safety" and "respect for the minimum set of values of an open democratic society". However, Articles 8.2 and 9.2 ECHR did not expressly refer to the second of those aims or to the three values invoked by the Government in that connection.

The Court accepted that the legislature had sought, by adopting the ban in question, to address concerns of "public safety" within the meaning of Articles 8.2 and 9.2 ECHR.

As regards the second aim, "respect for the minimum set of values of an open democratic society", the Court was not convinced by the Government's submission in so far as it concerned respect for gender equality. A State Party could not invoke gender equality in order to ban a practice that was defended by women – such as the applicant – in the context of the exercise of the rights enshrined in Articles 8 and 9 ECHR, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms. Moreover, in so far as the

Government thus sought to show that the wearing of the full-face veil by certain women shocked the majority of the French population because it infringed the principle of gender equality as generally accepted in France, the Court referred to its reasoning (below) as to the other two values that they had invoked.

Secondly, respect for human dignity could not legitimately justify a blanket ban on the wearing of the full-face veil in public places. The clothing in question might be perceived as strange by many of those who observed it, but it was the expression of a cultural identity which contributed to the pluralism inherent in democracy.

Thirdly, in certain conditions, what the Government had described as "respect for the minimum requirements of life in society" – or of "living together", as stated in the explanatory memorandum accompanying the Bill – could be linked to the legitimate aim of the "protection of the rights and freedoms of others". The respondent State took the view that the face played an important role in social interaction. The Court was therefore able to accept that the barrier raised against others by a veil concealing the face was perceived by the respondent State as breaching the right of others to live in a space of socialisation which made living together easier. That being said, in view of the flexibility of the notion of "living together" and the resulting risk of abuse, the Court had to engage in a careful examination of the necessity of the impugned limitation.

First, it could be seen clearly from the explanatory memorandum accompanying the Bill that it was not the principal aim of the ban to protect women against a practice which was imposed on them or would be detrimental to them.

As regards the question of necessity in relation to public safety, within the meaning of Articles 8 and 9 ECHR, the Court understood that a State might find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. However, in view of its impact on the rights of women who wished to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face could be regarded as proportionate only in a context where there was a general threat to public safety. The Government had not shown that the ban introduced by the Law of 11 October 2010 fell into such a context. As to the women concerned, they were thus obliged to give up completely an element of their identity that they considered important, together with their chosen manner of manifesting their religion or beliefs,

whereas the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property had been established, or where particular circumstances prompted a suspicion of identity fraud. It could not therefore be found that the blanket ban imposed by the Law of 11 October 2010 was necessary, in a democratic society, for public safety, within the meaning of Articles 8 and 9 ECHR.

The Court then examined the questions raised by the need to meet the minimum requirements of life in society, seen as an element of the “protection of the rights and freedoms of others”. It took the view that the ban in question could be regarded as justified in its principle solely in so far as it sought to guarantee the conditions of “living together”.

In the light of the number of women concerned – about 1,900 women in relation to the French population of about sixty-five million and to the total number of Muslims living in France – it might seem excessive to respond to such a situation by imposing a blanket ban. In addition, there was no doubt that the ban had a significant negative impact on the situation of women who, like the applicant, had chosen to wear the full-face veil for reasons related to their beliefs. A large number of actors, both international and national, in the field of fundamental rights protection had found a blanket ban to be disproportionate. The Law of 11 October 2010, together with certain debates surrounding its drafting, might have upset part of the Muslim community, including some members who were not in favour of the full-face veil being worn. In this connection, the Court was very concerned by the fact that the debate which preceded the adoption of the Law of 11 October 2010 was marked by certain Islamophobic remarks. It was admittedly not for the Court to rule on whether legislation was desirable in such matters. It nevertheless emphasised that a State which entered into a legislative process of this kind ran the risk of contributing to the consolidation of the stereotypes which affected certain categories of the population and of encouraging the expression of intolerance, whereas it had a duty, on the contrary, to promote tolerance. Remarks which constituted a general, vehement attack on a religious or ethnic group were incompatible with the values of tolerance, social peace and non-discrimination underlying the Convention and did not fall within the right to freedom of expression that it protected.

However, the Law of 11 October 2010 did not affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which did not have the effect of concealing the face.

The impugned ban mainly affected Muslim women who wished to wear the full-face veil. Nevertheless, the ban was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face.

As to the fact that criminal sanctions were attached to the ban, the sanctions provided for by the legislature were among the lightest that could be envisaged, consisting of a fine at the rate applying to second-class petty offences (currently 150 euros maximum), with the possibility for the court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course.

In addition, by prohibiting individuals from wearing clothing designed to conceal the face in public places, the respondent State had to a certain extent restricted the reach of pluralism, since the ban prevented certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, the Government had indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of “living together”. From that perspective, the respondent State was seeking to protect a principle of interaction between individuals, which in its view was essential for the expression not only of pluralism, but also of tolerance and broadmindedness, without which there was no democratic society. It could thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constituted a choice of society.

In such circumstances, the Court had a duty to exercise a degree of restraint in its review of Convention compliance, since such review would lead it to assess a balance that had been struck by means of a democratic process within the society in question. In matters of general policy, on which opinions within a democratic society might reasonably differ widely, the role of the domestic policy-maker had to be given special weight. In the present case France thus had a wide margin of appreciation.

This was particularly true as there was no European consensus as to the question of the wearing of the full-face veil in public. While, from a strictly normative standpoint, France was very much in a minority position in Europe, it had to be observed that the question of the wearing of the full-face veil in public was or had been a subject of debate in a number of European States. In addition, this question was probably not an issue at all in a certain number of member States, where this practice was uncommon.

Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court found that the ban imposed by the Law of 11 October 2010 could be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others”. The impugned limitation was therefore to be seen as “necessary in a democratic society”.

The Court therefore found no violations of Article 8 or Article 9 ECHR.

III. The applicant also complained of indirect discrimination. As a Muslim woman who for religious reasons wished to wear the full-face veil in public, she belonged to a category of individuals who were particularly exposed to the ban in question and to the sanctions for which it provided.

A general policy or measure that had disproportionately prejudicial effects on a particular group might be considered discriminatory even where it was not specifically aimed at that group and there was no discriminatory intent. This was only the case, however, if such policy or measure had no “objective and reasonable” justification, that is, if it did not pursue a “legitimate aim” or if there was not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised. In the present case, while it might be considered that the ban imposed by the Law of 11 October 2010 had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, the measure in question had an objective and reasonable justification.

The Court therefore found no violations of Article 14 ECHR taken in conjunction with Article 8 or Article 9 ECHR.

Languages:

English, French.



Identification: ECH-2014-2-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 03.07.2014 / **e)** 13255/07 / **f)** Georgia v. Russia (no. 1) / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expulsion, collective, prohibition / Expulsion, administrative procedure, individual examination / Secrecy, state secret, access by court.

Headnotes:

A coordinated policy of arresting, detaining and expelling large numbers of nationals from a foreign country within a limited period of time and in circumstances in which no reasonable and objective examination of the particular case of each individual can be carried out will amount to an administrative practice of collective expulsion in breach of Article 4 Protocol 4 ECHR.

Summary:

I. The case concerned the arrest, detention and expulsion from Russia of large numbers of Georgian nationals from the end of September 2006 to the end of January 2007. The facts of the case were disputed.

According to the Georgian Government, during that period more than 4,600 expulsion orders were issued by the Russian authorities against Georgian nationals, of whom more than 2,300 were detained and forcibly expelled, while the remainder left by their own means. This represented a sharp increase in the number of expulsions of Georgian nationals per month.

In support of their allegation that the increase in expulsions was the consequence of a policy specifically targeting Georgian nationals, the Georgian Government submitted a number of documents that had been issued in early and mid-October 2006 by the Russian authorities. These documents, which referred to two administrative circulars issued in late September 2006, purportedly ordered staff to take large-scale measures to identify Georgian citizens unlawfully residing in Russia, with a view to their

detention and deportation. The Georgian Government also submitted two letters from Russian regional authorities that had been sent to schools in early October 2006 asking for Georgian pupils to be identified.

The Russian Government denied these allegations. They said they had simply been enforcing immigration policy and had not taken reprisal measures. As regards the number of expulsions, they only kept annual or half-yearly statistics that showed about 4,000 administrative expulsion orders against Georgian nationals in 2006 and about 2,800 between 1 October 2006 and 1 April 2007. As to the documents referred to by the Georgian Government, the Russian Government maintained that the instructions had been falsified. While confirming the existence of the two circulars, they disputed their content while at the same time refusing, on the grounds that they were classified "State secret", to disclose them to the European Court. They did not dispute that letters had been sent to schools with the aim of identifying Georgian pupils, but said this had been the act of over-zealous officials who had subsequently been reprimanded.

Various international governmental and non-governmental organisations, including the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE), reported in 2007 on the expulsions of Georgian nationals, pointing to coordinated action between the Russian administrative and judicial authorities.

II. Article 38 ECHR: The Russian Government had refused to provide the Court with copies of two circulars issued by the authorities at the end of September 2006 on the grounds that they were classified materials whose disclosure was forbidden under Russian law. The Court had already found in a series of previous cases relating to documents classified "State secret" that respondent Governments could not rely on provisions of national law to justify a refusal to comply with a Court request to provide evidence. In any event, the Russian Government had failed to give a specific explanation for the secrecy of the circulars and, even assuming legitimate security interests for not disclosing the circulars existed, possibilities existed under Rule 33.2 of the Rules of Court to limit public access to disclosed documents, for example through assurances of confidentiality. The Court therefore found that Russia had fallen short of its obligation to furnish all necessary facilities to assist the Court in its task of establishing the facts of the case.

Article 35.1 ECHR: From October 2006 a coordinated policy of arresting, detaining and expelling Georgian

nationals had been put in place in the Russian Federation. That policy amounted to an administrative practice meaning, in line with the Court's settled case-law, that the rule requiring exhaustion of domestic remedies did not apply.

In so finding, the Court noted that there was nothing to undermine the credibility of the figures indicated by the Georgian Government: 4,600 expulsion orders against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled. The events in question – the issuing of circulars and instructions, mass arrests and expulsions of Georgian nationals, flights with groups of Georgian nationals from Moscow to Tbilisi and letters sent to schools by Russian officials with the aim of identifying Georgian pupils – had all occurred during the same period in late September/early October 2006.

The concordance in the description of those events in the reports of international governmental and non-governmental organisations was also significant. Moreover, in view of the Court's finding of a violation of Article 38 ECHR, there was a strong presumption that the Georgian Government's allegations regarding the content of the circulars ordering the expulsion specifically of Georgian nationals were credible.

As regards the effectiveness and accessibility of the domestic remedies, the material before the Court indicated there had been real obstacles in the way of Georgian nationals seeking to use the remedies that existed, both in the Russian courts and following expulsion to Georgia. They had been brought before the courts in groups. Some had not been allowed into the courtroom, while those who were complained that their interviews with the judge had lasted an average of five minutes with no proper examination of the facts. They had subsequently been ordered to sign court decisions without being able to read the contents or obtain a copy. They did not have an interpreter or a lawyer and, as a general rule, were discouraged from appealing by both the judges and the police officers. Having regard to all those factors, the Court concluded that from October 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals was put in place in the Russian Federation which amounted to an administrative practice for the purposes of European Convention on Human Rights case-law.

Article 4 Protocol 4: Georgia alleged that its nationals had been the subject of a collective expulsion from the territory of the Russian Federation. The Court reiterated that for the purposes of Article 4 Protocol 4 ECHR collective expulsion was to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure was taken

following, and on the basis of, a reasonable and objective examination of the particular case of each individual member of the group. Unlike the position under Article 1 Protocol 7 ECHR, Article 4 Protocol 4 ECHR was applicable even if those expelled were not lawfully resident on the territory concerned.

The Court took note of the concordant description given by the Georgian witnesses and international governmental and non-governmental organisations of the summary procedures conducted before the Russian courts. It observed in particular that, according to the PACE Monitoring Committee, the expulsions had followed a recurrent pattern all over the country and that in their reports the international organisations had referred to coordination between the administrative and judicial authorities.

During the period in question the Russian courts had made thousands of expulsion orders expelling Georgian nationals. Even though, formally speaking, a court decision had been made in respect of each Georgian national, the Court considered that the conduct of the expulsion procedures during that period, after the circulars and instructions had been issued, and the number of Georgian nationals expelled from October 2006 onwards had made it impossible to carry out a reasonable and objective examination of the particular case of each individual.

While every State had the right to establish its own immigration policy, problems with managing migration flows could not justify practices incompatible with the State's obligations under the European Convention on Human Rights.

The expulsions of Georgian nationals during the period in question had not been carried out following, and on the basis of, a reasonable and objective examination of the particular case of each individual. This amounted to an administrative practice in breach of Article 4 Protocol 4 ECHR.

Languages:

English, French.



Identification: ECH-2014-2-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 17.07.2014 / **e)** 47848/08 / **f)** Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.7.15 Institutions - Judicial bodies - **Legal assistance and representation of parties.**

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

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

5.3.2 Fundamental Rights - Civil and political rights - **Right to life.**

Keywords of the alphabetical index:

Locus standi, victim status / Legal representative, organisation, non-governmental, / Mental disorder / Right to legal representation / HIV (AIDS), treatment.

Headnotes:

For the purposes of Article 34 ECHR a *de facto* legal representative may in exceptional circumstances be considered to have standing to bring an application before the Court on behalf of persons in a state of extreme vulnerability who would otherwise be prevented from having serious allegations of European Convention on Human Rights violations examined at the international level.

The State's positive obligation under Article 2 ECHR to protect life will not be complied with where the domestic authorities unreasonably put a highly vulnerable mental patient's life in danger by placing him in an institution where conditions are known to be wholly inadequate and which is unable to provide appropriate care and treatment for his HIV condition.

Summary:

I. The application was lodged by a non-governmental organisation, the Centre for Legal Resources (hereinafter, "CLR"), on behalf of a young Roma man, Mr Câmpeanu, who died in 2004 at the age of 18. Mr Câmpeanu had been placed in an orphanage at birth after being abandoned by his mother. When still a young child he was diagnosed as being HIV-positive and as suffering from severe mental disability. On reaching adulthood he had to leave the centre for disabled children where he had been

staying and underwent a series of assessments with a view to being placed in a specialised institution. After a number of institutions had refused to accept him because of his condition, he was eventually admitted to a medical and social care centre, which found him to be in an advanced state of psychiatric and physical degradation, without any antiretroviral medication and suffering from malnutrition. A few days later, he was admitted to a psychiatric hospital after displaying hyper-aggressive behaviour. The hospital concerned had previously said that it did not have the facilities for patients with HIV. There, he was seen by a team of monitors from the CLR who reported finding him alone in an unheated room, with a bed, but no bedding and dressed only in a pyjama top. Although he could not eat or use the toilet without assistance, the hospital staff refused to help him for fear of contracting HIV. He was refusing food and medication and so was only receiving glucose through a drip. The CLR monitors concluded that the hospital had failed to provide him with the most basic treatment and care. Mr Câmpeanu died that same evening.

According to a 2004 report by the CPT, in the winters of 2003 and 2004 some 109 patients died in suspicious circumstances at the psychiatric hospital in question, the main causes of death being cardiac arrest, myocardial infarction and bronchopneumonia, and the average age of the patients who died being 56, with a number of under 40. The CPT found that some of the patients were not given sufficient care. It also noted a lack of human and material resources at the hospital as well as deficiencies in the quality and quantity of the food and a lack of heating.

II. Article 34 ECHR: The Court dismissed the Government's preliminary objection that the CLR had no standing to lodge the application. It accepted that the CLR could not be regarded as a victim of the alleged European Convention on Human Rights violations as Mr Câmpeanu was indisputably the direct victim while the CLR had not demonstrated a sufficiently "close link" with him or established a "personal interest" in pursuing the complaints before the Court to be considered an indirect victim. However, in the exceptional circumstances of the case and bearing in mind the serious nature of the allegations, it had to have been open to the CLR to act as Mr Câmpeanu's representative, even though it had no power of attorney to act on his behalf and he had died before the application was lodged.

In so finding, the Court noted that the case concerned a highly vulnerable young Roma man suffering from severe mental disabilities and HIV infection who had spent his entire life in State care and died in hospital through alleged neglect. In view of his extreme

vulnerability, he had been incapable of initiating proceedings in the domestic courts without proper legal support and advice. At the time of his death Mr Câmpeanu had no known next-of-kin. Following his death, the CLR had brought domestic proceedings with a view to elucidating the circumstances of his death. It was of considerable significance that neither its capacity to act nor its representations on Mr Câmpeanu's behalf before the domestic medical and judicial authorities were questioned or challenged in any way. The State had not appointed a competent person or guardian to take care of his interests despite being under a statutory obligation to do so. The CLR had become involved only shortly before his death – at a time when he was manifestly incapable of expressing any wishes or views regarding his own needs and interests, let alone on whether to pursue any remedies. Finding that the CLR could not represent Mr Câmpeanu in these circumstances carried the risk that the respondent State would be allowed to escape accountability through its own failure to comply with its statutory obligation to appoint a legal representative. Moreover, granting CLR standing to act as Mr Câmpeanu's representative was consonant with the Court's approach in cases concerning the right to judicial review under Article 5.4 ECHR in the case of "persons of unsound mind" (Article 5.1.e ECHR). In such cases, it was essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. The CLR thus had standing as Mr Câmpeanu's *de facto* representative.

Article 2 ECHR: The decisions regarding Mr Câmpeanu's placements were mainly based on which establishment was willing to accommodate him rather than on where he would be able to receive appropriate medical care and support. Mr Câmpeanu was first placed in a medical and social care centre which was not equipped to handle patients with mental health problems. Ultimately, he was admitted to a psychiatric hospital, despite the fact that it had previously refused to admit him because it did not have facilities to treat HIV. The transfers from one unit to another had taken place without any proper diagnosis and aftercare and in complete disregard of Mr Câmpeanu's actual state of health and most basic medical needs. Of particular note was the authorities' failure to ensure he received antiretroviral medication. He had mainly been treated with sedatives and vitamins and no meaningful examination had been conducted to establish the causes of his mental state, in particular his sudden aggressive behaviour.

The Court underlined that for his entire life Mr Câmpeanu had been in the hands of the authorities, which were therefore under an obligation

to account for his treatment. They had been aware of the appalling conditions in the psychiatric hospital, where a lack of heating and proper food and a shortage of medical staff and medication had led to an increase in the number of deaths in the winter of 2003. Their response had, however, been inadequate. By deciding to place Mr Câmpeanu in that hospital, notwithstanding his already heightened state of vulnerability, the authorities had unreasonably put his life in danger, while the continuous failure of the medical staff to provide him with appropriate care and treatment was yet another decisive factor leading to his untimely death. In sum, the authorities had failed to provide the requisite standard of protection for Mr Câmpeanu's life. There had been a violation of Article 2 ECHR.

Article 46 ECHR: Recommendation that Romania envisage general measures to ensure that mentally disabled persons in comparable situations are afforded independent representation, enabling them to have European Convention on Human Rights complaints relating to their health and treatment examined before a court or other independent body.

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.

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.).

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⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

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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 sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.

⁵² Including the body responsible for revising or amending the Constitution.

⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

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⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ *Bicameral*, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

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⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

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⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

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⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹¹ 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.

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⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

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¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Including all questions of non-discrimination.

¹⁰⁹ Taxes and other duties towards the state.

¹¹⁰ "One person, one vote".

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¹¹¹ 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).

¹¹² For example, discrimination between married and single persons.

¹¹³ This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

¹¹⁴ Detention by police.

¹¹⁵ Including questions related to the granting of passports or other travel documents.

¹¹⁶ May include questions of expulsion and extradition.

¹¹⁷ 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.

¹¹⁸ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁹ This keyword covers the right of appeal to a court.

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¹²⁰ Including the right to be present at hearing.

¹²¹ Including challenging of a judge.

¹²² Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²³ This keyword also includes the right to freely communicate information.

¹²⁴ Militia, conscientious objection, etc.

¹²⁵ Aspects of the use of names are included either here or under "Right to private life".

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¹²⁶

Including compensation issues.

¹²⁷

This keyword also covers "Freedom of work".

¹²⁸

This should also cover the term freedom of enterprise.

¹²⁹

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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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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