

THE BULLETIN

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

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

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

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

The decisions are presented in the following way:

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

T. Markert

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

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

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Kosovo	V. Dula		

European Court of Human Rights.....J. Erb / A. Grgic / M. Laur
Court of Justice of the European Union C. Iannone / S. Hackspiel
Inter-American Court of Human Rights J. Recinos

Strasbourg, January 2016

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There was no relevant constitutional case-law during the reference period 1 January 2015 – 30 April 2015 for the following countries:

Bulgaria, Latvia.

Précis of important decisions of the reference period 1 January 2015 – 30 April 2015 will be published in the next edition, *Bulletin 2015/2*, for the following country:

Hungary.

Albania

Constitutional Court

Important decisions

Identification: ALB-2015-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 15.04.2015 / **e)** 19/2015 / **f)** Laws and other rules having the force of law / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.2.1.6 Constitutional Justice – Types of claim – Claim by a public body – **Local self-government body.**

3.8 General Principles – **Territorial principles.**

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

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

Keywords of the alphabetical index:

Consultation, public / Local government / Territory, ordering.

Headnotes:

A law establishing a new administrative-territorial division of the units of local government, into municipalities and regions, is not unconstitutional due to the procedure followed for its enactment or the substance of its provisions. If the public has suffered no concrete negative consequence as a result of the reform, then the claim relates to the lawmaker's appropriate sphere of action, which cannot be the object of examination by the Constitutional Court. The reform does not violate the equality of votes and the constitutional requirement to consult the public has been met.

Summary:

I. The applicant requested suspension of Law no. 115/2014 "On the administrative division of the units of local government in the Republic of Albania"

(hereinafter, "Law no. 115/2014"), which established a new administrative-territorial division of the units of local government, comprising 61 municipalities and 12 regions. The Law provided that elections for the organs of local government for the year 2015 will be organised and conducted on the basis of the administrative-territorial division defined in this Law. The organs of local government constituted after the local elections of the year 2015 will be organised and will function based on the administrative-territorial division defined in this Law (Article 3 of the Law).

The applicant's first argument concerned the procedure followed in enacting the Law. The applicant claimed that the draft Law was examined in violation of the procedure for law-making set out in Articles 81.2.f, 83.3 and 75.2 of the Constitution. The legislative initiative for this Law had been deposited in the Assembly (parliament) on 23 July 2014, and was put on the agenda for approval in plenary session on 31 July 2014, although it was not included in the three-week work calendar of the Assembly for the period 4-25 July, outside of the determined order. This transformed the procedure of examination of this Law into an expedited procedure.

The applicant's principal substantive claim was that the impugned law conflicts with Articles 108.1 and 116 of the Constitution, because it abolishes the local unit "the commune" provided in the Constitution. Article 108.1 states: "Communes or municipalities and regions are the units of local government. Other units of local government are regulated by law." Article 116 of the Constitution states that norms produced by organs of local government only apply within the territorial jurisdiction of those organs. The applicant argued that the Law abolished an existing local unit foreseen at the constitutional level, which cannot be avoided by law, not even one approved by the qualified majority.

The applicant also argued that the Law might have adverse effects on State or social interests or those of individuals, and that serious or irreparable damage might be caused to State interests due to the holding of irregular elections not in conformity with the new standards, due to a lack of sufficient time to prepare them. The applicant contended that this would distort the voters' will and violate their constitutional rights. The applicant argued that it is urgent to suspend the Law because the decree initiating the elections and preparation for elections begins long before the end of the mandate of the existing organs: a decision of the Constitutional Court enters into force after publication in the Official Journal and the local organs do not have sufficient time for preparing the elections. The applicant further claimed that the draft Law on

administrative-territorial form was drafted without respecting the constitutional principle of obtaining the opinion of the community affected by it.

In addition, the applicant claimed that Law no. 115/2014 violates the constitutional principle of the equality of the vote, because the 2011 Census is an unlawful basis for calculating the population of the year 2014, in the service of the constitutional requirements for a review of the territorial boundaries of the self-governing units and securing equal representation of the population. Because of serious deformations in the demographic criterion, the different units have different territorial sizes that are not comparable with one another. This kind of inequality, both demographic as well as territorial, does not respect the principle of the equality of representation, that is, of the vote.

In response to the applicant's first procedural argument, the Assembly responded that, as an initiative of the Special Parliamentary Commission, the draft Law could not have been examined, and was not examined, with an expedited procedure. The examination and approval by the permanent commissions is made unnecessary when a special commission is created for an issue of special importance.

More generally, the Council of Ministers (the executive) set out the main reasons that spurred the governing majority to undertake a total reform of the administrative organisation of the country's territory. The demographic changes of the last decade had brought drastic changes in the size of the units of local government (hereinafter, the "ULGs"). The high level of fragmentation of the ULGs had hindered the further development of decentralisation, due to the incapacity of ULGs to offer services with high efficiency. This also impeded the accomplishment and deepening of decentralisation, creating serious and significant inequalities among the ULGs and leading to an increase of administrative expenses at the local level and the tendency of a considerable part of the ULGs to have a budget dominated only by personnel expenses. A large number of local units did not manage to collect any income of their own and were not in a condition to offer any services to their residents.

II. The Court took the applicant's request for suspension of the Law under examination on a preliminary basis and held that this request did not meet the criteria defined by Article 45 of Law no. 8577, dated 10 February 2000, "On the organisation and functioning of the Constitutional Court of the Republic of Albania".

In addition to the above assessments, the Court considered it important to recognise that the applicant had not argued how and to what extent it was affected in its parliamentary constitutionality rights, concretely, during the procedure held by the Assembly to put the examination and approval of Law no. 115/2014 on the agenda outside of the three-week working calendar of the Assembly or by the avoidance of prior examination and approval in the Commission on Legal Issues, Public Administration and Human Rights. The applicant had not taken part in the special commission, in the examination of the Law in the commission, or in the respective plenary sessions of the Assembly. For these reasons, the Court concluded that the claims of the applicant of a violation of Articles 81.2.f and 83.3 of the Constitution during the procedure of approving Law no. 115/2014, or the Rules of the Assembly, are unfounded.

The Court observed that Article 108 of the Constitution provides: "The units of local government are communes or municipalities and regions...". Article 1 of Law no. 115/2014 provides: "1. The units of local government in the Republic of Albania are: Municipalities – 61; Regions – 12". The new law has left the "communes" as a unit of local government outside the provision.

The Court considered that the possibility of having other local units, in addition to those provided in the Constitution (communes/municipalities) is open. What is important in the constitutional aspect is whether the organisation of local government into one, two or more local units is efficient or harmful. Before undertaking any reform to reduce or increase the number of ULGs, the lawmaker should consider whether it negatively affects local governance, and consequently, the community. If it turns out that there has been no concrete negative impact on the public as a result of the reform, then we are not dealing with a claim of a constitutional nature, but a case of the lawmaker's appropriate sphere of action, which cannot be the object of examination by this Court. Legal reforms are part of governmental programs, and as such they should be evaluated as to whether the lawmaker finds them opportune, so long as they do not violate constitutional principles.

Concerning the other claim, that the abolition of communes infringes on the electoral process because the electoral zones have been organised or divided taking the commune as the basic unit, the Court held that this claim cannot be the object of examination by it, because that issue is related to the Electoral Code and not with the law that is the object of this application. The latter has the purpose of organising local government and not organising the election, which is regulated by a special law.

Regarding the argument that the Law had been drafted without taking into consideration the views of the community affected by it, the Court considered that the ways to realise this obligation have been delegated by the Constitution-drafters to the ordinary legislator. These methods were followed for the purpose of performing the process of public consultation in connection with the new territorial-administrative division. From the above, the Court concluded that the process of taking an opinion was realised through the use of the greatest part of the methods provided by the relevant law (Law no. 8652/2000). In this sense, the Court held that the constitutional criterion of canvassing public opinion according to Article 108.2 of the Constitution was not violated.

As regards the argument claiming a violation of the equality of votes, the Court emphasised that considering the type of electoral system, the equality of the weight of each vote does not mean exact mathematical equality of the contribution of every vote in the final result of the elections. The weight of every vote is related to the mechanisms of the electoral system, and differences are unavoidable in the influence that each vote might have, depending on the mechanisms adopted.

The Court held that the arguments set out by the applicant were not of a constitutional level and for this reason they cannot give them a final response.

In conclusion, based on the above, the Court held that the application for the repeal of Law no. 115/2014 "On the administrative-territorial division of the units of local government in the Republic of Albania" should be refused as unfounded.

Languages:

Albanian.



Identification: ALB-2015-1-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 24.04.2015 / **e)** 23/2015 / **f)** Laws and other rules having the force of law / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.10 General Principles – **Certainty of the law.**
 3.16 General Principles – **Proportionality.**
 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**
 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:

Judicial Council / Judicial Council, competence / Judicial Council, member, dismissal / Judiciary, self-government.

Headnotes:

One provision of a law amending provisions on the functioning and composition of the High Council of Justice is unconstitutional. The reasons provided in the offending provision for the discharge of the members of the Council are not clear and do not guarantee due process of law during a proceeding for their discharge. Under those conditions, this provision is not in harmony with the principle of legal certainty, concerning the clarity of the content of a legal norm, and as such it is unconstitutional and should be repealed. Other challenged provisions are not unconstitutional. The election of the deputy chairman of the Council solely from among members of the Assembly (parliament) reflects the practice of the Council, since its creation, of always selecting the deputy chairman from the ranks of the members elected by the Assembly. The automatic suspension of any judge who is a defendant in a criminal trial does not violate the presumption of innocence or the principles of due process and serves the aim of preserving public trust in the administration of justice.

Summary:

I. On the proposal of a group of deputies, on 24 July 2014, the Assembly of Albania (hereinafter, the "Assembly") approved some amendments to Law no. 8811 dated 17 May 2001 "On the organisation and functioning of the High Council of Justice". This Law has 15 articles in all, which amend certain provisions of the basic law regarding the composition and functioning of the High Council of Justice (hereinafter, the "HCJ").

Concretely, the amendments affect issues such as the incompatibility of a member of the HCJ with other functions/duties, the prohibition of promotion of members of the HCJ during the time they hold that

function, the manner of declaring the end of the mandate of a member of the HCJ, discharge of the members of the HCJ, the manner of election of the deputy chairman of the HCJ, suspension of a judge from duty by a decision of the HCJ in cases where he or she is a defendant in a criminal case, and also the procedure for appointment of court chairpersons when there are vacancies.

The applicant claimed that Article 4 of the Law, which provides for the discharge of HCJ members, violates the principle of the separation of powers and weakens the self-governance of the judiciary. The law does not make distinctions or specifications in connection with cases of a serious violation of law as a reason for the discharge of an HCJ member, leaving room for abuse and for failing to guarantee the preservation of the inviolability of this constitutional organ.

The applicant claimed that Article 7 of the Law, which provides for the election of the HCJ deputy chairman only from among the members elected by the Assembly, is a narrow interpretation of Article 147.3 of the Constitution and as such conflicts with it. The Constitution has sufficed itself merely with providing that he or she is elected from the ranks of HCJ members without making a distinction in the manner of their election. According to applicant, this goes beyond the constitutional provision. The HCJ also joins with this claim in its submissions.

Finally, the applicant claimed that the content of Article 10.2 of the Law, which provides for the automatic suspension of a judge from duty when he or she is taken as a defendant for a criminal offence, conflicts with the principle of the presumption of innocence and legal certainty, not guaranteeing due process of law. This directly affects the independence of the judiciary. This provision also bypasses the role of the HCJ, which has to suspend the judge automatically. The HCJ also joined in this claim.

II. The Court had previously noted that the HCJ, as a constitutional organ independent of the legislative and executive power, decides among other things on the transfer of judges of first instance and of appeal and their disciplinary responsibility, as well as proposing judicial candidacies to the President of the Republic for appointment. The HCJ is the constitutional organ positioned at the apex of the organisational pyramid of the judicial power.

In order to accomplish the self-governance of the judiciary, the HCJ consists in its majority of judges, who, exercising their functions as such, provide the link of this Council with the judicial body. The Constitution-drafter has put a corporate spirit (self-

governing) into the HCJ with the particular purpose of making the court independent from interventions of the legislative and executive powers (Article 147.4 of the Constitution). It has been conceived of as an independent organ, a quality that is characterised by the manner of its formation, with the participation of the head of state and the highest figures of the judiciary (the chairman of the High Court), the representatives of the executive (the Minister of Justice) as well as representatives of the legislative power (three members). This composition not only aims at its independence from all the other powers, but also reflects the separation and balancing of the powers in the HCJ.

The principle of the separation of powers, like the other constitutional principles, is not an end in itself, but has the function of assisting in the realisation of an objective, which is the distribution of power among several holders, thus representing different interests in order to secure reciprocally as great a balance as possible in the exercise of power. The joint action of the holders of power should assure the greatest chances for the taking of the fairest possible decisions for the community. Therefore, it is considered essential that the principle of the separation of powers remain dominant and not yield for unjustified reasons, regardless of a change of the political forces in power.

The Court held that the cases of the end of the mandate and those of discharge should be distinct from one another, because the causes that lead to the end of the official's function are also different. The end of the mandate of a functionary is normally related to the time during which he or she is to exercise the mandate or to events that make the further exercise of the mandate impossible, such as, for example, physical or mental incapacity, the official's taking on another duty, his or her resignation and so forth. On the other hand, cases of discharge are related to the official's behaviour, which might not be in harmony with the rules for exercising it, such as, for example, violation of law, failure to exercise duty as he or she should, commission of a criminal offence during the exercise of duty and so forth.

That is, in the first case the official's mandate ends for reasons that do not conflict with law or with the rules, but simply because of events that make it impossible for him or her to exercise his or her duty any more. In the second case, that is, of discharge, the official is penalised for his or her conduct, which is not in conformity with the law and rules. The law should be clear as to when it will refer to the case of discharge "because of the commission of a crime" and when to "a conviction by final court decision" as a reason for the end of the mandate.

In conclusion, the Court held that the reasons provided in Article 4 of the Law for the discharge of the members of the HCJ are not clear and do not guarantee due process of law during a proceeding for their discharge. Under those conditions, this provision is not in harmony with the principle of legal certainty concerning the clarity of the content of a legal norm and, as such, it is unconstitutional and should be repealed.

Regarding appointment of the HCJ deputy chairman, the Court considered it necessary to refer to its prior decision about the role and nature of the work of the HCJ members. The Court stated that the functionaries of the HCJ *ex officio*, the Chairman of the High Court, the Minister of Justice and the nine judges elected by the NJC because of holding other functions, cannot be elected deputy chairman of the HCJ.

The Court does not see any reason to change its prior practice related to this issue, because it has not been presented with different legal or factual circumstances. In addition, it takes account of the fact that the practice of the HCJ since its creation shows that the deputy chairman of the HCJ has always been chosen from the ranks of the members elected by the Assembly. Starting from this premise, and considering the inability of functionaries to hold two full time positions at the same time, the Court deems it that the conclusion follows that potential candidates for being chosen for the duty of deputy chairman of the HCJ are only the three members elected by the Assembly.

From the above, the Court concludes that the election of the deputy chairman of the HCJ only from the ranks of the members elected by the Assembly does not conflict with Articles 116 and 147.3 of the Constitution.

Concerning the automatic suspension of a judge who is a defendant in a criminal case, the Court held that imposing the measure of suspension of a judge from duty when a criminal proceeding begins against him or her was foreseen in Law no. 9877 dated 18 February 2008 "On the organisation and functioning of the judicial power". This Law, contrary to what the applicant claimed in its submissions, provides that when the judge is found not guilty by final court decision, he or she returns to work and earns full pay from the moment of his or her suspension.

The Court held that the provision of the situation in the Law on the judicial organisation in which suspension of the judge is ordered is a clear provision, providing not only suspension from duty, but also the consequences that ensue if the judge is

found innocent, as a guarantee for the exercise of his or her duty. Since those guarantees have been provided in the Law for the organisation of the judicial power, which is also the specific law for judges and where their status is provided, reference for this purpose should be made to that Law.

The Court considered that the suspension of a judge from duty is in the service of increasing the trust of the public in the administration of justice. The right of the judge to exercise his or her duty unlimited in time, together with the other guarantees provided by Article 138 of the Constitution, are a constituent part of the status of the judge and as such serve the independence of the judiciary.

In addition to this aspect, the lawmaker should also seek the best possible functioning of the judicial power, in order to realise its mission, that is, the rendering of justice. Justice can only be credible and with integrity when it is administered by judges who do not raise doubts concerning their character.

The Court held that the claims of the applicant concerning the incompatibility with the Constitution of Article 4 of the Law under examination, amending Article 7 of Law no. 8811 dated 17 May 2001 "On the organisation and functioning of the High Council of Justice" are well-founded and should be accepted.

Languages:

Albanian.



Armenia

Constitutional Court

Statistical data

1 January 2015 – 30 April 2015

- 74 applications have been filed, including:
 - 56 applications, filed by the President
 - 3 applications, filed by a court
- 1 application, filed by 1/5 of the deputies of the National Assembly
- 15 cases have been admitted for review, including:
 - 6 applications, based on individual complaints concerning the constitutionality of certain provisions of laws
 - 7 applications concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 1 application on the basis of the application of a court
 - 1 application on the basis of the application of 1/5 of the deputies of the National Assembly of the Republic of Armenia.
- 16 cases heard and 16 decisions delivered including:
 - 8 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 5 decisions on cases initiated on individual complaints concerning the constitutionality of certain provisions of laws
 - 1 decision on the basis of the application of a court
 - 2 decisions on the basis of the application of the Human Rights Defender

Important decisions

Identification: ARM-2015-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 03.03.2015 / **e)** / **f)** On the conformity with the Constitution of the provisions of the Administrative Procedure Code of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **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.**

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:

Application to court, electronic form, requirement / Access to court, condition.

Headnotes:

A provision whereby an application can only be made to the Court of Cassation through a lawyer is out of line with the right of access to court. Conditions can be imposed provided they are reasonable and not unachievable.

Summary:

I. The applicants challenged a regulation of the Administrative Procedure Code which stated that a person only had the right to apply to the Court of Cassation through a lawyer. They also took issue with a provision of the same Code which required applicants to attach the electronic version of the application to the paper version and the relevant documents.

In terms of the stipulation that applications to the Court of Cassation could only be made through a lawyer, the applicants noted that the State had to set out a mechanism for providing free legal aid regardless of the financial condition of the party. They pointed out that financial means are needed to secure the services of lawyers, which often means that such services are unavailable. The issue the applicants had with the second provision was that it was vague; it was not clear what kind of electronic version should be attached to the application and by what kind of electronic device. They suggested that it meant that those without access to computers, printers and electronic devices were precluded from bringing a case before the Court of Cassation.

II. The Constitutional Court noted that the regulation prior to the norm under challenge did not preclude a direct application to the Court of Cassation, without a lawyer. In this regard, it found that the new regulation did limit the right of access to the Court of Cassation.

It reaffirmed the legal provisions which had been expressed in DCC-765 and DCC-833. The concept of only being able to apply to the Court of Cassation by a lawyer can only be legitimate if the legislation safeguards the universal right to legal representation irrespective of the financial situation of the parties concerned. The Court held that the legislator had not taken into account the respective legal positions of the Court, particularly those referring to the issues of financial discrimination.

In terms of the regulation which requires applicants to submit an electronic version of the application to the Court of Cassation, along with the other documents, the Constitutional Court noted that the right to access to court is not absolute; various conditions can be imposed. This requirement did not, in the Court's view, block the possibility of exercising the right to access to court. It did not require a person to achieve something that was impossible or to behave in contravention of the axiology of the Constitution and it did not lead to destruction of the substance of law. The Court also emphasised that the legislation did not define the criteria of the electronic version of the application. The absence of mandatory criteria should be construed as the right of a person to choose any format and any criteria for the electronic version of the application. The Court also noted that a party could use any electronic device to submit an electronic version of the application.

The provision did not, in the Court's opinion, make it compulsory to attach the electronic version to the paper form of application. The applicant could send it via e-mail. At the same time, the Court stressed that the common criteria should be legally defined.

The Constitutional Court declared that the provision whereby applications could only be made to the Court of Cassation through a lawyer was in breach of the Constitution and void. The second provision was in line with the Constitution, within the legal positions expressed in the decision.

Languages:

Armenian.



Austria Constitutional Court

Important decisions

Identification: AUT-2015-1-001

a) Austria / b) Constitutional Court / c) / d) 11.12.2014 / e) G 119-120/2014 / 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.**

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

Keywords of the alphabetical index:

European Convention on Human Rights, applicability / Couple, same-sex / Discrimination, sexual orientation / Equality / Adoption, homosexual partners, discrimination.

Headnotes:

Excluding same-sex partners in registered partnerships *a priori* from jointly adopting a child breaches the principle of equality.

Summary:

I. According to Article 8.4 of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz*), registered same-sex partners may neither jointly adopt a child nor adopt the adopted children of the other partner. Article 191.2 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides that, adopting a child by more than one person either simultaneously or subsequently is only permitted if

the adopting partners are married, with the exception of biological children of the other registered partner ("stepchild"), who shall be adopted.

The applicants, two women living in a stable relationship, had entered into a registered partnership in 2011. In 2012, one partner gave birth to a daughter who had been conceived by medically assisted reproduction. According to the Civil Code, this child was allowed to be adopted by the other partner. The applicants wished to have another child, in addition to their first one, by adoption. However, unlike married couples, they were barred by the above-mentioned provisions from jointly adopting a child.

The applicants lodged a constitutional complaint against Article 8.4 of the Federal Act on Registered Partnership as well as Article 191.2 of the Civil Code, claiming that they were discriminated against merely on grounds of their gender and sexual orientation. They maintained that the challenged provisions were contrary to the constitutional principle of equality, as laid down in Article 2 of the Basic Law on Fundamental Rights of the Citizens (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*), Article 7 of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*), as well as Article 14 ECHR in conjunction with Article 8 ECHR.

The applicants submitted that the different treatment of same-sex registered partners and heterosexual married couples regarding the joint adoption of children neither pursued a legitimate goal nor was it necessary. In particular, they considered that there was no apparent justification for generally forbidding registered partners to jointly adopt a child and to preclude *a priori* a court review of the applicants' suitability for a joint adoption in light of the child's best interests, whereas married couples were *per se* considered suitable as adoptive parents.

II. At first, the Constitutional Court turned to the question of applicability of Article 14 ECHR, according to which the enjoyment of the rights and freedoms set forth in the Convention shall be granted without discrimination. Following established case-law of the European Court of Human Rights, the European Convention on Human Rights, specifically Article 8 ECHR, did not provide for a right to adoption. However, as the existing legal provisions permitted adoption by individual persons irrespective of their sexual orientation as well as simultaneous parenthood of same-sex partners *vis-à-vis* a child with a view to adopting a stepchild, the Court found that the legal provisions governing adoption fell within the scope of application of Article 8 ECHR. As a consequence, these provisions had to satisfy the requirements of Article 14 ECHR.

Both the principle of equality and Article 14 ECHR, according to the case-law of the European Court of Human Rights, required convincing and weighty reasons to justify unequal treatment based on gender and sexual orientation.

The Constitutional Court observed that, according to the Civil Code, adopting a child was not exclusively reserved to spouses (together or individually, if the requirements were satisfied), but also possible for individuals – irrespective of their sexual orientation – whether they lived in a partnership or registered partnership or not, with the court approval of the adoption contract. In detail, the law allowed both unmarried heterosexual partners as well as registered partners to become the legal parents of a child, without that child descending from both partners.

Against this legal backdrop, the Court found that the challenged provisions created unequal treatment between registered partners as adopting parties in an adoption contract as against registered partners or (same-sex or heterosexual) partners in the case of stepchild adoption. Whereas the challenged ban precluded joint adoptive parenthood of registered partners, even if both had a foster child or one partner had already adopted the child, the law allowed for simultaneous legal parenthood of the biological and the adoptive parent in stepchild adoption by adding the contractual adoption relationship for the same child.

The Court established that neither Article 8 ECHR in conjunction with Article 14 ECHR, nor Article 7 of the Federal Constitutional Act provided for an objective justification to exclude registered partners *per se* as joint contracting parties to an adoption contract. In particular, the interests of the child could not serve as justification; in a way these interests were, on the contrary, even counteracted by such exclusion.

As a result, the Court found that the general exclusion by law of registered partners from jointly adopting a child as contracting parties to an adoption contract, while allowing the joint parenthood of registered partners in other constellations, was inconsistent and could not be justified on the grounds of protecting the child's best interests.

Cross-references:

Constitutional Court:

- nos. G 16/2013, G 44/2013, 10.12.2013, *Bulletin* 2013/3 [AUT-2013-3-004].

European Court of Human Rights:

- *X and others v. Austria*, no. 19010/07, 19.02.2013, *Reports of Judgments and Decisions* 2013.

Languages:

German.



Identification: AUT-2015-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 03.07.2015 / **e)** G 239/2014 / **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.**

3.16 General Principles – **Proportionality.**

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

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

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

Keywords of the alphabetical index:

Property, deprivation / Property, right, scope / Creditor, banks, insolvency.

Headnotes:

In principle, the State can legitimately take measures to save a *Land* (regional body) responsible for bank liabilities from experiencing a situation similar to that of insolvency. However, measures affecting only a small group of investors are neither justified nor proportionate if they are obviously insufficient to prevent the bank from failing.

Summary:

I. The applicants (members of Parliament and the regional court of Klagenfurt) requested the Court to review parts of the Hypo Reorganisation Act (*Hypo-Sanierungsgesetz*). Subdivided into four different laws, the Hypo Reorganisation Act provides for the restructuring and controlled winding-down of the Hypo Alpe-Adria – Bank International AG (hereinafter, “Hypo”), an Austrian credit institution in financial trouble, which had been nationalised in 2009. The two laws brought before the Court are the “HaaSanG” and “GSA”. The HaaSanG foresees the expiry of certain subordinate claims as well as guarantees thereon and the deferral of certain disputed claims. The “GSA” establishes a wind-down unit, which determines the conditions to wind-down the portfolios by Hypo (hereinafter, “HETA”).

Section 3 of the HaaSanG stipulates that, with the publication of a corresponding ordinance by the Financial Markets Supervisory Authority (hereinafter, “FMA”), all subordinate claims and shareholders’ claims substituting equity maturing before the 30 June 2019 (“cut-off date”) shall expire. Section 6 of the HaaSanG provides that creditors, whose claims fall under Section 3 of the HaaSanG, may gain a new claim against HETA if, after completion of the wind-down, assets remain. Disputed claims (claims whose status as subordinate or as shareholder’s claim is unsure) are deferred at least until this date or until the proceedings are completed. According to the explanatory remarks to the government bill, a period of around five years (cut-off date on 30 June 2019) was deemed to ensure an orderly wind-down of the portfolios at the best possible conditions, while allowing the remaining subordinated claims to be honoured.

The applicants, however, submitted that the expiry of claims violated the fundamental right to the protection of property. They saw it as an expropriation or restriction of property rights. The *pari passu* principle was not respected because only claims of certain subordinate creditors were affected while other (equally subordinate) creditors as well as the Austrian federation as the owner of HETA could keep their claims. Even if a public interest were to be granted, the restriction of the right to property would be disproportional, violating the right to equal treatment. An ordinary insolvency procedure could have avoided this discrimination.

II. The Court considered the concerns. The creditors’ claims were deemed to fall under the right to property as protected under constitutional law (Article 1 Protocol 1 ECHR and Article 5 Basic Law on the General Rights of Nationals) and European law

(Article 17 of the European Charter of Fundamental Rights). However, the Court found that the expiry of claims according to the HaaSanG was not an expropriation *stricto sensu* since the claims were chosen solely for their value. Moreover, the restructuring of Hypo was in the public interest. Since the legislator had discretion to make economic prognoses, he could choose a wind-down over ordinary insolvency proceedings. Also, a “hair-cut” may be necessary for the resolution of a bank in crisis. The differentiation between different groups of creditors (“normal” and “subordinate”) was legitimate since subordinate creditors would also be left empty-handed in insolvency proceedings. Regarding the differentiation between subordinate creditors and the Austrian federation as the owner of HETA, it had to be taken into account that the Austrian federation had already put in more than €5 billion to mitigate damages in the interest of other creditors.

However, the Court found that the right to property was nonetheless violated because the HaaSanG differentiated within the group of subordinate creditors by declaring only those claims that mature before 30 June 2019 as expired. Subordinate creditors with such claims were discriminated further as the securities and guarantees on their claims expired together with the claim. Meanwhile, the other equally subordinate creditors were not affected at all and even kept their interest claims. Since it turned out that the cut-off date could not prevent HETA from failing before the end of restructuring period (measures under the Bank Restructuring and Resolution Act had been taken with regard to the remaining creditors after the entry into force of the Hypo Reorganisation Act), it could not ensure an orderly restructuring and resolution.

The Court also agreed with the applicants regarding the expiry of all securities together with the claims foreseen in Section 3 HaaSanG (and Section 1356 of the Civil Code). This particularly affected guarantees by the *Land* of Carinthia according to the Holding Act of the *Land* of Carinthia (“K-LHG”). The Court emphasised that claims resulting from such statutory guarantees (rendering the claims quilt-edged and equipping them with qualified protection) constituted a severe restriction on the right to property. While the government claimed the protection of credit-worthiness of Austrian *Länder* as well as the prevention of an insolvency of the *Land* of Carinthia, the Court saw no reason solely for the specific group of subordinate creditors to be drawn on. The expiry of guarantees, which exclusively applies to those subordinate creditors whose claims expire while guarantees for other creditors remain unaffected, was found to be neither factually justified nor proportionate. Guarantees issued by a *Land* must not

be rendered invalid retroactively, even when the *Land* is evidently incapable of bearing the risk (at the time of the judgment, the guarantees still amounted to around € 10.2 billion).

Regarding the GSA, the applicants submitted *inter alia* that it was unclear which assets may be transferred to other entities in the course of the winding-down of Hypo and that the minister of finance’s discretion to decide how this transfer was affected (by way of ordinance or ruling) was too great. However, the Court found that owing to the legislator’s margin of appreciation and the flexibility needed for the resolution of Hypo, the GSA is constitutional. Thus, certain rights (e.g. cancellation or approval) may legitimately be limited when deciding on restructuring measures and specific insolvency rules foreseen for a wind-down unit.

The Court thus concluded that the HaaSanG is unconstitutional and repealed it in its entirety. Hence, the FMA ordinance based on it was repealed as well. A deadline for correction was not set; thus, the HaaSanG is no longer applicable. As far as the applications concerned the GSA, they were dismissed as unfounded.

Cross-references:

European Court of Human Rights:

- *Olczak v. Poland*, no. 30417/96, 07.11.2002, *Reports of Judgments and Decisions* 2002-X;
- *Capital Bank AD v. Bulgaria*, no. 49429/99, 24.11.2005, *Reports of Judgments and Decisions* 2005-XII;
- *Grainger and others v. United Kingdom*, no. 34940/10, 10.07.2012.

Languages:

German.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2015-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 12.02.2015 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azərbaycan Respublikası Konstitusiyası Məhkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

1.4.8.7 Constitutional Justice – Procedure – Preparation of the case for trial – **Evidence.**

1.4.8.7.1 Constitutional Justice – Procedure – Preparation of the case for trial – Evidence – **Inquiries into the facts by the Court.**

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

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

3.12 General Principles – **Clarity and precision of legal provisions.**

4.7.3 Institutions – Judicial bodies – **Decisions.**

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:

Criminal, legislation, proceedings / Evidence, operative search, inspect, investigate.

Headnotes:

Some provisions of Articles 137 and 445.2 of the Criminal Procedure Code provide for judicial control in the sphere of examining and determining the use of materials obtained during operative search activities as evidence.

Summary:

I. The Gabala Region Court requested the Constitutional Court to clarify some provisions of Articles 137 and 445.2 of the Criminal Procedure Code (hereinafter, the “CPC”), specifically the limits of

judicial control concerning materials extracted as a result of operative-search activity.

The resolution of 8 July 2014 “On carrying out of operative-search activity” and two protocols “On holding an inspection” carried out on the same day was brought by the Gabala Regional Office of Police to the Gabala Region Court’s attention according to requirements of Article 445.2 of the CPC.

Recognition and use of materials seized during operative-search activities as evidence are allowed only if these materials are presented and examined according to criminal procedure requirements (Article 137 of the CPC). Article 445.2 of the CPC provides not only for submission of the resolution on carrying out of operative-search activity to the court for information, but also for the court to examine the legality of the relevant operative-search activity as a result of which the materials were obtained. However, the issue is that rules for granting and examining operative-search materials in the criminal procedure legislation are not yet established.

II. The Constitutional Court noted that judicial and legal reforms are among top priorities in Azerbaijan’s development as a constitutional state. The court’s role is especially important in guaranteeing a person and citizen’s rights and freedoms, which are supreme values according to the Constitution. Restriction on human rights is possible only by law. Control of the legality, proportionality and justice of the restriction is carried out by courts.

In criminal procedure legislation, the judiciary generally has functional duties at the stage of pre-judicial procedure. Judicial control is one of the independent forms of judicial activity within criminal trial that serves to prevent illegal intervention in a person and citizens’ rights and freedoms and to restore rights violated by the activity of the investigator or the prosecutor controlling the preliminary investigation. The legal value of judicial control is established by the Constitution and interstate contracts to which Azerbaijan is a party.

According to the Constitution, legal protection of the rights and liberties of every citizen is ensured. Everyone is entitled to appeal to the court in connection with decisions and activity (or inactivity) of state bodies and state officials.

The legality of a court’s restriction on a person and citizen’s rights and freedoms follows from Part VII of the Constitution. Thus, the court shall resolve disputes connected with violation of such rights and freedoms. Any lawful prosecution by government

bodies shall be controlled and scrutinised by independent judicial authority.

Judicial control during pre-judicial production has recently been incorporated into criminal procedure legislation. Judicial control is directed at preventing subjects of preliminary investigation during pre-judicial procedure from breaching a person and citizen's rights and freedoms. While the public prosecutor's supervision is generally directed at verifying the respect of the rule of law during activity of inquiry by operative-search bodies, judicial control is aimed at verifying the validity, proportionality, expediency and urgency of the restriction on the person's rights and freedoms.

Under the principle of division of procedural functions, the court does not have complete duty to control the legality of all activities of subjects of operative search or preliminary investigation. Registering information of a crime and resolving issues at the beginning of preliminary investigation or procedural measures untied with restriction of other rights and freedoms of the person are not within the court's judicial control.

In contrast to the public prosecutor's supervision, the judiciary examines the legality and validity of decisions made by inquiry, investigation and prosecutor bodies in connection with a guarantee of the rights and freedoms of the person and citizen.

Article 442.2 of the CPC, acting since 1 September 2000, defines the object of judicial control. It specifies that during a procedure of judicial control, the court shall consider the following: applications and submissions concerning the compulsory conduct of investigative procedures, the application of coercive procedural measures or the conduct of search operations which restrict individual freedom, the inviolability of premises, personal inviolability and the right to privacy (including that of family life, correspondence, telephone conversations, post, telegraph and other information) or which concern information containing state, professional and commercial secrets; complaints against the procedural acts or decisions of the prosecuting authorities.

The results of operative search activity used in criminal trial can be received by two ways:

1. as a result of actions carried out with court consent;
2. as a result of actions carried out without prior court consent but under a condition to subsequently notify the court concerning the specified measures.

In the first case, the problem of the volume (limits) of judicial control over operative search activity via preliminarily received judgment does not create any disputes. According to Article 446.4 of the CPC, documents corroborating the need for compulsory investigative procedure, coercive procedural measure or the search operation shall be attached to the application. If these documents are not sufficient, the prosecutor in charge of the procedural aspects of the investigation or the judge exercising judicial supervision has the right to require them.

The legislator had set out the requirements for the petition of the head of the body carrying out the operative search activity. For example, the petition must justify the necessity of the action, specify the goals and explain why these results cannot be achieved by other ways and means, term, place and other important information.

The provisions specified in the petition are then presented to the prosecutor. After reviewing the materials, the prosecutor determines whether to issue a reasonable decree on refusal of protection of the petition. Alternatively, the prosecutor may forward the materials in the petition to the court for pronouncement of the relevant decision.

According to Article 448 of the CPC subsequent to the results of court session, concerning issues related to implementing the operative search action, the judge decides whether to authorise the operative search activity. The decision is provided to the body that initiated the operative search action and the presented materials are returned. At the same time, the decision made by the court has to be completely based on the judge.

While the Plenum of the Constitutional Court's was considering this inquiry, it was established that after carrying out the urgent measures, the order of the court notification on measures carried out under judicial control was put into practice differently. The reason is that it was a completely formalistic approach to the requirements of a norm by law applying subjects. In this case, an authorised official of a body conducting search operation should within 48 hours of carrying out of the search submit the reasoned decision on the conduct of the search operation to the court exercising judicial supervision.

The specified norm of the CPC demands that the body carrying out the operative search action, within 48 hours after the action, must formally submit only the motivated resolution on carrying out the measure to the court exercising judicial control. In case of a formalistic approach, the court has to adopt the relevant decision, having only checked the necessity

of the carried-out action and that it was according to the law. The copy of this decision is forwarded to the body carrying out the activity and to the prosecutor charged with managing the preliminary investigation. In the future, at trial on the merits, results of this operative measure are considered in the general order. That is, as well as other proofs, the results of the operative search actions are also checked and estimated.

During the process of collecting evidence, courts have the right, at the request of parties to the criminal proceedings or on their own initiative, to require presentation of documents and other items of significance to the prosecution by individuals, legal entities, officials and authorities which carry out search operations. Courts can also require checking and inspections by authorised authorities and officials.

Judicial control expands during the process of collecting proofs. Carrying out operative search actions under judicial control provides grounds to use the results of this measure as proof in a criminal procedure order. In the future, for the purpose of ensuring effective and objective use of proofs, courts during the pre-judicial stage have to be authorised to provide a comprehensive function of judicial control.

Limits on judicial control over operative search actions are invariable, whether results of these actions were obtained, as provided by legislation, as a result of events held with consent of court or without prior consent of court (but with subsequent notification to the court). In turn, courts make relevant decisions after inspection carried out in the framework of judicial control. From this point of view, the courts as judicial control – after verifying the legality, validity, proportionality, expediency and urgency of carrying out of the action from the point of view of a guarantee of rights and freedom – can make a decision according to Article 448 of the CPC.

At receipt in court of the resolution to carry out an operative search action according to Article 445.2 of the CPC, its legality and validity from the point of view of ensuring the rights and freedoms of person has to be verified by a court, which also can demand materials extracted as a result of operative search activity (keeping confidential). If materials obtained on the basis of the resolution are received according to the Law “On Operative Search Activity”, presented according to requirements of the CPC and comprehensively inspected by the court, according to requirements of the Article 137 of this Code, they can be recognised as proof for criminal prosecution.

Languages:

Azeri, English (translation by the Court).



Belarus

Constitutional Court

Important decisions

Identification: BLR-2015-1-001

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 17.04.2015 / **e)** D-978/2015 / **f)** On the conformity of the Law “On Making Alterations and Addenda to the Law “On Specially Protected Natural Areas” to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2015; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Environment, conservation / Environment, protection / Government, information of the public / Information, seek, right, obtain and disseminate / Statutory obligation to supply information.

Headnotes:

The right to receive information on specially protected natural areas is a constituent part of the constitutional right of individuals to receive, store and disseminate complete, reliable and timely information on the state of the environment. It also correlates with the obligation of state bodies (state organisations) to supply ecological information (under certain circumstances and for a reasonable charge).

Summary:

I. The Constitutional Court, in the exercise of obligatory preliminary review, considered the constitutionality of the Law “On Making Alterations and Addenda to the Law On Specially Protected Natural Areas” (hereinafter, the “Law”). Obligatory preliminary review (i.e., abstract review) is required for any law adopted by the Parliament before it is signed by the President.

II. Concerning, first, the domestic law, the Court observed that the provisions of the Law aim at further safeguarding the constitutional right of every person to a favourable environment, the realisation by every person of the constitutional duty to protect nature, and strengthening of the legal basis for the State’s fulfilment of the constitutional obligation to protect the environment, including the obligation to preserve biological and landscape diversity.

A number of articles of the Law develop the constitutional requirement of exercising State control over the rational use of natural resources with the purpose of protecting and restoring the environment as well as the provision of realisation by everyone of the duty to protect the environment, which, according to the Constitutional Court, represents a legal obligation and compulsory imperative (Decision no. D-920/2014, 21.04.2014).

Thus, the legislator imposes on all individuals and legal entities an obligation to observe the established regime of protected zones of specially protected natural areas, modes of protection and the use of nature preserves and natural monuments (Articles 1.13.8, 1.23 and 1.27.5 of the Law).

Article 1.17.8 of the Law, with the aim of creating conditions for the instruction of individuals in the field of protection of the environment and developing their ecological culture, supplements Article 21 of the Law on Protected Areas with an additional provision concerning activity aimed at the development of regulated ecological tourism (visits to nature trails, observation of animals, etc.) as one of the basic tasks of nature reserves.

Concerning, second, the requirements of international law, the Constitutional Court noted that Article 8 of the Constitution provides that the Republic of Belarus shall recognise the supremacy of the generally recognised principles of international law and shall ensure the compliance of laws therewith. The conclusion of treaties that are contrary to the Constitution shall not be permitted (Article 8.1 and 8.3).

Provisions of the Law on Protected Areas falling within the ambit of the operation of international treaties (Articles 10, 21, 33, etc.) correspond to the Constitution and meet the requirements of international legal obligations.

Thus, pursuant to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (hereinafter, the “Aarhus Convention”), which entered into force for the Republic of Belarus

on 30 October 2001, each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks (Article 5.3). Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount (Article 4.8).

The Law prescribes that the information on specially protected natural areas contained in the register of specially protected natural areas shall be made available to individuals and legal entities free of charge by means of its dissemination on the Internet (Article 1.7). Article 14.5 of the Law on Protected Areas couched by the Law in a new version (Article 1.13) provides that state bodies (other state organisations), which are entrusted to manage specially protected natural areas, shall bring to the public notice the information on boundaries, composition of lands and regime of protected zones of specially protected natural areas by means of its placement on their official websites on the Internet and (or) in the mass media, setting of information signs containing such an information or by other generally accessible means.

The Constitutional Court held that the right to receive information on specially protected natural areas is a constituent part of the constitutional right of individuals to receive, store and disseminate complete, reliable and timely information on the state of the environment (Article 34.1 of the Constitution). These provisions serve as a safeguard the exercise of this constitutional right and meet the requirements of the Aarhus Convention.

At the same time, the Law prescribes that services for supplying individuals and legal entities with information on specially protected natural areas contained in the register of specially protected natural areas, whose supply requires preliminary preparation (selection, generalisation, processing, analysis), shall be provided by a State organisation managing the register of specially protected natural areas for a charge (Article 1.7).

The Constitutional Court considered that the obligation of State bodies to render the respective services to citizens of the Republic of Belarus correlates with the right to receive information on specially protected natural areas. Furthermore, the supply of the requested information related to the realisation of this individual right may require incidental expenses, which determines the lawfulness of the paid nature of the mentioned services. Accordingly, the Constitutional Court held that this provision of the Law corresponds to the constitutional

right of individuals to receive, store and disseminate complete, reliable and timely information on the state of the environment and also accords with the rules of the Aarhus Convention.

The Constitutional Court also considered that under the conditions of globalisation and economic integration the preservation of natural ecological systems, biological and landscape diversity may be ensured by means of the subsequent harmonisation of rules of international and national ecological law, developing the ecological culture of individuals, and forming the proper legal framework for the improvement of mechanisms for the implementation of international ecological standards.

The Constitutional Court accordingly recognised the Law "On Making Alterations and Addenda to the Law "On Specially Protected Natural Areas" to be compatible with the Constitution.

Cross-references:

Constitutional Court:

- no. D-920/2014, 21.04.2014, *Bulletin* 2014/1 [BLR-2014-1-002].

Languages:

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



Belgium

Constitutional Court

Important decisions

Identification: BEL-2015-1-001

a) Belgium / b) Constitutional Court / c) / d) 28.01.2015 / e) 9/2015 / f) / g) *Moniteur belge* (Official Gazette), 19.03.2015 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Terrorism, training / Terrorism, offense, legal definition / Terrorism, incitement / Terrorism, recruitment / Terrorism, combat / Constitution and treaty, similar provisions / Constitution and treaty, combination.

Headnotes:

Punishing incitement to commit terrorist offences is not incompatible with the principle of legality in criminal matters, which is enshrined both in the Constitution and in several treaties.

Summary:

I. A trade union and the non-profit-making organisation, the “*Ligue des droits de l’homme*”, applied for the provisions of the Law of 18 February 2013 incorporating additional provisions into the Criminal Code to combat terrorism to be set aside.

The Law of 19 December 2003 had already incorporated new provisions to punish terrorist offences into the Criminal Code. In this way Belgium intended to execute the Council of the European Union’s Framework Decision of 13 June 2002 on combating terrorism (2002/475/JAI). The complaint

lodged by the “*Ligue des Droits de l’Homme*” and others v. the Law of 19 December 2003 had been dismissed by the Court in Judgment no. 125/2005 (see *Bulletin* 2005/2 [BEL-2005-2-012]).

The new Article 140bis of the Criminal Code, to which the applicants objected, imposed substantial prison sentences or fines on anyone who disseminated or made available to the public in any other way a message intended to incite others to commit a terrorist offence “where such conduct, irrespective of whether it directly advocates the commission of terrorist offences, creates the risk that one or more such offences may be committed”.

The applicants submitted that the description of the offence was too vague and was incompatible with the principle of legality in criminal matters. They argued that there had been a breach of Article 12.2 of the Constitution, read in conjunction with Article 7.1 ECHR, Article 15.1 of the International Covenant on Civil and Political Rights and Article 49.1 of the Charter of Fundamental Rights of the European Union.

They also submitted that the impugned provision undermined freedom of expression and freedom of association (Articles 19 and 27 of the Constitution, Articles 10 and 11 ECHR, Articles 19 and 22 of the International Covenant on Civil and Political Rights and Articles 11 and 12 of the Charter of Fundamental Rights of the European Union).

II. With regard to the complaint concerning the violation of the principle of legality in criminal matters, the Court noted initially that because they required that every offence be prescribed by law, Article 7.1 ECHR, Article 49 of the Charter of Fundamental Rights of the European Union and Article 15.1 of the International Covenant on Civil and Political Rights had a similar scope to that of Article 12.2 of the Constitution and that accordingly and in this respect the guarantees provided by these measures formed an indissociable whole. The Court clarified these guarantees.

The Court noted subsequently that the aim of the impugned provision was to implement Framework Decision 2008/919/JAI of the Council of the European Union, which had amended Framework Decision 2002/475/JAI on combating terrorism. The wording of Article 140bis of the Criminal Code was identical moreover to that of Article 3.1.a of the Framework Decision of 2002.

The Court also noted that paragraph 14 of the preamble to the Framework Decision of 2008 stated that the offence for which it provided was an

intentional crime. The Court defined the special intent that was required in the instant case and emphasised that the courts were expected to gauge this intent not according to subjective ideas which would make the application of the impugned provision unforeseeable but with regard to the objective features of the offence, while taking account of the specific circumstances of each case.

The Court subsequently clarified how some of the terms used in the description of the offence cited above (such as “incite” and “risk”) should be interpreted and found that, although the impugned provision granted courts a considerable amount of discretion, it did not grant them the kind of independent power to define offences which would encroach on the powers of the legislature. The terms were sufficiently clear and detailed for everyone to know what type of conduct would be subject to the penalty provided for.

As to the second complaint with regard to freedom of expression and freedom of association, the Court also noted the similarity between the various reference standards relied on in the submissions and stated that they formed an indissociable whole.

The Court found that Article 140bis of the Criminal Code made it an offence to disseminate certain messages or to make them available to the public in any other way and therefore that the impugned provisions constituted a restriction of the exercise of the right to freedom of expression (Article 19 of the Constitution, Article 10 ECHR, Article 19 of the International Covenant on Civil and Political Rights and Article 11 of the Charter of Fundamental Rights of the European Union). Any such restriction had to meet the requirements laid down in Article 10.2 ECHR. They had to be necessary in a democratic society, meaning that they had to meet a pressing social need. In this connection the Court referred to the case-law of the European Court of Human Rights and to extracts from the preparatory work on the impugned provision. It also explained what the role of the court required to rule was: although it was granted considerable discretion, it could not under any circumstances pass a sentence which would entail an unwarranted infringement of freedom of expression.

The Court therefore dismissed the complaints directed against the new Article 140bis of the Criminal Code.

The Court also dismissed the complaints against the new Articles 140ter, quarter and quinquies of the Criminal Code, which punished recruitment of terrorists or training received by or given to terrorists.

Cross-references:

Constitutional Court:

- no. 125/2005, 13.07.2005, *Bulletin* 2005/2 [BEL-2005-2-012].

Languages:

French, Dutch, German.



Identification: BEL-2015-1-002

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 05.02.2015 / **e)** 13/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.02.2015 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi.**
- 1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**
- 1.4.9.4 Constitutional Justice – Procedure – Parties – **Persons or entities authorised to intervene in proceedings.**
- 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**
- 2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.14 General Principles – **Nullum crimen, nulla poena sine lege.**
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

Keywords of the alphabetical index:

Tax fraud, serious, notion / Tax, fraud, penalty, proportionality / Constitution and treaty, similar provisions / Criminal law, penalty, proportionality / Constitution and treaty, combination.

Headnotes:

Providing for an aggravation of the penalty for punishable offences which must be regarded as “serious” tax fraud is not incompatible with the principle of legality in criminal matters, which is enshrined both in the Constitution and in several treaties.

Summary:

I. The non-profit-making association the “*Ligue des Contribuables*” (Taxpayers’ League) applied for the provisions of the Law of 17 June 2013 which relate to the “fight against tax fraud” to be set aside. These provisions amend several laws so as to provide for an aggravation of the penalty when punishable offences must be regarded as “serious tax fraud”.

The “*Orde van Vlaamse balies*” and a lawyer asked to intervene in the proceedings in support of the application.

The applicant and the intervening party argued that the notion of “serious” tax fraud was too vague and hence incompatible with the principle of legality in criminal matters. They submitted that there had been a breach of Articles 12.2 and 14 of the Constitution, read in conjunction with Article 7.1 ECHR and Article 15.1 of the International Covenant on Civil and Political Rights.

The Council of Ministers, whose task it is to defend the federal law contested before the Court, began by raising several objections of inadmissibility.

II. The Court accepted, in accordance with its established case-law, that an association whose aims according to its statutes included defending taxpayers’ interests and which pursued, in particular, respect for the principle of legality in tax matters, had a sufficient collective interest in contesting a provision which could affect the social goal of this association directly and unfavourably.

In the Court’s opinion, the interest of the “*Orde van Vlaamse balies*” and a lawyer in intervening was not sufficiently direct.

The Court noted firstly that Articles 12 and 14 of the Constitution and Articles 7.1 ECHR and 15.1 of the International Covenant on Civil and Political Rights had a similar scope and therefore formed an indissociable whole in that they required that all offences be prescribed by the law.

By assigning the legislature the power to determine in which cases criminal proceedings were possible, Article 12.2 of the Constitution guaranteed to all citizens that their conduct could only be punished in accordance with rules adopted by a democratically elected deliberative assembly.

In addition, the principle of legality in criminal matters, which derived from the aforementioned constitutional and international provisions, stemmed from the idea that the criminal law had to be framed in terms which enabled everyone to know, when he or she adopted a form of conduct, whether it was punishable. It required that it be stated in legislation, in sufficiently clear and detailed terms affording legal certainty, what acts would be punished, firstly so that someone adopting a particular form of conduct could satisfactorily assess in advance what the criminal consequences of that conduct would be and, secondly, so that courts were not granted too much discretion.

However, the principle of legality in criminal matters did not prevent the law from granting the courts some discretion. Account had to be taken of the general nature of laws, the diversity of situations to which they applied and new developments in the types of conduct they were designed to punish.

The Court noted that the impugned provisions formed part of the action taken following a parliamentary inquiry into some major cases of tax fraud and that the fight against tax fraud was, according to the preparatory work for the impugned law, one of the main social objectives of modern Western societies.

The impugned provisions had not created a new offence. They simply provided for an aggravation of the penalty when conduct whose punishable nature had already been established could be classed as “serious”. Furthermore, only the maximum length of the prison sentence could be increased to five years. The impugned provisions did not affect the minimum length of prison sentences or the possible amounts of fines.

The Court found that although the impugned provisions granted courts a considerable amount of discretion, they did not give them the kind of independent power to define offences which would encroach on the powers of the legislature. The legislature could, without fear of breaching the principle of legality, instruct the courts to assess the degree of seriousness beyond which punishable conduct could lead to an aggravation of the penalty.

Bearing in mind the diverse situations liable to arise in practice, courts were required to assess the seriousness of punishable conduct not according to

subjective notions which would make the application of the impugned provisions unforeseeable but taking into consideration objective aspects and taking account of the specific circumstances of each case and the restrictive interpretation which prevailed in criminal law.

According to the Court, the impugned provisions did allow the perpetrators of tax fraud to know enough about what the criminal consequences of their conduct would be.

The Court added that the principle of legality required the penalty to be proportionate to the seriousness of the misconduct. In this respect the Court referred expressly to the case-law of the European Court of Human Rights and the Court of Justice of the European Union (see, *mutatis mutandis*, ECHR, 11 January 2007, *Mamidakis v. Greece*, §§ 44-48; CJEC, 27 September 2007, *Collée*, C-146/05, paragraph 40; Constitutional Court, 4 February 2010, no. 8/2010, B.12; CJEU, 3 December 2014, *De Clercq and Others*, C-315/13, paragraph 73).

The Court concluded that the impugned provisions were not in breach of the principle of legality in criminal matters and dismissed the application.

Supplementary information:

In a subsequent case, the Court, in Judgment no. 41/2015 of 26 March 2015, dismissed applications against the provisions whereby the notion of “serious, organised tax fraud making use of complex mechanisms or international processes” was replaced by several laws combating money laundering through “organised or non-organised, serious tax fraud”.

Cross-references:

Constitutional Court:

- no. 8/2010, 04.02.2010, B.12.

European Court of Human Rights:

- *Mamidakis v. Greece*, no. 35533/04, 11.01.2007.

Court of Justice of the European Union:

- C-146/05, *Albert Collée v. Finanzamt Limburg*, 27.09.2007;
- C-315/13, *De Clercq e.a. v. Belgium*, 03.12.2014.

Languages:

French, Dutch, German.



Identification: BEL-2015-1-003

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 12.02.2015 / **e)** 17/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 18.03.2015 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.3.2 Sources – Categories – Case-law – **International case-law.**

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

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

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

Keywords of the alphabetical index:

Access to court, scope / Court fee, excessive cost / Environment, protection, Aarhus Convention / Environment, protection, access to court / Right of access to court, fee, registration / Right of access to court, multiple applicants / Right of access to court, collective application, fee / Constitution and treaty, combination.

Headnotes:

The right of access to a court is a general legal principle which has to be secured to everyone in accordance with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). This right can be subject to limitations, including of a financial nature, provided that they do not impair the very essence of the right of access to a court. In itself the establishment of a register duty does not infringe this right provided that it does not place an excessive burden on one of the parties to a trial.

The Court should not act solely on the basis of the claimant's financial situation but should also carry out an objective analysis of the amount of the costs. It might also take into account the situation of the parties concerned, whether the claimant had a reasonable prospect of success, the importance of what was at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

Summary:

I. Several private individuals applied for a legislative provision to be set aside which provided that for an application to be lodged with the Permit Disputes Board (a judicial body of the Flemish Region which ruled on land-use permits) a register duty of €175 (or €100 for a suspension request) had to be paid for the application to be admissible.

The parties' interest in the application was not disputed.

Their main complaint was that, by requiring the payment, for collective applications, of a register duty of €175 per individual applicant, the impugned provision disproportionately limited the right of access to a court. They argued that the law was in breach of Articles 10, 11, 13 and 23 of the Constitution, read alone or in conjunction with Articles 6, 13 and 14 ECHR, Article 47 of the Charter of Fundamental Rights of the European Union, the general principle of access to a court and the principle of reasonableness. They also invoked a violation of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken alone or in conjunction, in particular, with several provisions of the Aarhus Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

II. The Court noted firstly that the right of access to a court was a general legal principle which had to be secured to everyone in accordance with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). This right could be subject to limitations, including of a financial nature, provided that they did not impair the very essence of the right of access to a court. In itself the establishment of a register duty did not infringe this right provided that it did not place an excessive burden on one of the parties to a trial. In this connection the Court referred to a judgment of the European Court of Human Rights (3 June 2014, *Harrison McKee v. Hungary*, §§ 27 and 28).

The Constitutional Court also noted that the European Court of Justice had found that the requirement that proceedings should not be prohibitively expensive referred to in Article 9.4 of the Aarhus Convention, did not prevent the national courts from making an order for costs in judicial proceedings provided that they were reasonable in amount and that the costs borne by the party concerned taken as a whole were not prohibitive (CJEU, 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, paragraph 26; 13 February 2014, *Commission v. the United Kingdom*, C-530/11, paragraph 44). According to the Court of Justice, it was for the court ruling on a dispute which came within the jurisdiction of the Aarhus Convention to satisfy itself that the proceedings were not prohibitively expensive for the applicants, taking into account both the interest of the person wishing to defend his or her rights and the public interest in the protection of the environment (*Edwards and Pallikaropoulos*, paragraph 35; *Commission v. the United Kingdom*, paragraph 45).

For this purpose, the Court should not act solely on the basis of the claimant's financial situation but should also carry out an objective analysis of the amount of the costs. It might also take into account the situation of the parties concerned, whether the claimant had a reasonable prospect of success, the importance of what was at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime (*Edwards and Pallikaropoulos*, paragraph 46; *Commission v. the United Kingdom*, paragraph 49).

The fact that a claimant had not been deterred, in practice, from asserting his claim was not of itself sufficient to establish that the proceedings were not prohibitively expensive for him (*Edwards and Pallikaropoulos*, paragraph 47; *Commission v. the United Kingdom*, paragraph 50).

The Court noted that the impugned register duty was charged on a per applicant basis. Consequently, a collective application, lodged by all the members of a de facto association, gave rise to the payment of a register duty of €175 or €100, times the number of applicants.

According to the Court, however, this decision by the author of the decree in no way undermined the right of access to a court, given that each individual applicant was charged only €175 or €100 as they would have been had they lodged an individual application.

In the Court's view, register duty was not an insurmountable obstacle to lodging an application with the Permit Disputes Board. Under Article 4.8.13.3 of the Flemish Regional Planning Code, applicants or intervening parties who could demonstrate that they had an inadequate income were exempted from the payment of any register duty. This exception applied regardless of whether the application was an individual one or a collective one. Consequently, the cost of proceedings before the Permit Disputes Board could not be considered prohibitive within the meaning of Article 9 of the Aarhus Convention.

Having rejected several other pleas, the Court dismissed the application.

Supplementary information:

The Court, which has jurisdiction to carry out a direct review under Articles 10, 11, 13 and 23 of the Constitution, also declared itself competent, when reviewing norms with the force of law in relation to the reference standards cited above, to check whether the provisions subject to its review were compatible with the international legal standards and European legal rules which bound Belgium and whose violation was alleged in conjunction with the aforementioned constitutional provisions.

Cross-references:

Constitutional Court:

- no. 48/2015, 30.04.2015, *Bulletin* 2012/3 [BEL-2012-3-013].

European Court of Human Rights:

- *Harrison McKee v. Hungary*, no. 22840/07, 03.06.2014.

Court of Justice of the European Union:

- C-260/11, *Edwards and Pallikaropoulos v. Environment Agency and others*, 11.04.2013;
- C-530/11, *European Commission v. the United Kingdom*, 13.02.2014.

Languages:

French, Dutch, German.



Identification: BEL-2015-1-004

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 12.03.2015 / **e)** 34/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 28.05.2015 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

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

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

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 option / Religion, declaration, obligation / Religion, education, neutrality of the State / Religion, freedom, negative / Religion, education, subject, obligatory / Education, religion or ethics classes, choice / Education, religion or ethics classes, dispensation / Religion, right not to divulge.

Headnotes:

Article 24.1.4 of the Constitution grants parents and pupils a fundamental right and requires the public authorities managing education to organise religion and non-denominational ethics classes. This provision does not entail a requirement to make a choice between instruction in one of the recognised religions and instruction in non-denominational ethics or a requirement to attend one of these classes.

Under Article 24.3 of the Constitution, everyone has the right to an education respecting fundamental rights and freedoms. Among these fundamental rights is the right of parents, guaranteed in particular by Article 2 Protocol 1 ECHR, to ensure that the education dispensed to their children by the public authorities is in keeping with their own religious and philosophical convictions. There is no reason to distinguish between religious instruction and other subjects.

Summary:

I. The Court was asked for a preliminary ruling by the *Conseil d'État* on Article 8 of the Law of 29 May 1959 amending some provisions of the legislation on

education (called the “Law on the School Pact”) and on a provision of a decree of the French Community describing the neutrality of the Community’s education.

Since the constitutional amendment of 15 July 1988, the French and Flemish Communities have had the power to regulate most of the subjects taught at school on their territories. However, under Article 24.1 of the Constitution, schools run by the public authorities are required to offer, until the end of compulsory education, a choice between instruction in one of the recognised religions or non-denominational ethics.

An application was lodged with Belgium’s Supreme Administrative Court, the *Conseil d’État* for it to set aside and suspend the enforcement of a decision by the City of Brussels refusing to exempt a pupil in the fourth year of one of the city’s secondary schools from attending religion or ethics lessons. The *Conseil d’État* accordingly requested a ruling from the Constitutional Court on the compatibility of the aforementioned legislative provisions with the constitutional rules on equality and non-discrimination (Articles 10, 11 and 24.4 of the Constitution) on the ground that they might create discrimination in the exercise of the rights and freedoms relating to worship and education (Articles 19 and 24 of the Constitution, read alone or in conjunction with Article 9 ECHR, Article 2 Protocol 1 ECHR and Article 18.4 of the International Covenant on Civil and Political Rights).

II. The Court noted that Article 24.1.4 of the Constitution granted parents and pupils a fundamental right and required the public authorities managing education to organise religion and non-denominational ethics classes. In the Court’s view, however, this provision did not entail a requirement to make a choice between instruction in one of the recognised religions and instruction in non-denominational ethics or a requirement to attend one of these classes. These requirements stemmed from the legislation on which the Court had been asked to rule.

The Court stated subsequently that under Article 24.3 of the Constitution, everyone had the right to an education which respected fundamental rights and freedoms. Among these fundamental rights was the right of parents, guaranteed in particular by Article 2 Protocol 1 ECHR, to ensure that the education dispensed to their children by the public authorities was in keeping with their own religious and philosophical convictions. On the basis of several judgments of the European Court of Human Rights, the Court stated that there was no reason to distinguish between religious instruction and other subjects.

A parallel should be drawn between the changes in the non-denominational ethics course and the revision, on 5 May 1993, of Article 181 of the Constitution, which had recognised the constitutional legitimacy of “organisations recognised by the law as providing moral assistance according to a non-denominational philosophical concept” and placed representatives of the non-denominational philosophical community and the various religious communities on an equal footing.

The Court also concluded from an examination of several provisions of the decrees of the French Community that the non-denominational ethics class could also be subjective because the person in charge of this class could show support for a particular philosophical system. Neither these classes nor the classes in religion could therefore be considered to disseminate information or knowledge that was “objective, critical and pluralistic”, as required by the case-law of the European Court of Human Rights. It should therefore be possible for pupils to be exempted from having to attend these lessons.

In addition, in order to protect their right to conceal their religious or philosophical convictions, which were primarily an entirely personal matter, the procedure to be completed to obtain this dispensation should not require parents to give reasons for their request and hence reveal their own religious or philosophical beliefs.

The Court concluded that if it was interpreted not to entail the right for parents to be granted a dispensation for their child to attend lessons in one of the recognised religions or in non-denominational ethics on a simple request requiring no other reasons to be given, the impugned legislation was in breach of Article 24 of the Constitution, read in conjunction with Article 19 of the Constitution and Article 2 Protocol 1 ECHR.

Languages:

French, Dutch, German.



Identification: BEL-2015-1-005

a) Belgium / b) Constitutional Court / c) / d) 23.04.2015 / e) 44/2015 / f) / g) *Moniteur belge* (Official Gazette), 26.06.2015 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**

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

5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings.**

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

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

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

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

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

Keywords of the alphabetical index:

Legislator, discretionary power / Penalty, administrative, municipal, appeal / Penalty, administrative, municipal, minor / Penalty, administrative, municipal, legality / Youth, protection / Prohibition from certain areas, administrative authority / Prohibition from certain areas, appeal.

Headnotes:

When legislators consider that certain breaches of laws or regulations must be punished, they have the power to assess whether it is preferable to opt for criminal or administrative penalties. The choice of one or other of these categories cannot be considered in itself to constitute discrimination. Discrimination will only have occurred if the difference in treatment deriving from this choice entails a disproportionate restriction of the rights of the persons concerned.

The right to proper administration of justice, as guaranteed by Article 6 CEDH, does not prevent an administrative penalty from being imposed by a civil

servant provided that an independent and impartial court may carry out a full review of this administrative decision.

The decision imposing the administrative penalty must contain an adequate description of the reasons on which it was based so that those affected can assess whether there is good reason to avail themselves of the remedies available to them.

Article 22bis, paragraphs 4 and 5, of the Constitution and Article 3.1 of the Convention on the Rights of the Child do not prevent legislators from determining from what age certain types of conduct may be punishable by law, but they do require them, when deciding on the forms of conduct to be punished and the procedures through which penalties will be imposed, to take account of minors' particular circumstances, especially as regards their personality and their degree of maturity.

A temporary ban on entering certain areas whose aim is not to punish an offence but to counter a threat or risk of further disturbances of public order or anti-social behaviour in future can be regarded as an administrative measure, which forms part of the powers granted to mayors to enable them to keep order in their municipalities. It is for the relevant court hearing an appeal against such a measure to ascertain whether it was strictly limited to this aim.

Summary:

I. The Constitutional Court received applications to set aside the Law of 24 June 2013 on Municipal Administrative Penalties lodged by several applicants including associations defending children's rights and human rights and trade unions.

Under this law, municipal councils were entitled to establish administrative penalties or sanctions to punish breaches of its regulations or orders and an administrative penalty was introduced to punish certain offences outlined in the Criminal Code and the legislation on road traffic policing, which are referred to as "mixed offences". Mayors could also, under certain circumstances, issue orders temporarily prohibiting persons from entering certain areas. The applicants contested many aspects of these regulations.

II. Many complaints were made against this law. The Court examined in turn whether it complied with Belgian's rules on the division of powers, the principle of legality in criminal matters, the right to respect for one's private life, the right to the proper administration of justice and the right of minors to be protected.

In the Court's view, the principle of legality in criminal matters was not infringed by:

- the possibility for municipal councils to establish administrative penalties or sanctions to punish breaches of its regulations or orders;
- the notion of "anti-social behaviour" provided that municipal councils established in concrete terms what forms of behaviour would be punished; simply engaging in any sort of anti-social behaviour was not punishable in itself;
- establishing what administrative penalties or sanctions could be imposed;
- the procedure governing the reporting of offences, the decisions of the public official issuing the penalty and appeals against such decisions.

The Court held that the fact that every municipality – or several municipalities together – kept a register of persons on whom a municipal administrative penalty had been imposed did not infringe the right to respect for one's private life.

The Law on Municipal Administrative Penalties was compatible with the right to the proper administration of justice provided that three possible interpretations of this law were compatible with the Constitution.

For instance, the Court required that the staff of public transport companies who could, within the limits of their competence, report offences that were punishable by municipal administrative penalties also satisfied certain minimum criteria in terms of selection, recruitment, training and skills, which were to be fixed by royal decree. Civil servants reporting such offences also had to meet conditions with regard to their qualifications and independence, as laid down by royal decree.

As to mixed offences, which were both criminal and administrative offences, a memorandum of agreement could be – or, for certain offences, had to be – negotiated between the college of the mayor and deputy mayors or the municipal executive body and the relevant Crown prosecutor. Such agreements specified in what cases the Crown prosecutor undertook to initiate proceedings and made it possible to set up practical arrangements to exchange information. The Court emphasised that, in order to protect the prosecution's power of investigation, which was guaranteed by the Constitution, it should be possible to amend the memorandum of agreement at any time, at the prosecution's request.

To determine whether the offence was a repeat offence, the Court insisted that no account should be

taken of a municipal administrative penalty which had not yet been the subject of a final judgment on appeal. It was only after such a judgment had been given that a previous penalty could be taken into account when imposing a new penalty.

According to the Court, the Law on Municipal Administrative Penalties provided for an effective remedy before an independent and impartial court against any administrative fine that was imposed. In addition, the absence of a right to appeal against a decision of the police court, mediation procedures or penalties designed to impose the suspension or withdrawal of an authorisation or permit and the closure of an establishment were not infringements of the right to proper administration of justice either.

The Court then examined the provision which lowered the age from which a municipal administrative penalty could be imposed on a minor from sixteen to fourteen. It emphasised that when establishing what forms of conduct should be punished and organising the procedure by which penalties would be imposed, the particular circumstances of minors should be taken into account, especially in terms of their personality and degree of maturity. According to the Court, the law on municipal administrative penalties included various safeguards so that it did not undermine these minors' rights.

One of these safeguards was the right for minors to ask the public official imposing the penalty to allow them to present their defence orally. In the Court's view minors always had the right to be heard. Any other interpretation would, moreover, be incompatible with the Convention on the Rights of the Child. The Court held that, subject to this interpretation, lowering the age limit to fourteen did not infringe minors' rights.

The Court also found that the parental involvement procedure, the local mediation procedure and the citizen service system did not infringe minors' rights.

The Law on Municipal Administrative Penalties also added a new article, Article 134*sexies*, to the New Municipal Law, under which mayors were entitled, in the event of disturbances to public order caused by individual or collective behaviour or repeated infringements of the regulations and orders of the municipal council, committed in the same place or during similar events and involving a breach of the peace or anti-social behaviour, to order that a person or persons be temporarily forbidden from entering certain areas. A prohibition order of this type was valid for only one month, renewable twice, and limited to specific publicly accessible places within precise bounds.

The Court considered, however, that repeated infringements of the regulations and orders of the municipal council were not enough in themselves to justify temporary prohibition from certain areas. Mayors had to ascertain that these repeated offences caused public disorder or anti-social behaviour.

As to the scope of such prohibition orders, the Court held that the length of prohibition should not exceed one month, albeit renewable, and could not relate to a wider area than was necessary to prevent or put a stop to the public disorder. The prohibition order could relate only to an accurately defined area within precise bounds. It could not therefore cover a neighbourhood or a series of streets in the municipality in general and abstract terms.

Since temporary prohibition from certain areas was not a criminal penalty but an administrative measure, the principle of legality in criminal matters did not apply and the right to the proper administration of justice was guaranteed by an effective remedy before an independent and impartial court, namely in this case the *Conseil d'État*.

Supplementary information:

See also Judgment no. 45/2015 of 23 April 2015, which ruled on the application to set aside the Law of 19 July 2013 amending the Law of 8 April 1965 on youth protection, the handling of minors who have committed an act considered to be an offence and compensation for the damage caused by this act.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2015-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 26.03.2015 / **e)** U 14/12 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Election, candidacy, restriction / Aim, legitimate / Peace.

Headnotes:

The exclusion of citizens of Bosnia and Herzegovina, who are not members of the three constituent peoples under the Constitution (Bosniaks, Serbs and Croats), from the possibility of standing in elections for President and Vice-Presidents of the Entities (i.e. the sub-state territories comprising the State of Bosnia and Herzegovina), is unconstitutional and contrary to the European Convention on Human Rights. Given that the right to stand for election without discrimination and restrictions is guaranteed by law, the exclusion of so-called 'Others' (i.e. those not members of the constituent peoples) no longer represents the only way to achieve the legitimate goal of preserving peace in the post-war state, meaning that it cannot have a reasonable and objective justification.

Summary:

I. The applicant challenged constitutional provisions of the two parts ('Entities') of the the state of Bosnia and Herzegovina (the *Republika Srpska* and the Federation of Bosnia and Herzegovina). The applicant argued that these provisions, which provide

that the Presidents and Vice-Presidents must come from among the three constituent peoples, comprising Bosniaks, Croats and Serbs (alongside express provisions of the Election Law), constitute a violation of the Federal Constitution of Bosnia and Herzegovina and of the European Convention on Human Rights in relation to those who are counted as 'Others', i.e. not members of any of the three constituent peoples.

In addition, the applicant argued that the challenged provisions are contrary to the judgment of the European Court of Human Rights in the case of *Sejdić and Finci v. Bosnia and Herzegovina* in 2009, given that they make it impossible for 'Others' to participate equally in the exercise of these public functions. The European Court of Human Rights, in that judgment, had found that the electoral rules precluding persons who self-identified as 'Others' from standing as candidates in presidential elections violated the prohibition of discrimination in Article 14 ECHR, taken in conjunction with the right to free elections in Article 3 Protocol 1 ECHR.

The applicant, *inter alia*, contended that the existence of differential treatment, and the analogous situation raised by the challenged provisions of the Entities' constitutions and the Election Law, is reflected in the fact that each person is guaranteed the right to run for office in elections without discrimination, but that, in accordance with the challenged provisions of the Entities' constitutions and the Election Law, persons not belonging to the constituent peoples cannot appear on lists of candidates for President and Vice-Presidents. In other words, such persons are prevented from running for any of the mentioned offices.

II. The Constitutional Court considered the alleged violation of Article 14 ECHR in conjunction with Article 3 Protocol 1 ECHR. Given that Article 3 Protocol 1 ECHR relates to legislatures, the Constitutional Court held that the analysis of this question does not indicate that the President of the *Republika Srpska* and President of the Federation of Bosnia and Herzegovina have powers to initiate or adopt laws or that they have more extensive powers to control the adoption of laws or powers to control basic legislative bodies in order to hold that there is a "legislature" within the meaning of Article 3 Protocol 1 ECHR. Taking into account the aforesaid, the request in question does not raise an issue under Article 14 ECHR in conjunction with Article 3 Protocol 1 ECHR. In this respect, the Constitutional Court dismissed this part of the application as ill-founded.

Furthermore, the Court held that it follows from the applicant's allegations that the challenged provisions

of the Entities' constitutions and the Election Law introduced discrimination against 'Others' with respect to their exercising the right to stand for election and to be possibly elected, being a right guaranteed by law. 'Others' are denied the right to run for office of the President and Vice-Presidents of the Entities solely on the ground that they are not members of one of the constituent peoples. This, according to the applicant's allegations, runs counter to Article II.4 of the Constitution and Article 1 Protocol 12 ECHR, which sets out a general prohibition on discrimination (unlike Article 14 ECHR, which solely protects against discrimination when connected to a specific Convention right).

The Constitutional Court considered that it must answer the question whether the challenged provisions establish differential treatment without an objective and reasonable justification against the persons who are in a similar position. The Court observed that the Election Law guarantees the right to vote and to stand for election to all citizens of Bosnia and Herzegovina. The Law on Citizenship stipulates that all citizens of Bosnia and Herzegovina enjoy the same human rights and fundamental freedoms as laid down in the Constitution and enjoy the protection of these rights throughout Bosnia and Herzegovina, under the same conditions. On the basis of the mentioned provisions it follows indisputably that the notion of the citizens of Bosnia and Herzegovina, which guarantees the rights to vote and to stand for election in terms of Article 1.4 of the Election Law, implies constituent peoples and 'Others'. In that respect, the challenged provisions of the Entities' constitutions and the Election Law, which exclude the possibility for 'Others', as citizens of Bosnia and Herzegovina, to run for office of the President and Vice-Presidents of the Entities, guaranteeing that possibility exclusively to the constituent peoples as the citizens of Bosnia and Herzegovina, establish differential treatment "between the persons who are in a similar (or the same) position", on the basis of ethnic origin.

The Court then turned to the question of whether the differential treatment was established without an objective and reasonable justification. The Constitutional Court recalled that the distribution of positions in state bodies among the constituent peoples was the central element of the Dayton Peace Agreement of 1995, in order to secure peace in Bosnia and Herzegovina. In that context it is hard to deny the legitimacy of norms that may be problematic from the point of view of non-discrimination, but which were necessary in order to secure peace and stability and to avoid further loss of human lives. The challenged provisions of the Entities' constitutions and the Election Law concerning the distribution of the offices

of the President and Vice-Presidents of the Entities among the constituent peoples, although built into the Entities' Constitutions in the process of the implementation of the Third Partial Decision of the Constitutional Court no. U 5/98, serve the same goal.

In that respect, the Constitutional Court observed that the legitimacy of the goal of securing peace was not called into question by the European Court in the light of the European Convention on Human Rights (see the judgment of the European Court of Human Rights in *Sejdić and Finci v. Bosnia and Herzegovina*, paragraph 46). However, this justification must be considered in connection with the development of events in Bosnia and Herzegovina following the Dayton Agreement. The Constitutional Court pointed out that it is undisputed that positive progress has been made in the development of Bosnia and Herzegovina as a democratic state and in the democratic institutions achieved on the basis of the functioning of the system of power-sharing, which excluded 'Others' from access to a number of public offices, as regulated by the challenged provisions. It is indisputable that such a system has a justification in the legitimate goal reflected in the preservation of peace, which is a value in the service of the society as a whole. It is in the service of the establishment and preservation of security and stability, as a precondition for the preservation of the progress achieved and of the further development and the building of the society and the building of trust between the former conflicting parties.

The next question to be answered was whether the only way to achieve the legitimate goal determined in such a way is by imposing restrictions as in the challenged provisions with respect to a certain group regarding the exercise of the right established under the law, which is guaranteed to everyone without discrimination.

The Constitutional Court recalled that, in accordance with Article I.2 of the Constitution, Bosnia and Herzegovina is defined as a democratic state operating under the rule of law and with free and democratic elections. In accordance with Article II.1 of the Federal Constitution, Bosnia and Herzegovina and both Entities will ensure the highest level of internationally recognized human rights and fundamental freedoms. Besides, in accordance with Article II.4 of the Federal Constitution, rights and freedoms provided for in Article II or in the international agreements listed in Annex I to this Constitution will be secured to all persons in Bosnia and Herzegovina without discrimination on any ground. These provisions suggest the establishment of the principle of a democratic state, the rule of law and free elections, which will have that same specific significance as in the developed democratic countries with a long-

standing practice of the establishment thereof.

The legitimate goal which is reflected in the preservation of peace for a country following war represents the permanent value to which society as a whole must be dedicated, the significance of which cannot be diminished by the lapse of time and progress made in democratic development. In that respect, the Constitutional Court could not accept that at this point in time the existing power-sharing system, which is reflected in the distribution of the public offices among the constituent peoples, as regulated by the challenged provisions, and which serves the legitimate goal of the preservation of peace, can be abandoned and replaced by a political system reflecting the rule of majority.

However, the question that arises is whether the only way to achieve the legitimate goal and preserve peace is still the exclusion of 'Others' from standing for election as candidates for, particularly, the office of the President and Vice-Presidents of the Entities. When one considers, on the one hand, the principles of the rule of law, the standards of human rights and the obligation of non-discrimination in their enjoyment and protection, the positive development made by Bosnia and Herzegovina ever since the signing of the Dayton Agreement, the international obligations it assumed also in the area of exercising and protecting human rights, and the clear commitment to the further democratic development, the exclusion of 'Others' from exercising one of the human rights which constitutes the foundation of a democratic society can no longer represent the only way in which to achieve the legitimate goal of preserving peace.

This is particularly so when one bears in mind that such an exclusion was established expressly on ethnic affiliation, which cannot be objectively justified in the contemporary democratic societies built on the principles of pluralism and respect for different cultures, which Bosnia and Herzegovina society is and which it aspires to. The Preamble of the Constitution, according to which the Constitution is based on respect for human dignity, liberty and equality and which indicates that democratic governmental institutions and fair procedures are the best means of producing peaceful relations within a pluralist society, is also suggestive of this conclusion.

The Constitutional Court concluded that the provisions of Article 80.2.4 (Item 1.2 of the Amendment LXXXIII) and Article 83.4 (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII) of the Constitution of the *Republika Srpska*, Article IV.B.1, Article 1.2 (amended by the Amendment XLI) and Article IV.B.1, Article 2.1 and 2.2 (amended by the Amendment XLII) of the Constitution of the Federation

of Bosnia and Herzegovina, and Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law, are in contravention of Article II.4 of the Federal Constitution of Bosnia and Herzegovina and Article 1 Protocol 12 ECHR. In exercising the right guaranteed by law, the mentioned provisions of the Entities' constitutions and the Election Law establish the differential treatment of 'Others', which is based on ethnic affiliation and which result in discrimination contrary to Article II.4 of the Federal Constitution and Article 1 Protocol 12 ECHR.

The Constitutional Court held that the challenged provisions of Articles 9.15, 12.1 and 12.2 of the Election Law are in conformity with Article II.4 of the Constitution and Article 1 Protocol 12 ECHR. The Constitutional Court observed that these provisions, although in the service of the regulation of the election process of the President and Vice-Presidents of the Entities, do not *per se* restrict and exclude the members of 'Others' from exercising their right to stand for election, being the right guaranteed by law, which would result in the discrimination contrary to Article II.4 of the Constitution and Article 1 Protocol 12 ECHR.

III. A Joint Partly Dissenting Opinion of President Valerija Galić, Vice-President Miodrag Simović and Judges Mato Tadić and Zlatko M. Knežević has been annexed to the decision (concerning the part of the decision granting the request).

Cross-references:

European Court of Human Rights:

- *Sejdic and Finci v. Bosnia and Herzegovina*, nos. 27996/06 and 34836/06, 22.12.2009, *Reports of Judgments and Decisions* 2009.

Languages:

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



Identification: BIH-2015-1-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 09.07.2015 / **e)** U 18/14 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality.**

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

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

Keywords of the alphabetical index:

Management, collective, copyright / Non-discrimination principle / Property, control and use.

Headnotes:

Prescribing the mandatory collective management of copyrights and related rights in specific cases does not constitute such a restriction of copyrights and related rights as to be contrary to the right to freedom of assembly, the right to property or the prohibition against discrimination in the Constitution or the European Convention on Human Rights.

Summary:

I. The applicants lodged a request for review of constitutionality of a number of provisions of the Law on the Collective Management of Copyright and Related Rights (hereinafter, the "challenged Law").

The applicants argued that the legal framework regulating the exercise of copyrights and related rights through the mechanism for collective management of rights, mandatory collective management of copyright and related rights in certain cases, the imposition of a legal basis for collective management of rights, the prohibition on the exemption of certain works, and the legal presumptions of collective management of rights, as prescribed by the challenged Law, constitute such a restriction of the copyright and related rights that is contrary to the right to property guaranteed in Article II.3.k of the Constitution and Article 1 Protocol 1 ECHR.

The applicants also claimed that the impugned provisions amounted to discrimination contrary to Article II.4 of the Constitution and Article 14 ECHR, in conjunction with Article 1 Protocol 1 ECHR. They complained of direct discrimination against those authors who did not enter into contracts with the collective organisation, compared to authors who entered into such contracts with regards to the distribution of revenues collected by the collective organisation.

The applicants also argued that the challenged provisions violate the right to freedom of assembly in Article II.3.i of the Constitution and Article 11 ECHR, because the Law accords a monopoly position to the collective organisation.

II. The Constitutional Court first noted that the legislator decided to regulate the issue of collective management of copyright by imposing a special law and it did so by adopting the challenged Law. The legislator chose a restrictive list of cases in which copyright must be exercised through a collective organisation, two of which being based on the appropriate regulations of the European Union. The remaining two cases are the result of the legislator's efforts to ensure for authors the exercise of their rights, which otherwise they could not exercise or could hardly exercise. The legitimate aim of such a restriction of the author's free will in the management of his or her property authorisations (collection of remuneration), not the deprivation of copyright, and it is established in the interest of the holder's copyright and related rights and, consequently, in the general interest.

The Court held that such an arrangement serves a legitimate aim and that the measure undertaken is proportionate to that aim, as required by Article 1 Protocol 1 ECHR on the right to property. The challenged provisions do not call into question in any way whatsoever the very essence of the copyright. Copyright still belongs to the author and there is nothing to indicate that the impugned provisions enable the collective organisation to use the copyright "against the author's will" or to dispose of it as it wishes. The management of the copyright and related rights implies solely the collection of remunerations on behalf of the author.

Moreover, the challenged Law provides for a presumption that the collective organisation, within the scope of the right and the type of work for which it is specialised, is authorised to act for the benefit of all authors and stipulates that any author who does not wish to exercise his or her rights on a collective basis is obliged to inform the appropriate collective organisation of it. Moreover, an author may choose to exercise his or her right individually. In such a case, the collective organisation is excluded.

The Constitutional Court also noted that the challenged Law stipulates that the collective organisation may not refuse a request for the conclusion of a contract for the collective management of rights, which, again, protects any author who wishes to regulate his or her relationships with the collective organisation by concluding a contract. Furthermore, the challenged Law prohibits the

exemption of particular works or particular forms of the use of such works from the collective management of rights, unless otherwise stipulated in the contract between the author and the collective organisation. The Court noted that the aim of such a provision, generally forbidding the authors to arbitrarily decide which rights they will exercise collectively and which of them they will exercise individually, is to facilitate the implementation of collective management of rights for the collective organisations and users of works.

The Court held that the impugned provisions do not indicate anything which would lead to the conclusion that the authors are deprived of their right as defined in the relevant provisions of the challenged Law or to the conclusion that the collective organisation, based on the impugned provisions, may dispose of the author's right without his or her consent. The Court concluded that the exercise of copyrights in such a way does not constitute a restriction of copyright and related rights that would be contrary to the right to property.

Regarding the applicants' arguments concerning the discriminatory impact of the Law, the Constitutional Court considered that it follows from the reasoning of the proposer of the challenged Law that the main aim of the challenged Law was to achieve harmonisation of the regulations in this matter with *acquis communautaire* and that the concrete aim of the provision, related to the distribution of revenues collected by the collective organisation, was to achieve proportionality, appropriateness, equality and to avoid arbitrariness whatsoever.

The Constitutional Court held that it is obvious that these are legitimate aims sought to be achieved. The Constitutional Court reiterated that law establishes a presumption that a collective organisation is authorised to act for the benefit of all authors. However, as the rights at issue may be nevertheless exercised individually, such a presumption may cease to be applicable and produce legal effects from the moment the author who does not want his or her rights to be managed collectively informs the relevant collective organisation of that in writing. In order to participate in the distribution of remunerations collected by the collective organisation, authors must be the members of such an organisation, i.e. must conclude a contract with it, which is an implicit requirement. The Court considered that such an arrangement has a reasonable justification. In particular, the collective organisation shall carry out all the tasks within the scope of its activity in such a manner as to ensure the achievement of the maximum possible level of effectiveness, good business practice, economic efficiency and transparency.

The Constitutional Court noted that the only obligation placed on authors, who wish the collective organisation to act for their benefit, is to conclude a contract with that organisation, which, according to the Court, cannot be considered an excessive burden placed on them. It would be certainly impossible to foresee the number of authors on the entire territory on which the collective organisation performs its activities and the number of works in respect of which it collects remunerations. This is the reason why the authors themselves need to identify themselves either through a request for conclusion of a contract with the collective organisation, or through a declaration to the effect that they want the collective organisation to act for their benefit.

Furthermore, in order for an association to have the status of a collective organisation it must submit, along with the request, the indication of the number of authors who have authorised a legal entity to manage the rights in their works, as well as a list of works included in the repertoire of the collective organisation. After having obtained a licence, a collective organisation may not refuse a request for the conclusion of a contract for the collective management of rights in the area of its activity so that it cannot prevent the author in any way whatsoever from concluding a contract in order to obtain membership of the organisation.

Thus, the obligation placed on the collective organisation to treat equally authors who are members and non-members should be understood by applying a teleological interpretation, in the context of all the aforesaid, not by applying the linguistic interpretation solely and independently, which was done by the applicants. The Constitutional Court accordingly held that the challenged provisions did not constitute discrimination in contravention of the Constitution and Article 14 ECHR, in conjunction with Article 1 Protocol 1 ECHR.

As regards the applicants' arguments concerning the conferral of a monopoly to the collective organisation, after analysing comparative law and case-law the Constitutional court concluded that the monopoly position of collective organisations is not *per se* inadmissible. Quite the contrary: it is necessary to be considered from the legal and factual point of view, taking into account all specific circumstances. The challenged Law accorded a monopoly position to a collective organisation, but also prescribed the standards of operation of a collective organisation, under which the organisation shall carry out all the tasks within the scope of its activity in such a manner as to ensure the achievement of the maximum possible level of effectiveness, good business practice, economic efficiency and transparency. It is

also obliged to adhere to international and generally accepted rules, standards and principles which apply to collective rights management.

Besides, a collective organisation may perform the activity of collective management of copyright and related rights as its sole activity not for profit, and thus acts not in its name, but exclusively for the account of the author. It is rather important that the challenged Law prescribed the control of the work of a collective organisation through independent supervision by authors and through State control. The proponent of the challenged Law, in the reasoning of the proposal of the text of the Law, stated that this monopoly status of collective organisations is necessary for the very nature of their business and for the greater efficiency and rationalisation of their business operations.

The Constitutional Court also observed that protection against any abuse of this monopoly position may be exercised also on the basis of the Competition Act. The Court concluded that the legislator, as part of its wide margin of appreciation, decided that in the present factual and legal circumstances it is appropriate to apply a model that is well-known in a large number of other countries, and to grant a monopoly position to such an organisation. The Court observed that the legislator prescribed and established the mechanisms of control of the monopoly position of a collective organisation in an appropriate manner, both, in the challenged Law and procedure-wise in the Competition Act.

As to the objection holding that authors' right to freedom of assembly is restricted, the Court considered that the challenged Law carries nothing that may be construed as precluding a specific number of authors from founding their own association and to authorise it to manage their respective rights.

The Constitutional Court accordingly concluded that prescribing the monopoly position of a collective organisation for managing copyrights and related rights has a legitimate goal – the effective exercise of rights and the protection of authors and users – and that such a solution is proportionate to the goal sought to be achieved. In the Court's view, the Law established reasonable mechanisms for oversight of the work of the collective organisation and measures prescribed for preventing the abuse of such organisations' monopoly position. In addition, the challenged Law carries nothing leading to a conclusion that such a solution, limiting the number of collective organisation for the collective management of the same type of rights on the same type of works, constitutes a restriction on the freedom of assembly.

Languages:

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



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2015-1-001

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 11.06.1992 / **e)** 383 / **f)** Constitutional Claim / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 21.05.1993 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.11.1 Constitutional Justice – Jurisdiction – The subject of review – Acts issued by decentralised bodies – **Territorial decentralisation.**

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

Keywords of the alphabetical index:

Constitution, federal and regional / Constitutional Court, federal and regional, relation / Municipality, constitutional complaint.

Headnotes:

The State Courts are competent to hear direct actions asserting the incompatibility of municipal provisions with the State Constitution, even when the norm of the State Constitution is a reproduction of the Federal Constitution norm that binds all levels of the Federation.

Summary:

I. This case refers to a constitutional claim filed against a decision of the State Court that, in a direct action challenging the compatibility of a municipal rule with the State Constitution, granted a preliminary injunction. The challenged municipal rule established progressive rates for property tax and urban land. The applicant argued that the municipal jurisdiction to establish such tax derives from the Federal Constitution and it is not bound to the State Constitution. Therefore, although the direct action indicates violation of the State Constitution, it requests the State Court to assess the compatibility of a municipal rule with the Federal Constitution, since such state rules are a mere reproduction of the

federal rules that bind all levels of the Federation. The applicant argued that this violated the Supreme Court's competence to deliver a final decision on interpretation of the Federal Constitution.

II. The Supreme Court, by a majority vote, denied the constitutional claim. The Court acknowledged, initially, that the State constitutions reproduce several rules of the Federal Constitution, which are binding on all levels of the Federation. However, the challenged direct action was appropriate, since the cause of action was violation of the State Constitution. Thus, the State Court is competent to assess the nature of the violated norms (whether state or federal) and could eventually decide the case strictly on grounds of the state norms (which do not reproduce norms binding on all levels of the Federation).

Moreover, the Court held that, if the thesis that the State Courts have no competence to enter judgment on state rules that reproduce mandatory federal norms prevails, it would hinder the possibility of an intervention of the State regarding the actions of municipalities, as provided in Article 35.IV of the Federal Constitution. That is because, in such cases, the State Courts shall decide if there is a violation of a constitutional principle in order to authorise the intervention. If the violated principle was a federal principle of mandatory reproduction, the State Courts would have no competence, which would hinder the possibility of a State intervention in the municipality.

The Court highlighted, also, that, under the Brazilian law, federal rules do not prevail over state rules. Furthermore, the Court stated that its competence would not be limited, as, in the cases of direct actions asserting the incompatibility of municipal rules with State constitutions, where federal rules of mandatory reproduction were interpreted, an extraordinary appeal could be filed, which would bring the matter before the Supreme Court.

III. In dissenting opinions, a number of Justices stated that the direct action of unconstitutionality would not be appropriate, since the state provisions would only reproduce federal rules that are of mandatory compliance to all levels of the Federation. The Justices explained, in this sense, that there are three categories of jurisdiction in federations: the general legal system (Federated Republic of Brazil), the central legal system (Federal Government) and the local legal systems.

The general legal system sets rules not only applicable to the Federal Government, but to all members of the federal State. Thus, the violation of state constitutional provisions that reproduce the general legal system rules does not violate the local

legal system, but the Federal Constitution. As such, it would be exclusively the Supreme Court's competence to issue judgments in a direct action of unconstitutionality that would be grounded on the rules of the general legal system. Therefore, it would not be appropriate to file a direct action before the State Court that aims at applying rules of the general legal system, even though such rules were reproduced in the State Constitution.

Cross-references:

- Article 35.IV of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-1-002

a) Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 30.04.2002 / **e)** 222.368 / **f)** Internal Appeal on Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 14.02.2003 / **h)**

Keywords of the systematic thesaurus:

4.16 Institutions – **International relations.**

Keywords of the alphabetical index:

Foreign state, immunity / Immunity from execution / Immunity from jurisdiction / Immunity, judicial, foreign state.

Headnotes:

In disputes of a private nature, foreign states do not enjoy absolute immunity from jurisdiction, but do enjoy immunity from execution of judgments. The immunity from execution may be refused if the foreign state waives it or if it has assets that are not bound to the essential purposes of diplomatic activity.

Summary:

I. This case refers to an internal appeal filed against the Supreme Court's refusal to hear an extraordinary

appeal. The challenged decision established that foreign states have no immunity from labour cases, but have immunity from execution of judgments in such cases. The appellant argued that it is not harmful to set aside the immunity from jurisdiction in view of the ineffectiveness of the jurisdictional provision, because of the immunity from execution.

II. The Second Panel of the Supreme Court, by unanimous vote, denied the internal appeal. The Court acknowledged that, initially, immunity from jurisdiction was regarded as absolute. However, this understanding was overruled in order to consider the immunity relative, in disputes of a private nature, mainly in labour cases. Such change resulted from legislative innovations in the international sphere (such as the European Convention on State Immunity of 1972) and in the internal rules of several countries.

On the other hand, immunity from execution still applies and it may only be refused if the foreign state waives it or if it has assets that are not bound to the essential purposes of diplomatic activity. Nonetheless, the Court held that immunity from execution does not interfere with immunity from jurisdiction, as they are recognisably different prerogatives, which, among other features, require specific waiver for each one. Moreover, the impossibility of execution does not prevent the ruling from being applied spontaneously.

Cross-references:

- European Convention on State Immunity of 1972.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-1-003

a) Brazil / **b)** Federal Supreme Court / **c)** Plenum / **d)** 12.05.2010 / **e)** 2.182 / **f)** Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 168, 10.09.2010 / **h)**

Keywords of the systematic thesaurus:

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

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

4.5.6.5 Institutions – Legislative bodies – Law-making procedure – **Relations between houses.**

Keywords of the alphabetical index:

Legislative procedure.

Headnotes:

Amendments to a bill, made by the revising House, that only introduce formal changes of legislative technique, are not substantive amendments. In this case, the bill does not have to pass again through the House where the legislative procedure had begun.

Summary:

I. This case refers to a direct claim of unconstitutionality filed against Law 8429/1992 (Administrative Dishonesty Act), which establishes penalties for public officers found guilty of unjust enrichment while holding a mandate or a public office in the government, in governmental agencies and in governmental foundations.

The applicant challenged the constitutionality of the law on the basis of a formal defect during the legislative procedure. He explained that the bill that was first introduced in the House of Representatives was significantly modified in the Federal Senate. When it returned to the House of Representatives, a third version was consolidated and sent for presidential approval. Nevertheless, it was not re-sent to the Federal Senate to be revised. Thus, the legislative procedure breached Article 65 of the Federal Constitution, according to which a bill that is approved by one House must be revised by the other House and sent for approval or promulgation; but, if there is an amendment, it must return to the House where it had originated.

II. The Supreme Court, by majority vote, denied the direct claim of unconstitutionality. Preliminarily, the Court analysed if review of the substantive unconstitutionality of the law was possible, as the cause of action only indicated the formal defect. The Court held, by majority, that, in this case, review of the substantive constitutionality of the law would be impossible, due to the limited cause of action, otherwise the Court would have to analyse the whole law, under all the norms of the Constitution. However,

the Court also stated that, due to the open cause of action in constitutional objective procedures, it could review the constitutionality of the law under other grounds, different to the ones indicated by the plaintiff.

On the merits, the Court denied the claim, as it reviewed the law only with regard to the formalities followed for its enactment. The Court stated that, although the original bill had thirteen articles and in the Federal Senate the number of articles was increased to thirty seven, the amendments were more about legislative technique than about the substance of the law. Therefore, the bill that passed in the Senate was not a new bill, but only a revision of the original one, and a second revision by the Senate was unnecessary.

III. In a separate opinion, a concurring Justice argued that the amendments were not only formal ones, but substantive amendments, as they added new rules about administrative acts. However, the return of the bill to the revising House would be unnecessary, because the House of Representatives had rejected the bill that passed in the Senate and had approved the original bill, with some additions.

In another separate opinion, a dissenting Justice argued that the amendments constituted a new bill. When the matter returned to the House where it had originated, it became a third version. Such third version should have been sent to the revising House, as the matter must be analysed by both Houses of Congress.

Cross-references:

- Article 65 of the Federal Constitution;
- Law 8429/1992.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-1-004

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 24.11.2010 / **e)** 16 / **f)** Declaratory Claim of Constitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 09.09.2011 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Contract, administrative / Employee, damages, liability / State, liability, pecuniary.

Headnotes:

Default by a contracted company concerning labour charges does not transfer to the Government, by itself, the liability for the payment of labour charges due. The liability of the State only occurs in exceptional circumstances and only where it is proved that the State failed in its duty of supervision, by guilt *in vigilando*, i.e. failure to exercise its supervisory and regulatory powers to ensure payment of labour charges.

Summary:

I. This case refers to a declaratory claim of constitutionality aimed at recognising the validity of Article 71.1 of Law 8666/1993, according to which it is not possible to transfer to the State, among others, liability for the payment of labour charges not honoured by companies contracted to render services for the Government.

II. The Supreme Court, by majority, granted the claim and declared the constitutionality of Article 71.1 of Law 8666/1993. The Court held that the default of the contracted company does not transfer to the Government, by itself, the responsibility for the payment of labour charges due. This is because the non-payment of these charges does not generate an employment relationship between the Government and the employees of the private company. In this situation, the liability of the State only occurs in exceptional circumstances and only if proved that there was a failure in its duty of supervision, by guilt *in vigilando*, i.e. failure to exercise its supervisory and regulatory powers to ensure payment of labour charges.

Moreover, the Court highlighted that the automatic liability of the State would imply a double burden, because the government would have to fulfil both its regular contractual obligations and the company's duties.

III. In a separate opinion, a dissenting Justice argued that the liability of the State would be possible, since the Government would have benefited from the labour of the contracted company workers.

Cross-references:

- Article 71.1 of Law 8666/1993.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2015-1-005

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 27.04.2011 / **e)** 30.260 / **f)** Petition for a writ of mandamus / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 166, 30.08.2011 / **h)**.

Keywords of the systematic thesaurus:

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

4.9.12 Institutions – Elections and instruments of direct democracy – **Proclamation of results.**

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

Keywords of the alphabetical index:

Election, coalition / Parliament, member, alternate.

Headnotes:

A vacant seat in the House of Representatives, due to the absence of a representative, must be filled by the deputy representative of the coalition of parties established in the elections, not by the deputy representative of the party to which the absent representative belongs.

Summary:

I. This case refers to a preventive petition for a writ of *mandamus* filed by the applicant who wished to be accorded a vacant seat in the House of Representatives due to the absence of a representative. He argued that a vacant seat in Parliament belongs to the party of the absent representative, not to the coalition of parties

established in the elections. In the information for the Court, the public official responsible for the impugned act asserted that the applicant's claim was illegitimate, on the basis that only the political party could file this claim. As a separate matter, the public official also argued that the claim had been rendered moot, because the deputy representative of the coalition had already been nominated to fill the vacant seat; thus, the threat to a right (requirement of the request for a writ of *mandamus*) no longer existed.

II. Preliminarily, the Supreme Court decided, unanimously, that the applicant, as well as the party, has legitimacy to file the preventive request for a writ of *mandamus*, because he would be the effective nominee to fill the vacant seat.

On the merits, by majority vote, the Court decided that the vacant seat due to the absence of a representative belongs to the deputy representative of the electoral coalition. The Court highlighted that Article 17 of the Federal Constitution allows political parties to freely bind together in electoral coalitions, in order to achieve better electoral results, helping small parties to elect their candidates. With such a bond, each party loses its individuality and is presented to voters as a coalition. Whereas the Brazilian electoral system for the election of representatives is based on proportional representation, the electoral quotient helps the division of seats in the House of Representatives to the candidates who receive the most votes, of the coalition as a whole. In this system, the party has no influence on the result. Even if the coalition is undone after the elections, its effects on the order in which parliamentary seats are to occupied remains valid throughout the entire legislative term, in order to respect the decision of voters.

III. In a separate opinion, a dissenting Justice stated that the vacant seat always belongs to the party. Article 112.I of the Electoral Code establishes that the deputy is the candidate of the party who has received the most votes. Besides, voters do not vote for the coalition, but for the candidate himself or herself, who belongs to a particular party. Furthermore, the coalitions presented at the elections should not be the parameter of reference, because they are undone after the elections, and the alternation of seats among different parties would violate the required party-political stability during a legislative term.

Cross-references:

- Article 17 of the Federal Constitution;
- Article 112.I of the Electoral Code.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2015-1-006

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 10.08.2011 / **e)** 598.099 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 189, 03.10.2011 / **h)**.

Keywords of the systematic thesaurus:

4.6.9.1 Institutions – Executive bodies – The civil service – **Conditions of access.**

4.6.9.2 Institutions – Executive bodies – The civil service – **Reasons for exclusion.**

Keywords of the alphabetical index:

Public service, entrance competition.

Headnotes:

Competitors who have been approved in a competitive civil service examination within the number of offered positions have the subjective right to take office before the examination expires.

Summary:

I. This case refers to an extraordinary appeal filed against a decision that acknowledged the subjective right to take office after approval within the number of offered positions in a competitive civil service examination. The appellant argued that the challenged decision breached the principle of governmental efficiency, established under Article 37 of the Constitution.

II. The Supreme Court, unanimously, denied the appeal. The Court stated that when the government sets a competitive civil service examination, it creates the obligation to provide the position to those who have been approved within the number of offered positions, before the examination expires. This is a consequence of the enforcement of the principles of legal certainty, good faith and the protection of

confidence in the government, as it has to comply with the rules of the competitive civil service examination to the same extent as the competitors. This does not breach the principle of efficiency, because the government must set a competitive civil service examination in a responsible way, foreseeing exactly which positions are needed and if there will be financial resources to pay for them.

The Court acknowledged that, in some exceptional cases, the government could not provide office for those who had been approved within the number of positions. But such cases must be incidental, unpredictable and serious – during an economic crisis, for instance – so that the only choice would be to not provide positions to successful applicants. Accordingly, the Court held that this decision establishes a limit to the action of the government, which is bound by the principle of the competitive civil service exam.

Cross-references:

- Article 37 of the Constitution.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2015-1-007

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 08.09.2011 / **e)** 481 / **f)** Penal Action / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 29.06.2012 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Election, electoral law, infringement / Election, sham / Election, candidature.

Headnotes:

The crime of electoral corruption does not require, for its configuration, the official registration of the candidate. It is possible to punish those who, in any case, participate in the crime, even if they do not personally practice the act described in the criminal law.

Summary:

I. This case refers to a penal action filed against a Representative accused of electoral corruption crimes, irregular surgical sterilisation, swindling and conspiracy. The accused, before he became a candidate for mayor in the municipal elections of 2004, with the aid of friends, relatives and followers, organised a scheme of exchanging votes for sterilisation surgeries. These surgeries were performed irregularly, because they did not abide by legal restrictions and because they defrauded the public health system.

According to the prosecution, the exchange of votes falls within electoral corruption. To carry out surgeries, without legal precautions, constitutes the crime of irregular surgical sterilisation. The fraud had occurred because the hospital that performed the surgeries had no authorisation for this procedure, and had faked documents to obtain reimbursement of costs, thereby defrauding the public health system. The conspiracy took place in view of the association of several people (friends, relatives and followers of the accused) to commit the crimes.

The defence preliminarily argued that the crime of electoral corruption does not occur before the official registration of the candidate. On the merits, he added that there was no evidence of personal participation of the accused in the crimes.

II. The Supreme Court, by majority, rejected the preliminary question and condemned the accused. Regarding the preliminary question, the Court held that the practice of electoral corruption does not require the condition of being a candidate, because it would turn the protection against the criminal act useless, since it would not penalise irregularities committed before the official registration of the candidate.

On the merits, the Court stated that the testimony found in the process indicates that the accused, despite not having personally committed the criminal acts, was the main person responsible for illegally obtaining the votes in his favour. Thus, Article 29 of the Penal Code is applied, which provides that anyone who, in any case, participates in the crime

can be punished, according to his or her guilt, and it is not necessary that the person personally commits the act described in the criminal law.

III. In a separate opinion, a dissenting Justice argued that the practice of electoral corruption was proven, but this crime was barred by the statute of limitations. In relation to the other crimes, he denied the involvement of the accused, since he would have only sent the victims to have the surgeries. The irregularities in the execution of surgeries could not be attributed to him, because they were performed only by the physicians involved.

Cross-references:

- Article 29 of the Penal Code.

Languages:

Portuguese, English (translation by the Court).

*Identification: BRA-2015-1-008*

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 20.10.2011 / **e)** 4.661 / **f)** Preliminary Injunction on Direct Claim of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 23.03.2012 / **h)**

Keywords of the systematic thesaurus:

- 2.1.1 Sources – Categories – **Written rules.**
- 3.10 General Principles – **Certainty of the law.**

Keywords of the alphabetical index:

Constitution, infringement / Law, entry into force / Tax law, amendments / Tax, time-limit.

Headnotes:

A presidential decree that raises the Industrial Product Tax and establishes that it will be in force on the day of its publication, breaches the principle that any law that creates or increases tax rates can only enter into force 90 days after its publication.

Summary:

I. This case refers to a preliminary injunction on a direct claim of unconstitutionality filed against Article 16 of the Presidential Decree 7567/2011, which raised the Industrial Product Tax (hereinafter, "IPI" in the Portuguese acronym) on imported cars and established that this increase will be in force on the day of its publication. The applicant argued that, according to Article 150.III.c of the Federal Constitution, the Government must comply with the principle that a law that creates or increases tax rates can only enter into force 90 days after its publication.

II. The Supreme Court, unanimously, granted the preliminary injunction, with prospective effects, in order to suspend the increase of the IPI on imported cars until the end of the 90-day period after the publication of the Law. The Court did not follow the draft judgment of the Rapporteur Justice, who had granted the injunction without prospective effects (the Rapporteur Justice prepares a draft judgment, which is then voted on by each judge). The Court decided that the impugned decree, as it establishes that it would be in force on the day of its publication, breached the Federal Constitution, because it immediately raised the tax, not complying with the required 90-day period. The Court stated that this time lapse is a constitutional safeguard aimed at preserving the certainty and the foreseeability of legal relationships concerning taxes before the government. Furthermore, as it is a safeguard for taxpayers against the act of imposing taxes, it could only be denied through an explicit constitutional provision.

Cross-references:

- Article 150.III.c of the Federal Constitution;
- Decree 7567/2011.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2015-1-009

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 16.02.2012 / **e)** 29 / **f)** Declaratory Claim of Constitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 127, 29.06.2012 / **h)**.

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
 4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility**.
 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:

Election, ineligibility / Good conduct and morality, requirement / Principle, constitutional, compliance.

Headnotes:

The application of Supplementary Law 135/2010 (the Clean Record Act) to conduct and legal facts that occurred before its enactment is constitutional.

Summary:

I. This case refers to a declaratory claim of constitutionality filed to support Supplementary Law 135/2010 – “the Clean Record Act” – which amended Supplementary Law 64/1990, introducing new disqualifications to hold an elective office. Among other disqualifications, the Act disqualified persons who: were sentenced by a collective body of judges (in electoral, criminal or administrative dishonesty cases); had their accounts concerning holding a public office rejected (such rejection is issued by a collective body – either the Legislative Branch or the Accountings Court); were expelled from office (either an elective or a civil service office); resigned the office when faced with a procedure that could expel them from office; or were prohibited to exercise a regulated profession by the respective regulatory council because of the violation of professional ethics duties.

II. The Supreme Court, by majority, granted the claim and declared that the application of Supplementary Law 135/2010 to conduct and legal facts that occurred before the Act was issued is constitutional. The Court stated that such application does not breach the non-retroactivity of law principle, because Supplementary Law 135/2010 applies to electoral processes after its issuance. The Court explained that the Act does not imply a case of retroactivity, but it

establishes retrospectivity, as it brought, after its issuance, new consequences to facts that had occurred before. The Act could only be considered retroactive if the legal effects of such facts were changed. Besides, the Court stated that the disqualification of a person from standing for elections is not a penalty; hence, the non-retroactivity principle of the more stringent criminal law is not applicable. Actually, the electoral qualifications of a person must be assessed at each election. Thus, no one has a vested right to stand for elections.

The Court also defined that the new disqualifications do not breach the presumption of innocence principle (Article 5.LVII of the Constitution), as this principle relates to penal and procedural penal law. In electoral law, this principle can be balanced. Considering this fact and also considering that the sentence must be issued by a collective body of judges – which gives more certainty regarding its correction – there is no necessity to wait for it to become *res judicata*. In this case, the burden on the citizen's freedom to stand for election does not surpass the desired social benefits of morality and honesty of those who hold public office.

In addition, the Act did not breach the essential core of political rights, given that it only limits the right to stand for election (the passive right), but still allows disqualified people to vote (the active right).

Finally, the Court emphasised that the Act was an outcome of a popular initiative, conveying the effort of the Brazilian population to set a rule to moralise the political arena. Accordingly, even though the Court is not bound by public opinion, the Act represents a meaningful democratic advance aimed at removing from politics people who do not comply with the requirements of morality, honesty and legitimacy to stand for elections, when their previous record is considered, following the rule of Article 14.9 of the Constitution, which allows rules concerning ineligibility for public office to be established by law.

III. In a separate opinion, a dissenting Justice partially granted the claim, to interpret the provision of Supplementary Law 135/2012 that established a period of eight years of disqualification from standing for election after the penalty is executed. The Justice argued that the period between the time the sentence is issued and the time it becomes *res judicata* should be included when counting the period of eight years.

In other separate opinions, dissenting Justices denied the claim, on the grounds that Supplementary Law 135/2010 could only have legal effects on facts that happened after its issuance, because it established electoral disqualifications that limit rights.

They argued that the popular initiative should not legitimate Acts that limit fundamental rights or breach the Constitution. These Justices also argued that the disqualification of someone who had been sentenced by a collective body of judges, before the sentence becomes *res judicata*, would breach the presumption of innocence principle and the legal certainty principle.

Cross-references:

- Articles 5.57 and 14.9 of the Federal Constitution;
- Supplementary Law 64/1990;
- Supplementary Law 135/2010.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-1-010

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 06.03.2013 / **e)** 1.842 / **f)** Direct claim of unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 181, 16.09.2013 / **h)**

Keywords of the systematic thesaurus:

- 3.6.3 General Principles – Structure of the State – **Federal State**.
- 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.
- 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.

Keywords of the alphabetical index:

Collective interest / Federal State, entity, powers / Federal State, region, autonomy / Municipality, responsibility.

Headnotes:

Although a municipality has the competence to provide basic sanitation services, this competence can be transferred to the municipalities involved and the state-member regarded as a collective body, where a metropolitan area, urban agglomeration or microregion is created.

Summary:

I. This case refers to a direct claim of unconstitutionality filed against articles of Supplementary Law 87/1997, Law 2869/1997 and Decree 24631/1998 of the State of Rio de Janeiro. These norms created the Metropolitan Region and the Microregion of Lagos and granted the State of Rio de Janeiro the competence to provide public services that are in the interest of the metropolis. The applicant argued that those norms violated the Federal Constitution by transferring services within the municipality's competence to the state-member, mainly basic sanitation, which is a local interest public service.

The Full Court, by majority vote, partially granted the claim and declared void the transfer of ownership of basic sanitation services to the State. The Court based its decision on the autonomy of municipalities, which includes both self-government and self-administration. Therefore, pursuant to Article 25.3 of the Federal Constitution, state-members could only create metropolitan regions, urban agglomeration or microregions when the inattention of some public services affects not only a municipality, but also the neighbouring areas, establishing the prevalence of the common interest over the local interest (which is the municipalities' exclusive competence, according to Article 30.V of the Federal Constitution).

In relation to basic sanitation services, the river basin is the reference for planning service provision since it covers water capture, treatment, adduction, reservoir and distribution, and the collection and final disposal of sewage. Such services fall within the municipality's competence, although these steps usually go beyond its territorial limits.

In metropolitan areas, urban agglomerations or microregions, a municipality, on its own terms, cannot obstruct the provision of basic sanitation services, only because it has the exclusive competence to provide them. However, this would not justify transferring the responsibility to the state-member or another municipality, since it would violate municipal autonomy. Such assignment should be taken by all municipalities involved and the State, regarded as a collective body.

Finally, the Court decided that due to the exceptional social interest in preventing any interruption in basic sanitation services, the effects of the declaration of unconstitutionality should be postponed for 24 months. In the meantime, a new state-member law could be enacted, ensuring the participation of all the municipalities and the state-member, without concentrating the decision-making power in any of the parties involved.

III. In a dissenting opinion, the Justice held that in cases of metropolitan regions, urban agglomeration or microregions, basic sanitation services would belong rather to the state-member than the municipality, since it surpasses the exclusive local interest.

Cross-references:

- Articles 25.3 and 30.V of the Federal Constitution;
- Supplementary Law 87/1997 of the State of Rio de Janeiro;
- Law 2869/1997 of the State of Rio de Janeiro;
- Decree 24631/1998 of the State of Rio de Janeiro.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-1-011

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 15.05.2013 / **e)** 578.543 / **f)** Extraordinary appeal / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 100, 27.05.2014 / **h)**.

Keywords of the systematic thesaurus:

4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction.**
 4.8.8.5.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – International relations – **Participation in international organisations or their organs.**

Keywords of the alphabetical index:

International organisation, jurisdiction, immunity / Execution, immunity / Labour law, national, international organisation, applicability.

Headnotes:

The Labour Court has no jurisdiction over labour cases when an international organisation that enjoys immunity from jurisdiction set forth in international instruments signed by Brazil is a party to the case.

Summary:

I. This case refers to an extraordinary appeal filed against a decision of the Superior Labour Court (hereinafter, the "SLC"), which withdrew the United Nations' (hereinafter, "UN") immunity from jurisdiction and obliged the UN to pay severance pay due to an employee hired to work at the United Nations Development Programme (hereinafter, "UNDP"). The decision also held that the Labour Court has jurisdiction over such cases.

The UN argued that it enjoys immunity from jurisdiction, as set forth in the Convention on the Privileges and Immunities of the United Nations of 1946 and in other international instruments (the United Nations Charter of 1945 and the Basic Agreement on Technical Assistance between Brazil and the United Nations of 1964), which would hinder the possibility of internal jurisdiction. The UN also claimed that the decision declared unconstitutional international instruments and violated Articles 5.II, 5.XXXV, 5.LIII, 5.2 and 114 of the Federal Constitution (concerning, *inter alia*, the principle of legality, recourse to judicial remedies, subjection solely to competent authorities and the jurisdiction of the Labour Court). Furthermore, it argued that the challenged decision violated the principle of legality by allowing the submission of a case to a court with no jurisdiction over it and disregarded rights and guarantees set out in international instruments. The UN argued that the Labour Court does not enjoy automatic jurisdiction merely because it is considered a foreign legal entity governed by public law. It also added that the temporary employment contract has a special nature and follows the legal regime of UN standards. Finally, the UN stated that the leading case on which the challenged decision had relied (Civil Appeal 9696) is inapplicable to this case.

II. The Supreme Court, unanimously, decided to partially hear the case and, on that part, granted the appeal in order to declare that the Labour Court has no jurisdiction over the case. The Court acknowledged that the UN/UNDP immunity from jurisdiction and execution, as provided for in international norms, had been incorporated into Brazilian law.

The Court found that the challenged decision had not held the Convention on the Privileges and Immunities of the United Nations to be unconstitutional, as the decision withdrew the UN/UNDP immunity from jurisdiction on the basis of a mistaken interpretation of the relevant case-law, not on the incompatibility between the Convention and the Constitution. In this case, the SLC, interpreting Article 114 of the Federal Constitution, had abolished all existing immunity from

jurisdiction in the labour field and ignored the content of international instruments signed by Brazil. Such provision establishes the Labour Court's jurisdiction over labour cases when a foreign legal entity governed by public law is a party. However, the submission of these entities to Brazilian jurisdiction is not automatic. It is enforced only where the immunity is not applicable.

The Court stated that the decision of the SLC had erroneously relied on the Supreme Court's Civil Appeal decision 9696, since the same immunity from jurisdiction rule cannot be enforced in regard to international organisations and to foreign countries that are members of those organisations. After all, the immunity of foreign countries derives from the customary rule based on the principle of equality among states and on state sovereignty, while international organisations' immunity from jurisdiction arises from international treaties, as those organisations have neither territory nor sovereignty.

The Court highlighted that the contracts of temporary service signed by the UN/UNDP follow rules established in internal regulations and in technical cooperation documents, so that the rights of employees are safeguarded.

III. In other votes, concurring Justices pointed out that treaties and conventions are internalised in the countries' law, so they should be faithfully fulfilled by its signatories, unless declared unconstitutional. Thus, disregard of these international standards by courts, without first formally declaring the unconstitutionality of them or, possibly, the non-reception of them by a supervening constitutional rule, violates Binding Precedent 10 of the Supreme Court, which, interpreting Article 97 of the Federal Constitution, affirms that a normative act of government may only be declared unconstitutional by a majority of judges of a competent court.

Finally, the Supreme Court stressed that co-operation among peoples for the progress of humanity (Article 4.IX of the Federal Constitution of 1988) is a constitutional principle. Therefore, the violation of UN/UNDP privileges and guarantees implies international liability, which could compromise the continuity of technical cooperation received from them, and could lead to the exclusion of Brazil from the United Nations.

Cross-references:

- Articles 4.IX, 5.II, 5.XXXV, 5.LIII, 5.2 and 114 of the Federal Constitution;
- Binding Precedent 10 of the Supreme Court.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2015-1-012

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 20.06.2013 / **e)** 32.033 / **f)** Request for a writ of *mandamus* / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 033, 18.02.2014 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**

Keywords of the alphabetical index:

Law, parliamentary voting procedure / Legislative procedure / Political party, competitive opportunity / Political party, democratic procedure / Political party, equal treatment / Separation of powers.

Headnotes:

Preventive substantial judicial review of legislative proposals during their formation in Congress is unacceptable, because the judiciary would usurp the constitutional prerogatives of the other branches of government.

Summary:

I. This case refers to a request for a writ of *mandamus*, with a preliminary measure request, in which the applicant argued that legislative due process was breached in the parliamentary processing of Legislative Bill 4470/2012. This Bill establishes that the change of affiliation from a political party to another during the term of Congress would not result in the transfer of resources from the parties' fund nor the transfer of time of free electoral advertising on the radio and television.

The applicant argued that the Bill had been approved under the expedited ('urgency') regime in the Deputies Chamber, aiming at hindering the formation of new political parties before the general elections of 2014 and, thus striking at the political mobilisation of parliamentary minorities. Furthermore, the applicant defended his clear and unquestionable right to not acquiesce, as a member of the Parliament, to the tabling of a legislative proposal that breaches the principles of the constitutional order and the democratic regime, such as political pluralism, the equality of political parties and the right to the free creation of parties. Finally, the plaintiff requested the granting of a preliminary injunction to halt the processing of the Bill.

The Rapporteur Justice granted the preliminary request to halt the processing of the Bill, because he forecasted a possible breach of the right of the member of Parliament to not acquiesce to the processing of an unconstitutional legislative proposal. The Justice explained that this was an exceptional case, due to the speed of the processing of the Bill, the enactment of which would cause a change in the rules of creation of parties during the current term of Congress, having a detrimental effect on political minorities and, as a consequence, democracy itself.

II. The Supreme Court, by majority, admitted the request for the writ of *mandamus*, but denied it and vacated the preliminary decision. The Court deemed that the applicant had the intention to halt the processing of the Bill itself, under the pretext of the protection of an individual right. The Court observed that the applicant, as a member of Parliament, could abstain from voting, which would render unnecessary the suspension of the legislative procedure.

The Court explained that, in the Brazilian system, a *priori* substantial judicial review (i.e., preventive judicial review of norms during its formation) is unacceptable. The Court stated that the early intervention of the judiciary in the formation of normative acts ongoing in Parliament would not only universalise the system of a *priori* review, which is not allowed under the Constitution, but would also meddle in the autonomy of the other branches of government. If early judicial review was acceptable, the Supreme Court would act as a participant in parliamentary deliberations, exercising a typical role of the legislator and surpassing, with no grounds, the constitutional prerogative of Congress to debate and improve bills, as well as to correct possible unconstitutionality and to deny the passing of bills, if this were the case.

The Court emphasised that the role of the judiciary is to perform repressive judicial review, which must be initialised after the passing of the bill into law. The Court stated that, though the Supreme Court shall safeguard indispensable individual rights of popular participation in the democratic procedure to make decisions, promoting interaction and institutional dialogue, and improving the quality of decisions, the Court shall not anticipate the conclusions of parliamentary debates.

The Court observed that, exceptionally, it admits a *priori* judicial review when there is a Constitutional Amendment Bill that openly violates an eternity clause of the Constitution and when there are actions held in the enactment procedure of an act, bill or constitutional amendment bill that are incompatible with the norms that regulate the legislative procedure. In such instances, which are not applicable to the present case, the unconstitutionality is directly related to the formal and procedural aspects of the legislative activity. Thus, the filing of the request for a writ of *mandamus* would correct the breach that occurred during the procedure of formation of the norm, even before and regardless of its final enactment. Furthermore, a member of Parliament, who does not have standing to initiate repressive abstract judicial review, must not have the prerogative to initiate in advance, through a request for a writ of *mandamus*, the very same abstract judicial review.

III. In separate opinions, dissenting Justices proposed denying the admissibility of the request for a writ of *mandamus*, because no procedural error had been demonstrated. The request had been grounded only on a supposed breach of constitutional principles, which indicated the aim of halting the parliamentary debate through early judicial review.

In other separate opinions, dissenting Justices partially granted the writ to declare the possibility of the suspension of the procedure of a bill through a writ of *mandamus*, when the bill breaches an eternity clause, equality, equality of opportunities, proportionality, legal certainty and the freedom to create political parties. This dissenting group declared the unconstitutionality of the application of the bill to the elections of 2014, because it is casuistic. Majority parties of Parliament had intended to unbalance the democratic race, as they hindered minority parties' free access to television and radio, which are essential means to convey political and electoral debate. The dissenting group argued that it is possible to review acts of the executive and legislative branches, when they are formally or substantially unconstitutional, without damaging the separation of powers. The division of competences

does not hinder the resistance against repressive acts of the State, abuse of power and the disregard of eternity clauses in the Constitution.

Cross-references:

- Bill 4470/2012.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-1-013

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 06.11.2013 / **e)** 4.543 / **f)** Direct action of unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 199, 13.10.2014 / **h)**.

Keywords of the systematic thesaurus:

4.9.9 Institutions – Elections and instruments of direct democracy – **Voting procedures.**

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

Keywords of the alphabetical index:

Election, vote, procedure, protocol / Election, voting, secrecy, individual.

Headnotes:

A paper-based voting system is unconstitutional, because it uses an identification number linked to the voter's digital signature, which allows the voter's identification. Thus, it breaches the constitutional guarantee of a secret vote.

Summary:

I. This case refers to a direct action of unconstitutionality filed by the Prosecutor General of the Republic against Article 5 of Law 12034/2009. This rule restores the paper-based voting system as of the 2014 elections. The petitioner claimed that such method uses an identification number linked to the voter's digital signature, which would allow his identification.

II. The Supreme Court, unanimously, declared the unconstitutionality of Article 5 of Law 12034/2009. The Court held that the paper-based voting system breaches the constitutional guarantee of the confidentiality of the vote, since it would be possible to identify the voter. The Court considered that the guarantee of the inviolability of the vote implies anonymity as a means to ensure the voter's freedom of expression, as well as to avoid any form of coercion against the voter. The Court added that keeping the ballot box open is not in accordance with the constitutional guarantees of the voter, because it jeopardises the security of the electoral system, as it allows the perpetration of acts of electoral fraud.

The Court also based its decision on the non-retrogression principle, whereby the retrogression of acquired rights, such as representative democracy, to give place to a surpassed model that has jeopardised the electoral procedure, is not allowed.

The Court stressed that the electronic voting system, which has been improved since 1996, has a strict security system and has effective means to recount and audit. Hence, it allows the anonymity and inviolability of the vote. The paper-based voting system, instead, breaches the guarantee of the secret vote, is slow and permits acts of fraud, duplications, changes and insertions in ballots. The paper-based system also requires prepared ballot boxes to safely keep the ballots and specific transportation of the ballots and it does not ensure the efficacy of the correct result of the voting system. Furthermore, the paper-based system makes recounting and auditing difficult, because the simple loss of one piece of paper can cause inconsistencies that may justify the nullification of whole ballot boxes and challenges against polling stations.

Finally, the Court observed that studies have found that the paper-based voting system has a relatively higher cost per voter. Hence, the reestablishment of such system would violate the principles of the efficiency and economy of government in Article 37 of the Federal Constitution.

Cross-references:

- Article 5 of Law 12034/2009.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-1-014

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 20.03.2014 / **e)** 4.335 / **f)** Constitutional Claim / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 208, 22.10.2014 / **h)**.

Keywords of the systematic thesaurus:

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

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.

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

1.6.9.1 Constitutional Justice – Effects – Consequences for other cases – **Ongoing cases**.

Keywords of the alphabetical index:

Constitutional Court, judgment, declaration of unconstitutionality, effects / Constitutional Court, judgment, effects, restriction / Senate, competence / Separation of powers.

Headnotes:

The Supreme Court of Brazil can operate as both an organ of constitutional control at first instance, with the power to issue decisions with *erga omnes* binding effect ('concentrated review'), and as the final court of appeal in constitutional matters that are first brought before the lower courts, with the power to issue judgments of solely *inter partes* effects ('diffuse review'). It is inapplicable to file a constitutional claim grounded on the reasoning of a Supreme Court judgment issued as the final court of appeal in the system of diffuse constitutional review. There has been no constitutional mutation of Article 52.X of the Federal Constitution, which provides that the Federal Senate has the exclusive power to stop the application of a law declared unconstitutional in a judgment of the Supreme Court as the final court of appeal. Thus, a judgment of the Supreme Court issued under diffuse review, to be effective against all, must be submitted to the Federal Senate. The declaration of unconstitutionality of a rule that banned sentence progression in heinous crimes, having initially been given in diffuse constitutional review, was accorded *erga omnes* effects only after Binding Precedent 26 was

issued (binding precedents may be issued by the Court regarding matters of particular importance).

Summary:

I. This case refers to a constitutional claim in which the Justices discussed the effectiveness of judgments issued by the Supreme Court as the final court of appeal in the system of diffuse constitutional review (i.e., cases arising from constitutional control exercised by the lower courts and later appealed). The claimant challenged a decision that had rejected a request for sentence progression on the basis that the crime was heinous. Sentence progression requires the sentencing judge to monitor an imprisoned individual's case and adjust the sentence in accordance with the prisoner's conduct. Article 5.XLIII of the Federal Constitution permits certain crimes to be classified as 'heinous', which applies more stringent rules to defendants; for instance, by prohibiting bail for such offences.

The claimant argued this decision violated the precedent set by the Supreme Court in *Habeas Corpus* 82959, in which the ban on sentence progression in heinous crimes (Article 2.1 of Law 8072/1990) had been declared unconstitutional. It was argued that this precedent, having merely *inter partes* effect, would merely affect the relevant parts of that case as the judgment had been issued under diffuse review. He argued that, in order to affect all, the Federal Senate would have to determine the suspension of the rule declared unconstitutional, pursuant to Article 52.X of the Federal Constitution (CF).

II. The Supreme Court, by majority, upheld the complaint grounded on Binding Precedent 26, which had established that the unconstitutionality of the ban on sentence progression in heinous crimes is effective against all. The Court held that the complaint should not be heard, at first, since the decision in *Habeas Corpus* 82959 was not effective against all. However, considering that Binding Precedent 26 had been issued during this trial, it could be used in favour of the request's admissibility.

The Court stated that, although the decisions of the Supreme Court had gradually acquired expansive effectiveness (other than merely *inter partes* effect), in line with its prior case-law, this development would not be enough to admit such effectiveness in any decision. Article 52.X of the Constitution, which requires the submission of a law declared unconstitutional in an appeal case to the Federal Senate, in order to acquire *erga omnes* effect, had not been implicitly amended by the legislative or judicial changes that expanded the effectiveness of Supreme Court judgments. The Court acknowledged

the increased effectiveness of its decisions issued in diffuse review cases, but it decided to maintain its case-law, thus permitting constitutional claims to be made exclusively by parties involved in a preceding case or to question dissenting decisions from Binding Precedents or from decisions given by the Supreme Court in concentrated review.

III. In concurring opinions, which upheld the claim on different grounds, the Justices acknowledged the constitutional development, by which the *erga omnes* effect of Supreme Court decisions of unconstitutionality no longer depend on referral to the Senate. The Justices argued that Article 52.X of the Constitution had been part of constitutional texts since 1934 and it was originally stipulated to extend the effects of decisions of the Supreme Court. However, legislative and case-law changes, such as the possibility to give a one-judge ('monocratic') decision or to modulate or suspend its effects, allowed decisions with *erga omnes* effects to be made under diffuse review. Furthermore, the Federal Constitution of 1988 placed priority on concentrated review of constitutionality, allowing re-interpretation of diffuse review. Thus, it may be said that there was a constitutional mutation of Article 52.X of the Constitution, which currently would only be interpreted as a way to give publicity to such decisions. Therefore, the Supreme Court's judgment in *Habeas Corpus* 82959 would be applicable to the hearing and granting of this claim.

In other opinions that decided not to hear the claim, arguing that there was no decision from the Senate that would give Supreme Court precedents *erga omnes* effect, the Justices granted the writ of *habeas corpus* on their own motion to remand the case to the claimed authority to assess the granting of sentence progression. They argued that the constitutional mutation thesis could not be established by the governmental branch that would benefit from it, namely, the judiciary. They argued that the Supreme Court could accord *erga omnes* effect to its decisions by issuing binding precedents. Hence, there would be no need to state the mutation of Article 52.X of the Federal Constitution. Furthermore, a change in the meaning of the text would require a greater time-lapse in order to prove the inefficiency of the rule. On the other hand, the Senate was still issuing resolutions to suspend laws declared unconstitutional, which would affirm the current effectiveness of Article 52.X of the Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-1-015

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 13.08.2014 / **e)** 4.007 / **f)** Direct Action of Unconstitutionality / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 213, 29.10.2014 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Federal State, entity, powers / Federal State, region, autonomy.

Headnotes:

A state law that compels the state body responsible for issuing citizens' identity documents to register blood data on the document, when its owner requires this to be done, is constitutional. There is no usurpation of competent jurisdiction, since the Federal Government has exclusive jurisdiction to legislate on public records or civil law matters. In this case, the law sets forth an administrative task of the state body.

Summary:

I. This case refers to a direct action of unconstitutionality filed against provisions of Law 12282/2006 of the State of São Paulo, which compels the state body responsible for issuing citizens' identification document (hereinafter, "ID") to register the blood type and Rh factor on the document, when the person concerned requires this to be done. The applicant argued that the Law was formally unconstitutional, on the basis of a violation of the Federal Government's exclusive jurisdiction concerning public records or civil law matters, pursuant to Article 22.I and 22.XXV of the Federal Constitution. The applicant argued that regulation on civil identification could not differ from state to state.

II. The Supreme Court, by majority, denied the request and affirmed that the State of São Paulo acted within the limits of its competent jurisdiction. The Court highlighted that constitutional assignments of jurisdiction are grounded on the federative principle, which prioritises either the states' autonomy or the Federal Government's sovereignty. Moreover, it emphasised that the Federal Government has exclusive competent jurisdiction concerning public records (Article 22.XXV of the Federal Constitution), quoting Federal Law 9049/1995, which authorises blood data to be registered on ID by the responsible state body if the owner of the document requires this to be done.

The Court observed that Law 12282/2006 does not expressly refer to public records (nature, form, validity or effects), but rather, to the state's jurisdictional competence to legislate on the administrative tasks of the state body responsible for issuing ID (Article 25 of the Federal Constitution). As such, state law complies with Federal Law 9049/1995. The Court also held that the exclusive jurisdictional competence of the Federal Government to regulate matters of civil law (Article 22.I of the Federal Constitution) was not violated, since the law does not address citizens' rights or duties.

III. In other votes, the justices added that the state law addresses health protection and defence, which is a subject of concurrent competent jurisdiction between the Federal Government, the states and the Federal District (Article 24.XII of the Federal Constitution). They added that there was no violation of personality rights (such as right to a name, right to honour, image and privacy). A violation would occur if the Law had determined a depreciative register of the ID owner, such as an incurable disease, a physical disability or a criminal record.

In a dissenting opinion, the justice argued that the law was unconstitutional because it violated Article 22.I of the Federal Constitution, concerning the Federal State's powers to legislate on civil matters. The justice argued that the law sets forth regulations on personality rights, since registering blood data on ID features as evidence of a personal characteristic of the owner of the document. The Law also establishes rules concerning public records, which have to be uniform in all states. As such matters are supposed to be regulated by the Federal Government, the competent jurisdiction had been violated. The justice added that re-establishing the federal rule on local legislation does not diminish or correct the formal unconstitutional defect. That is, granting a state an exclusive competent jurisdiction to legislate prevents the others from doing so, even if they enact an identical law from the valid one, as the formal unconstitutionality is a prior obstacle to the analysis of the Law's content.

Cross-references:

- Articles 22.I, 22.XXV, 24.XII and 25 of the Federal Constitution;
- Law 9049/1995;
- Law 7116/1983;
- Law 12282/2006 of the State of São Paulo.

Languages:

Portuguese, English (translation by the Court).



Canada

Supreme Court

Important decisions

Identification: CAN-2015-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 30.01.2015 / **e)** 35423 / **f)** Saskatchewan Federation of Labour v. Saskatchewan / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 4, [2015] 1 S.C.R. 401 / **h)** <http://scc.lexum.org/en/index.html>; 380 *Dominion Law Reports* (4th) 577; [2015] S.C.J. no. 4 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
 5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike**.

Keywords of the alphabetical index:

Constitutional right, charter of rights, violation / Public service, union, right to bargain collectively.

Headnotes:

Freedom of association guaranteed by Section 2.d of the Canadian Charter of Rights and Freedoms includes a right to collective bargaining, of which the right to strike is an essential part.

Summary:

I. The Saskatchewan Federation of Labour and other unions challenged the constitutionality of the Public Service Essential Services Act (hereinafter, the “PSESA”) and The Trade Union Amendment Act, 2008 (hereinafter, “TUAA”). The PSESA is the province’s first statutory scheme to limit the ability of public sector employees who perform essential services to strike, whereas TUAA changes the process by which unions may obtain or lose their status as a bargaining representative as well as changes the provisions governing employer communication to employees. The trial judge held that the prohibition on the right to strike in the PSESA substantially interfered with the Section 2.d rights of

the affected public sector employees and was not justified under Section 1 of the Charter. However, TUAA did not violate Section 2.d. The Court of Appeal, however, held that neither the PSESA nor TUAA violated Section 2.d.

II. A majority of five judges of the Supreme Court allowed the appeal. According to the majority, the PSESA prohibition against strikes substantially interferes with a meaningful process of collective bargaining and therefore violates Section 2.d of the Charter. The infringement is not justified under Section 1. The declaration of invalidity was suspended for one year. The appeal with respect to TUAA was dismissed.

In our system of labour relations, the right to strike is an essential part of a meaningful collective bargaining process. That right is not merely derivative of collective bargaining, it is an indispensable component of it. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. This crucial role in collective bargaining is why the right to strike is constitutionally protected by Section 2.d. In short, the right to strike promotes equality in the bargaining process, as well as the dignity and autonomy of employees in their working lives.

In addition, the historical, international and jurisprudential landscape suggests that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is, and has historically been, the irreducible minimum of the freedom to associate in Canadian labour relations.

To determine whether there has been an infringement of Section 2.d of the Charter, the test is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with a meaningful process of collective bargaining. The prohibition in the PSESA on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment meets this threshold and therefore amounts to a violation of Section 2.d.

The breach is not justified under Section 1 of the Charter. The maintenance of essential public services is self-evidently a pressing and substantial objective,

but the determinative issue is whether the means chosen by the government are minimally impairing, that is carefully tailored so that rights are impaired no more than necessary.

The fact that a service is provided exclusively through the public sector does not inevitably lead to the conclusion that it is properly considered essential. Under the PSESA, a public employer has the unilateral authority to dictate whether and how essential services will be maintained, including the authority to determine the classifications of employees who must continue to work during the work stoppage, the number and names of employees within each classification and, for public employers other than the Government of Saskatchewan, the essential services that are to be maintained. Only the number of employees required to work is subject to review by the Saskatchewan Labour Relations Board. And even where an employee has been prohibited from participating in strike activity, the PSESA does not tailor his or her responsibilities to the performance of essential services alone. The provisions of the PSESA therefore go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike.

Nor is there any access to a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration. Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Those public sector employees who provide essential services have unique functions which may argue for a less disruptive mechanism when collective bargaining reaches an impasse, but they do not argue for no mechanism at all.

The unilateral authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the conclusion that the PSESA is not minimally impairing. It is therefore unconstitutional.

III. In a partially dissenting opinion, two judges held that this Court should not intrude into the policy development role of elected legislators by constitutionalising the right to strike under the freedom of association guarantee in Section 2.d. According to the dissenting judges, the statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees and

the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained. Therefore, the dissenting judges held that the PSESA does not violate Section 2.d and they agreed with the majority that TUA also does not violate Section 2.d.

Cross-references:

Supreme Court:

- *Health Services and Support – Facilities Subsector Bargaining Assn. v. Colombie-Britannique*, 08.06.2007, *Bulletin* 2007/2 [CAN-2007-2-002].

Languages:

English, French (translation by the Court).



Identification: CAN-2015-1-002

a) Canada / b) Supreme Court / c) / d) 06.02.2015 / e) 35591 / f) *Carter v. Canada (Attorney General)* / g) *Canada Supreme Court Reports* (Official Digest), 2015 SCC 5, [2015] 1 S.C.R. 331 / h) <http://scc.lexum.org/en/index.html>; [2015] S.C.J. no. 5 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**

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

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.**

Keywords of the alphabetical index:

Health-care, physician-assisted dying / Review, constitutionality / Criminal Code, unconstitutionality, declaration / Remedy, violation constitutional right / Health-care / Overbreadth doctrine.

Headnotes:

The impugned provisions of the Criminal Code that prohibit the assistance of dying in Canada unjustifiably infringe the right to life, liberty and security of the person under Section 7 of the Canadian Charter of rights and freedoms and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. Special costs on a full indemnity basis are awarded to the appellants throughout.

Summary:

I. Under the Criminal Code, no person may consent to death being inflicted on them and everyone who aids or abets a person in committing suicide commits an indictable offence. Those provisions were challenged on the basis that they infringed the right to life, liberty and security of the person guaranteed by Section 7 of the Canadian Charter of rights and freedoms.

The trial judge found that the prohibition against physician-assisted dying violates the Section 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition and concluded that this infringement is not justified under Section 1 of the Charter. The Court of Appeal allowed the appeal on the ground that it was bound to follow a 1993 decision by the Supreme Court (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519) that upheld the blanket prohibition on assisted suicide.

II. In a unanimous decision, the Supreme Court declared the prohibition of physician-assisted dying unconstitutional.

The Court first determined that its past decisions could be revisited by a lower court in two situations:

1. where a new legal issue is raised; and
2. where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

Here, it held that both conditions were met, since the law relating to the principles of overbreadth and gross disproportionality in applying Section 7 of the Charter had materially advanced and the matrix of legislative and social facts differed from the evidence before the Court in the 1993 case.

The Court then held that here, the prohibition deprives some individuals of life, as it has the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. Similarly, the prohibition denies people who suffer from a grievous and irremediable medical condition the right to make decisions concerning their bodily integrity and medical care and thus trenches on their liberty. And by leaving them to endure intolerable suffering, it impinges on their security of the person.

For the Court, the prohibition on physician-assisted dying infringes the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice. The object of the prohibition is not, broadly, to preserve life whatever the circumstances, but more specifically to protect vulnerable persons from being induced to commit suicide at a time of weakness. Since a total ban on assisted suicide clearly helps achieve this object, individuals' rights are not deprived arbitrarily. However, the prohibition catches people outside the class of protected persons. It follows that the limitation on their rights is in at least some cases not connected to the objective and that the prohibition is thus overbroad.

The Court found that the impugned provisions are not saved by Section 1 of the Charter. While the limit is prescribed by law and the law has a pressing and substantial objective, the prohibition is not proportionate to the objective. A blanket prohibition is necessary in order to substantially meet the government's objective. The trial judge made no palpable and overriding error in concluding, on the basis of evidence from scientists, medical practitioners and others who are familiar with end-of-life decision-making in Canada and abroad, that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. Similarly, vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decision capacity in the context of medical decision-making more generally. The absolute prohibition is therefore not minimally impairing.

The appropriate remedy is to issue a declaration of invalidity and to suspend it for 12 months. Nothing in this declaration would compel physicians to provide assistance in dying. However, the Charter rights of patients and physicians will need to be reconciled in any legislative and regulatory response to the judgment.

Additionally, the appellants are entitled to an award of special costs on a full indemnity basis to cover the entire expense of bringing this case before the courts, because the case involved exceptional matters of public interest that have a significant and widespread societal impact, and the appellants showed that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, and that it would not have been possible to effectively pursue the litigation in question with private funding.

Languages:

English, French (translation by the Court).



Identification: CAN-2015-1-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 14.04.2015 / **e)** 35678, 35684 / **f)** R. v. Nur / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 15, [2015] x S.C.R. x / **h)** <http://scc.lexum.org/en/index.html>; [2015] S.C.J. no. 15 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Constitutional right, violation / Charter of rights, cruel and unusual punishment / Criminal Code, firearms, mandatory minimum sentence.

Headnotes:

Under Section 12 of the Canadian Charter of Rights and Freedoms, “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.” The mandatory minimum sentences of three and five years imposed by Section 95.2.a.i and 95.2.a.ii of the Criminal Code violate Section 12 of the Charter and are null and void under Section 52 of the Constitution Act, 1982, because they would impose cruel and unusual punishment (i.e. grossly disproportionate sentences) in reasonably foreseeable cases.

Summary:

I. Two accused were convicted of possessing loaded prohibited firearms contrary to Section 95.1 of the Criminal Code. They were sentenced under Section 95.2.a.i and 95.2.a.ii, which provide for three and five year mandatory minimum imprisonment terms, to 40 months and seven years imprisonment respectively. The trial judges held that the mandatory minimum sentences provided for by Section 95.2.a.i and 95.2.a.ii did not violate Section 12 of the Charter. The Court of Appeal held that they do violate Section 12; however, the sentences imposed on the accused were appropriate and should be upheld.

II. A majority of six judges of the Supreme Court dismissed the appeal. According to the majority, the mandatory minimum sentences imposed by Section 95.2.a.i and 95.2.a.ii of the Criminal Code violate Section 12 of the Charter. However, the accused's sentences were appropriate and are upheld. In most cases, including those of the accused, the mandatory minimum sentences of three and five years do not constitute cruel and unusual punishment. But in some reasonably foreseeable cases, they may do so.

According to the majority, when a mandatory minimum sentencing provision is challenged under Section 12, two questions arise. The first is whether the provision imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular individual before the Court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications would impose cruel and unusual punishment on other offenders. Only situations that are remote or far-fetched are excluded. In this case, the accused did not argue that the mandatory minimum terms of imprisonment in Section 95.2 are grossly disproportionate as applied to them. Rather, they argued that those mandatory minimum terms of imprisonment are grossly disproportionate as they apply to other offenders.

Turning first to Section 95.2.a.i, the question is whether the three year minimum term of imprisonment would result in grossly disproportionate sentences in reasonably foreseeable cases. According to the majority, the answer to this question is yes. Section 95.1 casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At that far end stands, for example, the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. Given the minimal blameworthiness of this

offender and the absence of any harm or real risk of harm flowing from the conduct, a three year sentence would be disproportionate. Similar examples can be envisaged. The bottom line is that Section 95.1 foreseeably catches licensing offences that involve little or no moral fault and little or no danger to the public. Consequently, Section 95.2.a.i breaches Section 12 of the Charter.

As for Section 95.2.a.ii, there is little doubt that in many cases those who commit second or subsequent offences should be sentenced to terms of imprisonment and some for lengthy terms. The seven year term of imprisonment imposed on the second accused in this case is an example. But the five year mandatory minimum term of imprisonment would be grossly disproportionate for less serious offenders. For them, the five year term goes far beyond what is necessary in order to protect the public, to express moral condemnation of the offenders and to discourage others from engaging in such conduct. Therefore, Section 95.2.a.ii violates Section 12 of the Charter.

According to the majority, these Section 12 Charter violations are not justified under Section 1. Although the government has not established that mandatory minimum terms of imprisonment act as a deterrent, a rational connection exists between mandatory minimums and the goals of denunciation and retribution. However, the government has not met the minimal impairment requirement under Section 1, as there are less harmful means of achieving its legislative goal. In addition, given the conclusion that the mandatory minimum terms of imprisonment in Section 95.2 when the Crown proceeds by indictment are grossly disproportionate, the limits are not a proportionate justification under Section 1. It follows that the mandatory minimum terms of imprisonment imposed by Section 95.2 are unconstitutional.

III. The three dissenting judges, however, held that the reasonable hypothetical approach under Section 12 of the Charter does not justify striking down Section 95.2 of the Criminal Code. To date, this Court's Section 12 jurisprudence has only considered the constitutionality of mandatory minimum sentences in the context of straight indictable offences. This is the first time it has examined their constitutionality in a hybrid scheme, which calls for a different analytical framework under Section 12.

According to the dissenting judges, the proper analytical framework has two stages. First, the Court must determine whether the hybrid scheme adequately protects against the imposition of grossly disproportionate sentences in general. Second, the Court must determine whether the Crown has exercised its

discretion in a manner that results in a grossly disproportionate sentence for a particular offender. In this case, the dissenting judges held that neither the sentencing scheme itself, nor its application to the accused, offends Section 12 of the Charter.

Languages:

English, French (translation by the Court).



Identification: CAN-2015-1-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 15.04.2015 / **e)** 35496 / **f)** Mouvement laïque québécois v. Saguenay (City) / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 16 / **h)** <http://scc.lexum.org/en/index.html>; [2015] S.C.J. no. 16 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

Keywords of the alphabetical index:

Administrative act, effects, discriminatory / Religion, neutrality of the state, principle / Municipality, religious practices, prayer.

Headnotes:

The practice of members of a municipal council that is regulated by by-law and that consists of reciting prayer at the start of each meeting of the council is in breach of the principle of religious neutrality of the state and results in discriminatory interference with the freedom of conscience and religion of the atheist plaintiff.

Summary:

I. At the start of each meeting of a municipal council, the mayor and councillors would recite a prayer after making the sign of the cross while saying “in the name of the Father, the Son and the Holy Spirit”. In one of the council chambers, there was a Sacred

Heart statue fitted with a red electric votive light. In another, there was a crucifix hanging on the wall. A citizen, who considers himself an atheist, felt uncomfortable with this display, which he considered religious. When confronted with a refusal to cease this practice, he complained to the Human Rights Tribunal. He argued that his freedom of conscience and religion was being infringed, contrary to Sections 3 and 10 of the Quebec Charter of human rights and freedoms.

The Tribunal granted the application, finding that the prayer was, when considered in light of its context, religious in nature and that the City and its mayor, by having it recited, were showing a preference for one religion to the detriment of others, which constituted a breach of the state’s duty of neutrality. The Court of Appeal allowed the appeal. It held that the prayer at issue expressed universal values and could not be identified with any particular religion, and that the religious symbols were works of art that were devoid of religious connotation and did not affect the state’s neutrality. According to the Court of Appeal, the plaintiff had not been discriminated against on the ground of freedom of conscience and religion. The interference, if any, was trivial or insubstantial.

II. In a unanimous decision, the Supreme Court decided that the prayer at issue breached the principle of religious neutrality of the state and resulted in discriminatory interference with the freedom of conscience and religion of the atheist plaintiff.

It explained that the state’s duty of religious neutrality results from an evolving interpretation of freedom of conscience and religion. The evolution of Canadian society has given rise to a concept of this neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard, which means that it must neither favour nor hinder any particular belief, and the same holds true for non-belief. The pursuit of the ideal of a free and democratic society requires the state to encourage everyone to participate freely in public life regardless of their beliefs. A neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person’s freedom and dignity, and it helps preserve and promote the multicultural nature of Canadian society. The state’s duty to protect every person’s freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. If the state adheres to a form of religious expression under the guise of cultural or historical reality or heritage, it breaches its duty of neutrality. The Tribunal was therefore correct in

holding that the state's duty of neutrality means that a state authority cannot make use of its powers to promote or impose a religious belief. Contrary to what the Court of Appeal suggested, the state's duty to remain neutral on questions relating to religion cannot be reconciled with a benevolence that would allow it to adhere to a religious belief.

The Court added that in a case in which a complaint of discrimination based on religion concerns a state practice, the alleged breach of the duty of neutrality must be established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion. To conclude that an infringement has occurred, the Tribunal must be satisfied that the complainant's belief is sincere, and must find that the applicant's ability to act in accordance with his or her beliefs has been interfered with in a manner that is more than trivial or insubstantial. Where the impugned practice is regulated by a legislative provision, the state can show that this provision, in its effect, infringes freedom of conscience and religion constitutes a reasonable and justified limit in a free and democratic society.

Here, the Tribunal's finding in this case that there had been discriminatory interference with the plaintiff's freedom of conscience and religion for the purposes of Sections 3 and 10 of the Quebec Charter was reasonable. The recitation of the prayer at the council's meetings was above all else a use by the council of public powers to manifest and profess one religion to the exclusion of all others. On the evidence in the record, it was reasonable for the Tribunal to conclude that the City's prayer is in fact a practice of a religious nature.

The Court further found that the prayer recited by the municipal council in breach of the state's duty of neutrality resulted in a distinction, exclusion and preference based on religion – that is, based on the plaintiff's sincere atheism – which, in combination with the circumstances in which the prayer was recited, turned the meetings into a preferential space for people with theistic beliefs. The latter could participate in municipal democracy in an environment favourable to the expression of their beliefs. Although non-believers could also participate, the price for doing so was isolation, exclusion and stigmatisation. This impaired the plaintiff's right to exercise his freedom of conscience and religion. The attempt at accommodation provided for in the by-law, namely giving those who preferred not to attend the recitation of the prayer the time they needed to re-enter the council chamber, had the effect of exacerbating the discrimination.

Languages:

English, French (translation by the Court).



Chile

Constitutional Court

Important decisions

Identification: CHI-2015-1-001

a) Chile / **b)** Constitutional Court / **c)** / **d)** 30.03.2015 / **e)** 2777-2015 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

4.5.10.1 Institutions – Legislative bodies – Political parties – **Creation.**

4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

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

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

Keywords of the alphabetical index:

Election, candidature / Election, system / Gender, quota, constitutionality / Election, independent candidates / Election, parliament.

Headnotes:

The redistribution of parliamentary seats under merged constituencies does not violate the principle of equal suffrage, even if there are some distortions between constituencies. It is constitutionally permitted to restrict, by law, the nomination of candidates through primary elections in order to obtain the required gender quota of candidates for a political party or electoral alliances. Reducing the level of voter support required for the creation of a regional party, which is lower than the support an independent candidate needs, does not infringe the constitutional principle of equality between both types of candidacy.

Summary:

I. A number of Members of the National Congress challenged the constitutionality of the new electoral

system for the general election of deputies and senators to the National Congress. This bill merged the existing 60 constituencies into just 28, increased the seats from 120 to 155, and redistributed them into the new constituencies' configuration. The goal was to achieve a more proportionate electoral system and to abolish the binominal electoral system that has ruled congressional elections for over two decades, under which the top two finishers in each district are elected. The electoral reform also created an affirmative action framework for women in order to increase their representation in Congress.

The applicants challenged a number of the bill's provisions as unconstitutional. First, they argued that the redistribution of parliamentary seats established in the law breached voting rights, such as the principle of the equal value of citizens' votes. Second, they challenged the provisions on primary elections and the gender quota. The rule here is that either female or male candidates cannot exceed 60% of the total candidates of a political party or electoral coalition. Therefore, in order to fulfil that requirement, the nomination system of candidates, known as "primary elections", is restricted by law to 40% of the candidates. The applicants argued that this ruling unreasonably limits the freedom of political parties to determine the structure of a primary election. Third, the applicants challenged the rule that reduced the percentage of voters required to create a new political party in a region, while maintaining the existing threshold for independent candidates. They argued that these new requirements would breach the constitutional principle of equal opportunities for independent and political parties' candidates.

II. The Constitutional Tribunal observed that the first question here is whether the redistribution of electoral seats among the constituencies is unconstitutional for breaching the principle of equal suffrage. The Tribunal recalled that the legislator has a broad competence to establish the regulation and procedures for elections. Although there might be some over-representation or under-representation of votes in some constituencies, those are justified by considering the characteristics of the population distribution in the country, in particular for those regions that have smaller populations.

Second, the Tribunal held that, regarding primary elections, there is no breach of the Constitution. The challenged rule is not unconstitutional, because it still remains a voluntary election procedure for political parties and electoral alliances, it is a temporary measure for the next five elections and it has a legitimate goal, since it constitutes affirmative action that seeks greater equality in political participation between men and women.

Third, the Tribunal held that the law does not breach equality between independent candidates and political parties' candidates. Even though it provides more flexibility concerning the creation of political parties, these are still ruled by the Law on political parties, which imposes strict controls and requirements for the creation of parties. These are burdens which are not placed on independent candidates.

Languages:

Spanish.



Identification: CHI-2015-1-002

a) Chile / **b)** Constitutional Court / **c)** / **d)** 01.04.2015 / **e)** 2787-2015 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.18 General Principles – **General interest**.
 4.10.6 Institutions – Public finances – **Auditing bodies**.
 4.15 Institutions – **Exercise of public functions by private bodies**.
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
 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:

Economic action, freedom / Education, public / Education, school, admission policy / Education, subsidy, independent school / Subsidy, State, use.

Headnotes:

The regulation of private schools, as regards their admissions policies, economic purposes and spending of public grants, is not unconstitutional. The State's aim to address discrimination in admissions to private schools is justified and does not violate the freedom of education. Rules requiring private schools to move to a non-profit structure, and concerning the spending of State money, are justified on the basis

that the State makes similar requirements concerning the structure of other private entities (e.g. banks) and the State's aim is to prevent expenditure of public money on purposes other than education.

Summary:

I. Chile has a mixed system of education in which both the State and the private sector bodies are education providers. The latter have the possibility to obtain a grant from the State, according to a number of requirements established in law. The Congress passed this year a legal reform for the education system, which pursues higher quality in education. In order to achieve this goal, the reform established a number of measures, principally an admission system for publicly-financed private schools, which prohibits selection in the admission process, and a ban on profit-making for private education bodies which are in receipt of a public grant.

The applicants are members of the Congress who challenged several provisions of the bill:

- a. the admission system to subsidised private schools;
- b. the obligation for these schools to convert to non-profit legal entities;
- c. the specification in law of the ways in which the grant shall be spent by private administrators; and
- d. the new legal power of the Ministry of Education to evaluate if these schools shall receive a public grant.

Regarding the first issue, the applicants argued that the admission system is unconstitutional given that it breaches the freedom of parents to choose a school of their preference. Second, regarding the obligation on subsidised private schools to convert to non-profit education, the applicants argued that this obligation breaches the freedom of education, mainly the constitutional right of schools to "freedom of organisation". According to the applicants it also breached the Constitution, because on the one hand it infringes the right to organisation for schools and it contravenes the principle of legal reserve, under which certain matters affecting fundamental rights may only be regulated by the Constitution or statute. Third, the applicants argued that the Law's specification concerning the use of public grants violates schools' right to organisational freedom, under the freedom of education. Finally, the applicants argued that the new power of the Ministry of Education to assess whether a private school should receive a public grant is a breach of the freedom of education, since it is an unreasonable limitation on the freedom of education.

II. Regarding the admission system, the Tribunal did not find any unconstitutionality. The Court considered that the new admission system makes it possible for parents to access schools of their choice without being the subject of discrimination, by preventing the selection of children based on criteria such as economic or family background. In this sense, the Court was of the view that the new system of admission achieves constitutional goals such as the dignity of children and families.

Regarding the organisation of private schools, the Constitutional Tribunal did not see any infringement of the freedom of education. The Court noted that this kind of regulation is not exclusive to the field of education. It applies to other spheres of economic activity, such as the regulation of banking, where it is mandatory for banks to adopt a joint stock company structure. Thus, the Tribunal observed that here the goal is to prevent private school administrators from using grants for purposes other than education.

Regarding the argument as to the Law's specification concerning the use of public grants, under the freedom of education, the Tribunal held that in this case there is no unconstitutionality. The list that establishes the use of a public grant is exhaustive and it include all possible educational purposes, excluding purposes that may pursue profit. The Court considered that this exhaustive list is justified by the aim to achieve higher quality in education, because it prevents administrators from using grants for a non-educational purpose. In addition, concerning the question whether an exhaustive list is a breach of the statutory reserve principle, the Tribunal held that the applicants here claimed an absolute freedom of education, by arguing against any regulation of subsidised private schools. The Court considered this claim to be erroneous, because there is no constitutional rule that prohibits regulation of the granting of subsidies. Understanding the subsidy as a grant from the State to private bodies that perform a public function, such as education, it is not unconstitutional to establish a framework and conditions for the granting of such subsidies.

Finally, concerning the constitutional challenge against the new power of the Ministry of Education, the Tribunal held that the applicants did not proffer the evidence required to support their arguments. Here, the State has the legitimate discretion to evaluate to whom a subsidy shall be given; under the criteria that the private body receiving this grant accomplishes all the minimal requirements to guarantee quality in the educational project.

These rulings were all adopted by the Constitutional Tribunal in a tied decision, where the President of the Tribunal had the casting vote.

Languages:

Spanish.



Croatia

Constitutional Court

Important decisions

Identification: CRO-2015-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.01.2015 / **e)** U-III-4150/2010 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 6/15 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Courts**.
 2.1.1.4.3 Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949**.
 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
 3.1 General Principles – **Sovereignty**.
 3.9 General Principles – **Rule of law**.
 3.10 General Principles – **Certainty of the law**.
 3.14 General Principles – **Nullum crimen, nulla poena sine lege**.
 5.2 Fundamental Rights – **Equality**.
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.

Keywords of the alphabetical index:

Armed conflict, international or national character / Case-law, discrepancies / Offence, criminal, element, essential / Court, law making task / Criminal proceedings / Fact, establishment / International obligation / Interpretation, ambiguity / Interpretation, implications / Interpretation, uniform / Offence, criminal, qualification / State, recognition, international law / War crime, definition.

Headnotes:

The Constitutional Court does not develop the criminal justice system in the field of war crimes, provided it remains within the boundaries of the Constitution. The Supreme Court, as the highest court in the country pursuant to Article 116.1 of the Constitution, has jurisdiction and responsibility to develop and guide jurisprudence in this field of law.

The Constitutional Court is not an ordinary court of the third or fourth instance and does not decide on the merits about suspicion of or a charge related to criminal offences in individual cases. Therefore, the Constitutional Court in its proceedings has not considered or decided whether applicants of constitutional complaints are guilty of crimes for which they had been convicted. This is the task of ordinary criminal courts.

Summary:

I. Constitutional complaints were filed against the judgment of the Supreme Court, which partially overturned the judgment of the court of first instance rendered in criminal proceedings against six applicants for war crimes against the civilian population referred to in Article 120.1 of the Basic Penal Code of the Republic of Croatia (hereinafter, "BPCRC"). The criminal acts occurred between mid-July and the end of December 1991. The applicants were convicted of committing the crimes on the grounds of command responsibility and/or responsibility for directly committing the crimes.

The Supreme Court confirmed the applicants' responsibility for crimes described in the contested first-instance judgment but at the same time, it declared that the appeal of the applicant Glavaš for a violation of criminal law and of the decision on the sentence was well-founded. It also declared that the other applicants' appeals related to the decision on the sentence were also well-founded. In these parts, it overturned the first-instance judgment.

The Supreme Court declared that the remaining part of the applicants' appeal was not founded. It held that, with exception of the applicant Glavaš, the first-instance court "applied domestic and international criminal law based on correctly and fully established facts with regard to each individual defendant when it found them guilty of the criminal offence of war crimes against the civilian population referred to in Article 120.1 BPCRC".

War crimes against the civilian population referred to in Article 120 BPCRC are criminal offences defined by another provision (*blanketno kazneno djelo*). The offenses require a showing that the perpetrator commits the acts expressly described in the law and commits them "by violating the rules of international law". Therefore, if the perpetrator commits the described acts without violating the rules of international law, war crimes in the meaning of Article 120 BPCRC are excluded and another crime (for instance, murder) can be considered in their place.

In their constitutional complaints, the applicants referred to the violations of several rights guaranteed by different articles of the Constitution and the European Convention on Human Rights. In their objections, they pointed out the issue of the differing case-law of criminal courts concerning the date when Croatia became a sovereign state in the meaning of international law.

II. The Constitutional Court received these complaints for the first time as individual complaints in these Constitutional Court proceedings. Since there was an obvious need to examine these complaints in light of constitutional law, this decision has also in this part (i) a general meaning and exceeds the boundaries of a particular case.

In these constitutional proceedings, the task of the Constitutional Court was limited to considering specific violations of the constitutional rights that the applicants referred to in their constitutional complaints. Within these boundaries, the judicial qualification of armed conflict, in conjunction with the issue of international law that the courts had applied, could have had concrete implications on the establishment of the criminal responsibility of the applicants. This includes violation of the applicants' constitutional rights to equality before the law (Article 14.2 of the Constitution) and to a fair trial (Article 29.1 of the Constitution and Article 6.1 ECHR), which are among the main features of the rule of law guaranteed by the Constitution and the European Convention on Human Rights.

The Constitutional Court's duty in this case was to review these matters in light of the case-law of the Supreme Court in other comparable cases.

Within these boundaries, a relevant fact in terms of constitutional law was that the applicants were convicted in the contested first-instance judgment, which the Supreme Court upheld by a final decision because:

“... with the purpose of intimidation and retaliation, they subjected the civilian population of Osijek, especially those of Serbian ethnicity, to treatment contrary to the provisions of Article 3.1.a of the Geneva Convention relative to the Protection of Civilian Persons in Times of War of 12 August 1949, and the provisions of Articles 4.1.2.a, 5.3 and 13.2 of the Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)”.

According to the operative part of the contested first-instance judgment, by acting in this way, “by violating the rules of international law during the armed conflict”, they committed “crimes against humanity and international law” as described and punishable pursuant to Article 120.1 BPCRC.

The Constitutional Court established that there were inconsistencies in the procedure of the Supreme Court in criminal matters where that Court found that lower-instance courts had incorrectly qualified the status of the Republic of Croatia before and after 8 October 1991, and the related character of the armed conflict in the territory of the Republic of Croatia since 1991, which led to direct consequences for the case in hand.

In the contested second-instance judgment, the Supreme Court did not consider the failure of the first-instance court, including the incorrect determination of the date when the Republic of Croatia acquired the status of a state in the meaning of international law and the related incorrect qualification of the armed conflict and application of international law regulating non-international conflicts. This was “a fundamental fact”, as it qualified the same failure in another comparable case. Moreover, the Supreme Court found this failure of the first-instance court to be “an oversight”.

However, this was a fact of constitutional significance and importance, which must not be identified or equated with any other “fundamental facts” in court cases and with the possibly inconsistent, even contrary, case-law of the competent courts and their qualifications. Therefore, this did not concern a general request to guarantee “legal and procedural certainty” that the European Court of Human Rights imposes on state authorities when it requires them to respect and apply domestic legislation in a predictable and consistent manner (case of *Jovanović v. Serbia*, no. 32299/08, paragraph 50). This was not a particular constitutional request to guarantee “legal and procedural certainty”. The reason is that – for everyone in an equal manner – it must be derived from a clear, unambiguous and firm court establishment of the date of the creation of the sovereign and independent Croatian state, the character of the armed conflict that took place at the beginning of the 1990s in its territory and the relevant international law of war and humanitarian law applicable during that period.

A consistent, uniform and stable approach of the Supreme Court is critical to criminal cases in which there is a departure from the date when the Republic of Croatia acquired the characteristics of a sovereign state in the meaning of international law

(8 October 1991) and when this date is relevant for the implementation of applicable law in these cases. There must be a consistent, uniform and clear interpretation of the manner in which this is applied to events before and after 8 October 1991, as well as consistent and uniform proceedings related to cases where the same type of failures of the lower-instance courts related to these matters have been observed. Besides special significance for the legality and legitimacy of the general activity of criminal courts, it is important for the suppression of arbitrary findings of courts concerning significant facts of constitutional law and winning public confidence in the judicial system. As a result, citizens can trust that it is capable of guaranteeing real legal certainty and the equality of all before the law, which constitute fundamental attributes of the rule of law guaranteed by the Constitution and by European Convention on Human Rights (see *mutatis mutandis*, the European Court of Human Rights, *Živić v. Serbia*, no. 37204/08 paragraph 40, 13.09. 2011).

Lack of compliance with these constitutional requirements to correctly assess the constitutional and legal foundation of the country is contrary to the “imperative of maintaining citizens’ legitimate confidence in the State and the law made by it” (European Court of Human Rights, *Broniowski v. Poland* [GC], no. 31443/96 paragraph 184, 22.06.2004) inherent in the rule of law, the highest value of the constitutional order of the Republic of Croatia (Article 3 of the Constitution).

Based on this state of affairs, the Constitutional Court established that the Supreme Court must reopen proceedings in the case in which it had rendered the contested judgment. The aim is to achieve legal certainty of the objective legal order and ensure consistency in its case-law (“visibility of justice”). This is the only way to also ensure public confidence in the judicial system as a whole, clarify judicial proceedings for applicants of constitutional complaints in individual cases and remove the perception of arbitrariness stemming from the court judgments.

At the same time and for the same reasons, the Court decided that the Supreme Court, in reopened proceedings, should give reasons for its positions regarding the application of Additional Protocol II to the Geneva Convention relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 08.06.1977) and the events that took place after 8 October 1991. The Supreme Court shall also elaborate on other legal matters related to the character of the armed conflict in the Republic of Croatia before and after 8 October 1991, which are referred to in the statement of reasons of this decision.

Finally, the Constitutional Court noted that, there are certain objections of the applicants that the European Court of Human Rights generally takes into account as those “that can be defended” and for which that Court has a stable and extensive case-law.

Since the proceedings before the Supreme Court had to be reopened, the Constitutional Court stressed that it is obliged to relinquish to the Supreme Court the responsibility to decide upon these objections since it is the highest court in the country. The Constitutional Court is authorised to ensure the uniform application of the law (including Convention law) and the equality of all (Article 116 of the Constitution). This has also allowed these objections to be reviewed from the aspect of Convention law as a single whole in the same proceedings in which the case is reviewed in conformity with the legal positions of the Constitutional Court established in this decision. This concerns the appropriate application of Article 77 of the Constitutional Act on the Constitutional Court in conjunction with Articles 116.1 and 134 of the Constitution. It shall be considered in light of international commitments, as ratified in the European Convention on Human Rights and the constitutional requirement that “[c]ourts shall administer justice according to...international treaties...” (Article 115.3 of the Constitution).

In line with the above, the Constitutional Court decided that the Supreme Court, in the reopened proceedings, should review the cases described in this decision’s statement of reasons. The Supreme Court should consider whether the applicants’ rights had been violated in light of the European Convention on Human Rights: equality of arms, including the right to an adversarial procedure, the right to a reasoned court decision, the right to an effective remedy and the right to a defence counsel.

The remaining parts of the complaints were rejected, because the Constitutional Court held that the remaining objections were unfounded.

Cross-references:

Constitutional Court:

- no. U-X-2271/2002, 12.11.2002.

European Court of Human Rights:

- *Jovanović v. Serbia*, no. 32299/08, 02.10.2012;
- *Živić v. Serbia*, no. 37204/08, 13.09.2011;

- *Broniowski v. Poland* [GC], no. 31443/96, 22.06.2004.

Languages:

Croatian.



Identification: CRO-2015-1-002

a) Croatia / b) Constitutional Court / c) / d) 22.01.2015 / e) U-III-5614/2013, U-III-5577/2013 / f) / g) *Narodne novine* (Official Gazette), 27/15 / h) CODICES (Croatian).

Keywords of the systematic thesaurus:

4.7.3 Institutions – Judicial bodies – **Decisions.**

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

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:

Crime against official duty / Criminal liability, elements, precision / Judge, immunity / Judge, criminal liability, abuse of position and authority.

Headnotes:

In principle, a piece of legislation that has been incorrectly interpreted and applied in a particular case neither constitutes nor is taken to include excessive use of judicial authority and abuse of the official position of a judge, even when another person suffers damage or where material gain is obtained.

Whether an abuse of judicial authority occurred requires a showing that the judge's decision exceeds the boundaries of what is acceptable, which is absurd in itself and obviously, in the interpretation and application of legislation, favours the resolution of a specific legal issue to the benefit or detriment of a party in the proceedings.

An essential element for the "abuse of the position of judge" claim is that the substantive or procedural breach evidently affected the legal position of one of the parties in the proceedings, resulting in the

discriminatory treatment of the other party (e.g., the judge consciously/deliberately acted contrary to the principle of the equality of arms of the parties).

In terms of the judge's responsibility for the "abuse of position", it is not relevant whether as a result of his or her action (or omission) the aim of exceeding the official authority (of the judge) was accomplished. It is a formal criminal offence concluded at the time the act was committed. Furthermore, there must be (indisputable) awareness on the part of the judge about how his or her legal opinion, issued in the interpretation and application of the piece of legislation, may affect the outcome of the proceedings, and his or her awareness and intention to obtain material gain for others or to cause damage to others.

Therefore, the fact that a judge issues an opinion concerning the application of legislation, which might be contrary to case-law and related positions, may not in itself indisputably mean that the "judge had the intention" of abusing his or her official position.

Summary:

I. Before the Constitutional Court proceedings, the applicant had been criminally convicted. According to the decision, the applicant, as the competent land registry judge (therefore in the capacity of an official person), had abused his position with the aim of obtaining considerable material gain for another. As such, he exceeded the limits of his authority (Article 291 of the Criminal Code) and consciously acted contrary to Article 47 of the Privatisation Act, enabling the company "*Dubrovačko primorje*" d.d. to register its title to real property, which had not been entered in the assets of the said company in the transformation process.

The applicant brought his case to the Court after the Supreme Court rejected his appeal against the first-instance judgment. He contended that the rejection of the appeal violated his constitutional rights under Articles 14.2, 29.2 and 31.1 of the Constitution. He also referred to violations of Articles 115.3, 116.1 and 119.2 of the Constitution. The applicant held that Articles 6 and 7 ECHR were also violated, in addition to Article 2 Protocol 7 ECHR.

II. In this case, the Constitutional Court considered the results of the Zagreb's County Court in proceedings in the first-instance judgment and its declaration that the applicant's actions constituted a criminal offence against official duty by abusing his position and authority. It also examined how the County Court explained its decision and the Supreme Court's reasons to uphold the decision in the contested

judgment. In so doing, the Constitutional Court considered whether they were arbitrary and whether they violated the right of the applicant to a fair trial stipulated in Article 29.1 of the Constitution.

Further, the case examined the extent of a judge's freedom of beliefs and opinions and the guarantee contained in the first part of Article 119.2 of the Constitution, which states that judges taking part in court proceedings may not be held accountable for an opinion or vote given in the process of judicial decision-making.

The Constitutional Court considered the "ordinary" irregularity of a decision of a judge, which was established on the basis of an erroneous opinion of the judge expressed with regard to the application of a piece of legislation applicable to the legal matter concerned. The Court viewed that it is not and may not be sufficient to establish the existence of reasonable suspicion concerning the abuse of judicial authority and the abuse of the official position of a judge, and hence the criminal prosecution of the judge for having committed a criminal offence of the type concerned.

The Constitutional Court examined the limit where it would no longer be possible to justify the judge's interpretation of the applicable legislation to resolve a particular legal dispute without any (possible) suspicion as to the "abuse of official position and authority". The limit is where the judge acted fully aware that the application of the piece of legislation applicable to the case at hand would lead to an obvious violation of the principle of the rule of law, legal security of the objective legal order and the basic undermining of the work of the judiciary.

It follows from the statement of reasons of the first-instance court's judgment that the objective characteristics of the criminal offence of abuse primarily lie in the fact that the applicant as a judge before, during or after the incriminated event acted differently in similar or identical cases and that for a number of years, he was a land registry judge who worked on complex cases.

Courts have a duty to provide a statement of reasons for ruling that a criminal offence occurred. The courts established that the actions of the judge in the same kind of cases before, during and after the disputed entry did not speak in his favour. It was not visible, though, from the statement of reasons of the courts how they established this and whether this indeed was the case. A general assessment of the potentially different course of action in the same kind of cases, without stating the specific cases and analysing them, therefore without objective facts, is not acceptable.

This applies particularly in the specific case, if one bears in mind that a decision concerning the course of action is being made within the framework of the freedom of judicial beliefs and the right to opinion, and that it is being established whether the judge concerned crossed the line between the freedom of judicial beliefs (opinion) and punishable conduct (i.e., the "existence of intention" of the judge aimed at abusing his official position). The Court holds that it remains questionable how it was possible to discuss the intentions or awareness of the judge related to such action without first conducting a thorough analysis of his actions in other identical cases. That is, a detailed statement of facts on the basis of which conclusions about the existence of the objective characteristics of the offence were drawn should be undertaken. The foregoing is wholly missing from the case at hand.

The question of transformation and privatisation, in particular the application of Article 47 of the Privatisation Act, and accordingly the issue of the entry of the right of ownership of assets arising from transformation (even those entered in the company capital of legal entities arising from transformation) has resulted in a series of disputes, doubts and mutually conflicting positions both in professional literature and in practice. In view of the (diametrically) opposed positions held by the scientific and professional public, case-law could not be based on answers to the practical questions and doubts found in professional literature. That is, each judge or other legal practitioner could choose any option that he or she considered correct based on his or her knowledge and convictions.

If we apply the foregoing to this case, the Constitutional Court points out that the entry was made in 1998. Therefore, it was "only" two years after the adoption of the Privatisation Act at a time when the said doubts for implementing the act were even more prominent. The reason is that at such a time (i.e., two years after its entry into force, when the contested entry was made), the practice concerning the entry of such real property was not elaborated or common. Further, the Court holds that it is not logical or legally acceptable that the applicant was incriminated for his conduct ten years after the making of the incriminated entry, after the case-law had become common following a relatively long period of implementation of the Privatisation Act.

The Constitutional Court established before these proceedings, the ordinary courts do not state any relevant, sufficient and serious grounds under which they established that the applicant had committed a criminal offence. That is, he, as a land registry judge, had deliberately permitted an illegal entry, thus

committing the criminal offence of abuse of position and authority referred to in Article 291 of the Criminal Code. In the specific circumstances of the criminal offence, the courts were obligated to state clear and specific reasons that the applicant had been aware and had the intention of committing a criminal offence. That is, the courts were required to provide why they held that the action of the applicant, as a judge, had exceeded his right to a judicial opinion and beliefs in the case at hand, thus committing a criminal offence. In other words, how they established that the applicant had acted fully aware that applying a specific piece of legislation applicable to the case would lead to an obvious violation of the principle of the rule of law and legal security, thus gaining benefit for others or causing damage to others.

Subsequently, the Constitutional Court held that the contested judgments were arbitrary as a result of insufficient explanation of reasons for which they are based, which is why the applicant was not provided with the standards of a fair trial.

Since the constitutional complaint was accepted for the said reasons, the Constitutional Court did not review the applicant's other claims concerning the violation of other constitutional and Convention rights.

Cross-references:

Constitutional Court:

- no. U-III-5807/2010, 30.04.2013, *Bulletin* 2013/2 [CRO-2013-2-007];
- no. U-III-2160/2011, 09.05.2013.

Languages:

Croatian.



Identification: CRO-2015-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 30.03.2015 / **e)** U-I-1625/2014 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 40/15 / **h)** CODICES (Croatian).

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.**
- 3.16 General Principles – **Proportionality.**
- 3.18 General Principles – **General interest.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**
- 4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**
- 4.6.10.1 Institutions – Executive bodies – Liability – **Legal liability.**
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Benefit, right / Civil and public services, collective labour agreement, loyalty benefit / Collective bargaining / Government, legislative measure, review of constitutionality / Collective labour agreement, benefit, suspension / Economic situation, adjustment / Law, economic aim / Aim, legitimate.

Headnotes:

The rule of law obligates competent authorities to use their constitutional powers in order to carry out their roles in conformity with the rules of democratic procedure. They exist to promote while protecting the basic democratic values of society. Without a democratic procedure, there is no democracy. Legislators in a democratic society shall respect the prescribed procedure, democratic standards in adopting laws, other legislation, and general acts.

In any state based on the rule of law, unlimited power may not exist. Arbitrary power leads to unfair, unfounded, unreasonable or oppressive decisions contrary to the principle of the rule of law.

A responsible approach of state authorities in terms of legal interventions in substantive rights arising from collective agreements is essential. Such interventions must always be accompanied by clarity, precision, certainty, and foreseeability of duration, such that the addressees affected might adjust their conduct and expectations.

Summary:

I. The applicants (several trade unions and natural persons) requested the Constitutional Court to review the Act on the Denial of the Right to an Increase in Salary Further to Years of Service (hereinafter, the "Act") and the Regulation amending the Act on the Denial of the Right to an Increase in Salary Further to the Years of Service (hereinafter, the "Regulation amending the Act"), adopted on the basis of legislative authority. The Court closely examined the temporary bonus freeze for a certain category of employees in the civil or public service with 20 and more years of service due to the economic crisis. Depending on their seniority, they were promised automatic increases of 4, 8 or 10 per cent. As a result of the freeze, the employees received their salaries without the seniority bonus increase.

The Act was adopted as part of a government policy for limited duration until 31 December 2014. Article 1 of the Regulation amending the Act extended the policy until 31 March 2015.

The applicants challenged the formal and substantive constitutionality of the Act and the Regulation amending the Act. They contended that the rights and legitimate expectations of employees arising from collective agreements (i.e., "human rights and freedoms of employees in civil and public services") had been violated. Without prior collective negotiations on the amendments, the government abused its constitutional authority to propose legislation and "forcibly" interfered in the system of collective negotiations, justifying their action on the "years-long recession". By doing so, the applicants asserted that the government undermined the right to collective negotiations and enjoyment of the rights specified in the collective agreements. The government also disregarded the rules of the democratic procedure, because it simultaneously participated in the collective negotiations and agreed to certain material rights, but then proposed legislation derogating from such rights.

II. After reviewing the case, the Constitutional Court rejected the applicants' objections to the Act and proposals (made by a couple of trade unions) to institute proceedings for review of the constitutional and legality of the Regulation amending the Act.

The Court noted that a precondition for human dignity is minimum economic well-being. The efficient realisation of human rights in practice means that all employed persons receive a minimum for their daily needs (i.e., "the means to ensure a decent living").

With the contested measure, the state impinged upon the material rights of a certain category of employees in the civil and public services, which had been the result of collective negotiations.

The Constitution guarantees that all employees have the right to remuneration enabling them to ensure a free and decent life for themselves and their family (Article 55.1 of the Constitution). The said constitutional guarantee is elaborated in the legislation and the collective agreement. In terms of employees in the civil and public service, "the right to remuneration" is elaborated in the Act on Civil Servants and Employees and the Act on Salaries in the Public Service, and in the collective agreements concluded for employees in the state and public service.

Although each employee is guaranteed the right to remuneration, the Constitution does not stipulate a specific amount of such remuneration. The Constitution does not even guarantee specific elements of such remuneration (for example, incentives, supplements for special working conditions, position-related supplements, increments in salary, and the like).

The Constitutional Court pointed out that increments in salary based on years of service in the civil or public service are not a constitutional category. The increment is regulated by collective agreements and as any other increment, is subject to change depending on the will of the contracting parties, the state of the country's economy, which is as a rule, one of the basic reasons for which such changes are initiated. Therefore, the Court held that the objection that "by the Regulation the government directly impinged upon the rights and freedoms of employees in the civil and public service set out in the Constitution" is irrelevant. The reason is that the bonus in question is not a human right or fundamental freedom guaranteed by the Constitution.

Article 110.1 of the Constitution (the government shall propose bills and other acts to the Croatian Parliament), Article 80.2 of the Constitution (Parliament shall adopt laws) and Article 88 of the Constitution (regulations of the Government adopted by legislative authority) were found relevant for a review in the formal sense for the (un)constitutionality of the Act and the Regulation amending the Act.

With respect to the applicants' contention that rules of democratic procedure had been violated, the Constitutional Court stated that it accepts the objections that the government, by adopting the Act and the Regulation amending the Act, acted contrary to the principle of collective negotiations in good faith. In principle, it is not acceptable to take part in

collective negotiations on the remuneration of employees and agree on certain material rights, but within a short period of time afterwards, derogate from the same material rights by a legislative measure without previous negotiations on the amendments to the collective agreements. What is more, several days before the expiration of the validity of the Act, the government prolonged its validity by three months pursuant to the provision in Article 88 of the Constitution (by means of the Regulation amending the Act).

Through the government's actions, the derogation was undertaken in full respect of the rules of the democratic procedure in collective negotiations. Still, the Court noted that the content of the Act and the Regulation amending the Act was not unconstitutional in any substantive sense and acknowledged the circumstances under which they were adopted. The Court then concluded that the government did not exceed the limits of its authority to an extent that could qualify as an "abuse of constitutional authority to propose legislation", as claimed by the applicants.

The Court's review was based on reasons given in the assessment of the substantive non-conformity of the contested acts with the Constitution. In terms of the substantive non-conformity of the contested acts with the Constitution, the Court stated, *inter alia*, that "the right to an increment in salary" has been "an organic and structural part of the salary (remuneration)" of employees in the civil and public service for a number of years. However, the Court reiterated that the said "right" is not by nature a component part of the salary ("remuneration") within the meaning of Article 55.1 of the Constitution. It is a bonus recognised for one category of employees in view of their long civil service (without interruption for 20 years or more).

Examining the justifiability of the legal measure of interfering with the bonus from the aspect of Article 16 of the Constitution (the principle of proportionality) in conjunction with Article 55.1 of the Constitution, the Court considered that the Act and the Regulation amending the Act have a legitimate goal. They are intended to preserve the stability of the state's financial system during economic crisis by having a rapid effect on the revenue of the state budget.

Regarding the proportionality of the measure to be achieved, the Court established that the said bonus had not existed before 2004; that it was agreed at a time when the country was in a much better economic condition; that the measure set out in the Act and the Regulation amending the Act was taken in view of and under the conditions of economic crisis; that the

measure was only one in a series of measures that the government made to resolve the issue of excessive budget shortages in line with the recommendations of the Council of the European Union; that the provisions on other material rights agreed in the collective agreement for employees in the civil and public service, valid on the date of the adoption of the Act (and the Regulation amending the Act), still apply in full; and that the said measure had the features of an extraordinary measure, which is by nature extraordinary, but also temporary.

The Constitutional Court established that a prolongation of the measure by the Regulation amending the Act was constitutionally acceptable. The reason is that there were still very important reasons of public interest justifying its application (adjustments in view of an excessive budgetary shortage in line with the recommendations of the Council of the European Union).

However, the Constitutional Court emphasised that any further prolongation of the measure prescribed by the Act might result in the measure itself, by repeated interventions of state authority, being transformed from an exceptional and temporary measure into a more permanent or even a permanent one, with an uncertain deadline for its termination. Thus, the entire problem had given rise to the issue that "denial" of the said bonus would turn into a problem relating to the realisation of the rule of law, in particular the principle of legal security, legal certainty and legal predictability, with which the problem of the credibility of executing authority and the trust of citizens in such authority is most closely connected.

Further, the Court established that the measure is proportionate to the intended goal.

Finally, the Court concluded that the contested legal measure, as stipulated in the Act, cannot qualify in any respect as an excessive burden for its addressees. The measure did not include a calculation of the basic salary, including the general salary increment of 0.5 percent for each year of service to which each employee in the civil or public service is entitled, regardless of the years of service in the civil or public service. Considering that other material rights of employees in the civil or public service are still guaranteed in full, the Court assessed that with the temporary "denial" of the bonus, the essence of the right to remuneration within the meaning of Article 55.1 of the Constitution of its addressees (i.e., employees with 20 years or more of service in the civil or public service) is not denied.

The Constitutional Court disagreed that the rights of employees acquired through collective agreements and their legitimate expectations had been violated. Namely, the bonuses do not constitute subjective rights that would be included in the concept of "acquired rights". On the other hand, legitimate expectations are protected only for as long as there is a valid legal basis on which such expectations are based. Following the entry into force of the Act and the Regulation amending the Act, the effect of the legal basis on which the said bonus was based was temporarily suspended.

Cross-references:

Constitutional Court:

- no. U-II-1118/2013, 22.05.2013, *Bulletin* 2013/2 [CRO-2013-2-008].

Languages:

Croatian.



Identification: CRO-2015-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.04.2015 / **e)** U-III-1451/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 44/15 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

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

Keywords of the alphabetical index:

Bail, forfeiture / Case-law, development, respect for constitutional guarantees and rights / Constitutional Court, jurisdiction, limits / Constitutional Court, interpretation, binding effect / Criminal procedure, precautionary measures, effects.

Headnotes:

In determining whether bail conditions had been breached, the court would violate a person's constitutional right to freedom if it solely based its ruling on the finding that the act of committing new, other, and different criminal offences from the one for which pre-trial detention, later replaced by bail, had occurred. It does not matter that the (new) criminal offences were committed with the aim of making the presentation of evidence in the initial investigation more difficult or obstructing the investigation. Reasonable suspicion regarding the committing of new, other, and different criminal offences from the one for which pre-trial detention, later replaced by bail, was ordered could be the reason to order pre-trial detention against the applicant under other (new) grounds, but could not be a reason for the court to establish that the conditions of bail were breached. The reason is that the conditions in question were set for completely different criminal offences in the context of the initial investigation, for which investigation pre-determined rules of conduct binding upon the applicant were also previously established, including such precautionary measures specifically set and established within the framework of the investigation concerned.

The effects of a precautionary measure connected with the performance of a professional activity of the applicant and its termination are outside the purview of the Constitutional Court. Such measures are within the exclusive competence of ordinary courts. The Constitutional Court is not part of the judicial authority of the Republic of Croatia. Its jurisdiction is specific and exclusively aimed at the protection of human rights. In other words, it is limited to investigating whether ordinary courts have performed their obligations concerning human rights as stipulated by the Constitution.

Summary:

I. The applicant requested the Constitutional Court to review the second instance court's ruling on 18 March 2015 rejecting the applicant's appeal against the first-instance court's ruling on 10 March 2015 (investigating judge with the competent ordinary court).

In the contested rulings, the applicant was initially placed in remand during a criminal investigation, but released on bail after posting 15 million kuna to the state budget. Precautionary measures were also imposed prohibiting the applicant to carry out "the legal professional activity of Mayor of the City of Zagreb" (Article 123.1.2-3 of the Criminal Procedure Act). He was subsequently remanded in detention after the court found that he had violated bail

conditions set in the 13 November 2014 ruling (Article 102.1 of the Criminal Procedure Act) by committing new criminal offences and obstructing an investigation. He encouraged false testimony referred to in Article 305.1 in conjunction with Article 37 of the Criminal Code, prevented the procedure of the presentation of evidence referred to in Article 306.2 of the Criminal Code, and committed the criminal offence of forging an official or business document referred to in Article 279.1 of the Criminal Code.

The complaint raised the question whether the applicant's remand in detention with bail conditions lifted and the collection of bail in favour of the state budget were "legal" and "in accordance with the procedure set out in law". The question also gives rise to the issue whether the court correctly determined that the applicant had breached bail conditions. The applicant objected to the risk of repeating the offence as the basis for ordering/prolonging pre-trial detention (Article 123.1.3 of the Criminal Procedure Act) because the basis for detention must relate to the same or a similar criminal offence to the one for which the accused person is incriminated – not just any criminal offence.

II. The Constitutional Court examined the applicant's complaint in light of the right to freedom set forth in Article 22 of the Constitution and Article 5.1.c in conjunction with Article 5.3 ECHR.

It seems that for the investigating judge and the panel of judges who rendered the contested rulings, the only relevant issue was whether there was reasonable suspicion the applicant had committed new criminal offences unrelated to his function as Mayor of the City of Zagreb (offences punishable under law by imprisonment for five years or by a more severe punishment). By new criminal offenses, these offenses should be different to the four criminal offenses allegedly committed by the applicant under investigation, due to which a bail regime and precautionary measures had been set. The grounds for the renewed deprivation of liberty are found in the sheer number of criminal offences the applicant is charged with and his readiness to commit further criminal offences and his persistence, that is, the quite real danger that "while released on bail he might commit a serious criminal offence punishable by imprisonment for the duration of five years or by a more severe punishment".

On such grounds, the investigating judge and the panel of judges concluded that the applicant had failed to uphold the promises he had made in relation to the initial four criminal offences related to the initial investigation and breached the precautionary measure issued against him. As such, they remanded

him again in detention for those, but also for the three new offences, at the same time collecting bail in favour of the state budget.

In these proceedings, the Constitutional Court examined only one issue relevant in terms of the protection of the constitutional rights of individuals. From the aspect of the guaranteed freedom of persons within the meaning of Article 22.1 of the Constitution, and Article 5.1.c in conjunction with Article 5.3 ECHR, is it acceptable from the point of view of the Constitutional Court (and in the terminology of the European Convention on Human Rights, "lawful") to deprive a person of liberty and collect bail? This is permissible when reasonable suspicion is established that such a person committed a (any) criminal offence punishable under law by imprisonment for the duration of five years or by a more severe punishment, where such a criminal offence falls outside the circle of the criminal offences which were the subject-matter of the investigation and for which pre-trial detention was ordered, bail was set, and precautionary measures were issued.

By responding negatively to the given question, the Constitutional Court did not begin only with the wording of Article 123.1.3 of the Criminal Procedure Act, examining it in its entirety, which, in its opinion, clearly and indisputable leads to a negative answer. The reason is that there must be a concrete and reasonable suspicion as to the existence of the danger that the person will "repeat the criminal offence or complete the attempted one, or commit a serious criminal offence which is punishable under law by imprisonment for the duration of five years or by a more severe punishment".

The Constitutional Court recalled the principle in its legal position contained in decision U-III-6979/2014 of 19 November 2014. It posited that Article 123.1.3 of the Criminal Procedure Act may be duly applied only where the court first establishes the existence of facts leading to a concrete and reasonably foreseeable concern that the criminal offence will be repeated and where there is also the danger of repeating the same or similar offence. The same position is expressed in the decision of the Constitutional Court U-III-1162/1997 of 2 December 1998.

In view of its long-standing stable and solid case-law in this regard, the Constitutional Court expressed its concern relating to the derogation made by the investigating judge and the panel of judges in the case at hand. They introduced the objective criterion of the duration of the prison sentence under Article 123.1.3 of the Criminal Procedure Act as the only criterion to be used in evaluating the application of the said legal provision to specific cases. With

this approach, the investigating judge and the panel of judges made it possible to introduce harmful formalism and mechanical decision-making in particularly sensitive proceedings concerning the deprivation of liberty, at the expense of constitutional guarantees. Further, the Constitutional Court holds that the derogation in the contested rulings casts doubt on the comprehensibility and precision of Article 123.1.3 of the Criminal Procedure Act.

In view of the state of facts and in order to eliminate any doubts that the disputed positions of the competent court might raise in court practice, the Constitutional Court repeated its long-standing and solid legal position that, in principle, Article 123.1.3 of the Criminal Procedure Act deals with a specific and reasonably foreseeable concern that the same or similar criminal offence to the one for which the person is incriminated might be repeated.

The Court fully acknowledged that the applicant, by the ruling of 9 March 2015, is subject to reasonable suspicion that he committed new criminal offences, which are not the same as those he is accused of in the initial ruling on the investigation of 20 October 2014. As such the Court established that in the circumstances of the case, the conditions have not been met to order the applicant, who has had no criminal record so far, to pay the amount of bail of 15 million kuna into the state budget, to lift the precautionary measure as the bail condition and to remand him in custody pursuant to Article 123.3 of the CPA "for having committed new criminal offences... contrary to the conditions of the ruling on the bail".

Following the quashing of the contested rulings in these Constitutional Court proceedings, the ruling of the investigating judge of the competent court of 19 November 2014, lifting the detention order of the applicant of the constitutional complaint, and the ruling setting the bail and precautionary measures of 13 November 2014, remained in force.

Further to the foregoing, the Court held that the applicant should immediately be released and that bail paid into the state budget should be immediately returned to the deposit account of the competent court.

Cross-references:

Constitutional Court:

- no. U-III-6979/2014, 19.11.2014;
- no. U-III-1162/1997, 02.12.1998, *Bulletin* 1998/3 [CRO-1998-3-020].

Languages:

Croatian.



Identification: CRO-2015-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.04.2015 / **e)** U-VIIR-1158/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 46/15 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

- 1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**
- 1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**
- 3.9 General Principles – **Rule of law.**
- 4.9.2.1 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility.**
- 4.9.2.2 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Effects.**
- 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Bill, abstract review / Bill, constitutionality / Referendum, for amendment to legislation / Referendum, legislative / Referendum, national / Referendum, preconditions / Referendum, preliminary review / Public road, concession, prohibition.

Headnotes:

As opposed to the subsequent abstract control of the constitutionality of laws, where the Constitutional Court is authorised to repeal a law deemed not to be in conformity with the Constitution, in the case of the preliminary abstract control of the constitutionality of the proposal of a law, decisions of the Constitutional Court have an effect similar to a resolute condition. That is, if it is established that the proposal of a law is not in accordance with the Constitution, the proposal may not be submitted to voters for a referendum.

Further, as opposed to the abstract control of the constitutionality of laws, where the Constitutional Court examines whether a law conforms to the Constitution, in the procedure of referendum control, the Constitutional Court is obligated to examine whether a referendum question is in accordance with the Constitution.

The constitutional requirement that referendum questions concerning proposals of laws within the meaning of Article 87.1 of the Constitution, in conjunction with Article 87.3 of the Constitution, must be “in accordance” with the Constitution is a particularly strict legal imperative. The *ratio* lies in the fact that such proposals of laws are not prepared, written or examined, adjusted or discussed in a democratic procedure to which laws passed by Parliament are subject. Such a procedure is characterised by an uninterrupted process of alignment and adjustment of the wording of the draft law, which includes a working group of experts as the competent authority for the project, guidelines of the line ministry, interdepartmental exchange of positions on the draft law, discussions in government bodies, examination by the Legislation Office, public debates and discussions in competent and interested committees of Parliament, and a multiparty parliamentary debate.

Since the proposals of laws referred to in Article 87.1 of the Constitution in conjunction with Article 87.3 of the Constitution are not subject to such adjustment and control mechanisms, Article 95.1 of the Constitutional Act on the Constitutional Court instructs the Constitutional Court to apply a stricter form of constitutional control of such proposals. As opposed to the laws referred to in Article 125.1 of the Constitution, in order for the proposal of a law referred to in Article 87.1 of the Constitution in conjunction with Article 87.3 of the Constitution to be valid, a review by the Constitutional Court would be insufficient if it only considered whether the proposals are constitutionally acceptable. It would also be insufficient if it only looked at whether they conform to the Constitution, i.e., that they are not contrary to the Constitution.

Summary:

I. Parliament submitted a decision to the Constitutional Court concerning the Organising Committee’s request for voters’ opinion whether to call a referendum on the issue of awarding a concession for motorways. The objective of the proposed referendum question was to have voters decide whether they support the adoption of an Act on Amendments to the Roads Act (hereinafter, the “AA RA”) in the wording proposed by the Organising

Committee. The AA RA proposed the prohibition of awarding concessions for public services on existing public roads. With the Decision, in accordance with Article 95 of the Constitutional Act on the Constitutional Court, Parliament requested the Constitutional Court to establish whether the preconditions stipulated in Article 87.1-3 of the Constitution for calling a national referendum were fulfilled.

Article 95 of the Constitutional Act stipulates that, at the request of Parliament, the Constitutional Court will establish (within 30 days of the day of receiving the request) whether the content of the referendum question is in accordance with the Constitution and whether the preconditions referred to in Article 87.1-3 of the Constitution for calling a referendum are fulfilled. This is carried out if ten percent of the total number of voters in the state requests the calling of a referendum.

II. The Constitutional Court first assessed that the precondition stipulated in Article 87.1 of the Constitution was fulfilled. The precondition states that a referendum may be called concerning the proposal of a law, and the precondition stipulated in Article 87.3 of the Constitution obliging Parliament to call a referendum if so requested by ten percent of the total number of voters in the country. Further, the Court established that the request for a proposed referendum question together with a statement of reasons (set out in the Court’s Decision no. U-VIIR-4640/2014 of 12 August 2014) was not fully met. Considering it was the first case requiring that the request contain a statement of reasons, the Court held that the omission was not a reason to avoid reviewing the constitutionality of the referendum issue.

Since the proposed referendum question was submitted in the form of a proposal of a new law, the Constitutional Court in these proceedings has the special task of instituting preliminary (preventive, *a priori*) abstract control of the constitutionality of the law and reviewing whether the proposal of the AA RA is in accordance with the Constitution.

In reviewing the constitutionality of the proposed referendum question, the Court held that the text of the proposal of the AA RA has the form and all elements of a legal text, and satisfies the unity of form, content and hierarchical levels. Therefore, the proposed text of the referendum question (i.e., the text of the proposal of the AA RA) was aligned with Article 3 of the Constitution (the rule of law) from a procedural aspect.

In relation to the substantive conformity of the proposed text of the referendum question with the Constitution, the Court held that Article 3 of the Constitution (the rule of law), Article 5.1 of the Constitution (the principle of constitutionality) and Article 49.1 of the Constitution (free enterprise and free markets as the foundation of the economic system) were relevant.

In a state where free enterprise and free markets form the very foundation of the economic system, concessions are a common legal transaction. According to Article 1 of the Concessions Act, concessions are a right acquired by contract. The law recognises three types of concessions: concessions for the economic use of a general or other domain stipulated by law to be of interest for the state, public works concessions, and public services concessions.

Based on the applicable provisions of the Roads Act, the Constitutional Court established that as of 29 December 2009 public roads have the status of a "public domain in general usage owned by the Republic of Croatia". Public roads in the Croatian legal order are not regarded as domains of interest for the Republic of Croatia and do not enjoy special protection of the state within the meaning of Article 52 of the Constitution. Hence, it is permitted to award two types of concessions on public roads: concessions for public works and concessions for public services (Article 75.4 of the Roads Act).

It is evident that the Organising Committee launched the referendum initiative based on the incorrect assumption that public roads are "a domain of interest for the Republic of Croatia" enjoying "its special protection" within the meaning of Article 52 of the Constitution. On such grounds, it concluded that the Roads Act permits the prohibition of the award of concessions on public roads.

Therefore, the Constitutional Court established that the proposal of the AA RA is unacceptable to the extent that the proposed legal solutions are based and justified by referral to a constitutional basis not applicable to public roads, i.e., Article 52 of the Constitution.

It follows from the referendum question (i.e., the proposal of the AA RA) that the basic objective of the proposal was to stipulate a prohibition to "award public services concessions" on all public roads in Croatia (i.e., on motorways, but also on all state, county and local roads). In other words, the Organising Committee attempted to have all provisions that permit the award of public services concessions on existing public roads, including the

right of the concessionaire to operate and maintain such road facilities, deleted from the Roads Act as in force at present.

The Constitutional Court held that such a blanket legislative measure that includes an absolute prohibition to award public services concessions on all existing public roads in Croatia (i.e., on all existing motorways, state, county and local roads), without the possibility of any exceptions and without selective application, impinges upon the very essence of the economic system stipulated in Article 49.1 of the Constitution.

The prohibition set out in the proposal of the AA RA is by its very nature and effect retroactive to the extent that the Constitutional Court in any aspect cannot regard it as acceptable. The reason is that it *a priori*, automatically, non-selectively and indefinitely restricts the ways permitted in the Constitution for realising state economic goals in the road sector. A prohibition defined as above is *prima facie* unconstitutional.

Accordingly, the Constitutional Court found that the proposal is not in accordance with the Constitution and that it is not permitted to call a referendum concerning the proposed referendum question. The Court did not consider it necessary to proceed with any further review of the substantive conformity of the text of the AA RA with the Constitution.

In conclusion, the Court pointed out the decision to abandon the award of public services concessions to operate existing motorways and the maintenance thereof dated 16 April 2015 (in view of the possibility "to use the referendum to prevent further monetisation of public debt connected with the companies HAC and ARZ under the concession model"). As such, the government assumed the obligation that in the event of the adoption of a new decision on the award of a public services concession for the operation of existing motorways and the maintenance thereof, which legal transaction would be the same or very similar to the concession legal transaction abandoned on 16 April 2015, it would take into account that voters held that this was a decision that should be adopted at a referendum.

Cross-references:

Constitutional Court:

- no. U-VIIR-4640/2014, 12.08.2014, *Bulletin* 2014/2 [CRO-2014-2-011].

Languages:

Croatian.



Cyprus Supreme Court

Important decisions

Identification: CYP-2015-1-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 07.10.2014 / **e)** Joint Cases no. 740/11 and others / **f)** Ioannidou and Others v. The Republic of Cyprus, through the Office of the Accountant General / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

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, public sector, right / Pension, right, crystallisation / Pension, right, suspension.

Headnotes:

Pensionary rights in the public sector crystallise on the completion of service in a pensionable position. Such rights therefore constitute property rights protected under the Constitution. The suspension of such rights without anything in exchange amounts to a deprivation of property rights.

Summary:

I. The subject-matter of these proceedings are the administrative decisions for the “suspension” of the payment of the retirement pensions of the applicants. The applicants were entitled to receiving their retirement pensions, as they had completed their service in the public and broader public sector. Pursuant to the enactment of Law no. 88(I)/2011, if a retired officer, after his retirement, was employed in another position in the public or broader public sector, a “suspension” of the payment of his pension was imposed for the whole period of such employment.

According to the applicants the abovementioned “suspension” is unconstitutional, contrary to Article 23 of the Constitution and of Article 1 Protocol 1 ECHR.

II. The majority decision of the Supreme Court was given by the President, Justice Nicolatos. It was held that the applicants' pensionary rights were crystallised on the completion of their service in a pensionable position. Accordingly, such rights constitute property rights, protected by Article 23 of the Constitution.

As noted in the decision of the majority, the "suspension" under Article 3.b of the Law essentially deprives the applicants from their pensionary rights for the period they hold the aforementioned positions and is without anything in exchange. Even though some applicants may not have completely lost their pensionary right, their right has been reduced to the extent that if their salary to their newly held office or position is lower than the amount of their monthly pension, they will receive part of the pension, so that their monthly salary is to be equated with the amount of their monthly pension.

The second proviso of Article 3.b, according to which the payment of their pension is to be resumed after the termination of their service or the cessation of their office, could not be considered as restitution of their proprietary rights as it simply safeguards that the applicants will be entitled to any salary increases that might have taken place during the "suspension period".

It was held that Article 3.b of the Act is in breach of Article 23 of the Constitution. The restriction was not justified by the express provisions of Article 23.3 of the Constitution.

The right to property, in accordance with Article 17 of the Charter of Fundamental Rights (it has the same legal force as the Treaties), cannot be limited, except for the public interest and in those cases and under those conditions provided for by law, subject to fair compensation for any loss, being paid in good time.

The majority of Justices observed that the national law did not contain any provision for fair compensation and there was no arrangement made by the state to compensate the applicants for their loss, in due time. Therefore the impugned provision cannot be considered valid as it contravenes Article 17 of the Charter.

It was noted that in the case-law of the European Court of Human Rights there is a differentiation between:

- a. social benefits granted to citizens by a State that are given without any contribution of the citizens; and

- b. benefits acquired by the contributions of citizens. In the latter case, and under certain circumstances, the European Court of Human Rights recognises property rights attributable to citizens, as there is a direct relationship between the extent of their contribution and the amount of the benefit that is being paid to them.

The contested administrative decisions were, therefore, declared null and void.

Languages:

Greek.



Czech Republic

Constitutional Court

Statistical data

1 January 2015 – 30 April 2015

- Judgments of the Plenary Court: 4
- Judgments of panels: 79
- Other decisions of the Plenary Court: 6
- Other decisions of panels: 1 188
- Other procedural decisions: 31
- Total: 1 308

Important decisions

Identification: CZE-2015-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27.01.2015 / **e)** Pl. ÚS 16/14 / **f)** Mandatory vaccination as a requirement for acceptance into kindergarten / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

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

Keywords of the alphabetical index:

Education, access / Education, pre-school / Health, protection, scope / Public health / Right to education / Vaccination.

Headnotes:

Special regulations establishing mandatory vaccination requirements for preschool entry do not violate the right to education (Article 33 of the Charter of Fundamental Rights and Freedoms).

Summary:

I. The applicant, a minor referred to as P.R. who was represented by his statutory representatives, requested the Constitutional Court to annul Article 50 of Act no. 258/2000 Coll., on Protection of Public Health (hereinafter, the “PPHA”) and Article 34.5 of Act no. 561/2004 Coll., on Pre-school, Basic, Secondary, Tertiary Professional and Other Education (hereinafter, the “Education Act”). On 27 January 2015, the Plenum of the Constitutional Court delivered its ruling, partially denying his complaint against Article 50 of the PPHA, which stipulates that “pre-school facilities may accept only a child who has undergone the prescribed regular vaccination, and has documentation that he is immune to infection or cannot undergo vaccination due to permanent contraindication”. The Plenum dismissed the remainder of the complaint.

The request to annul Article 50 of the PPHA and Article 34.5 of the Education Act, as an accessory petition, originated in a proceeding on a constitutional complaint (no. I. ÚS 1987/13). The applicant objected to the administrative court’s decision to deny his complaint against a decision to not accept him into kindergarten. He failed to meet the requirement of Article 50 of the PPHA because he did not undergo mandatory vaccination. The applicant considered the legislative framework unconstitutional for two reasons. First, it conflicted with the statutory “reservation” (Article 4.1 and 4.2 of the Charter) because the scope of the duty to vaccinate was provided by a decree from the Ministry of Health and not by statute. Second, the legislative framework was contrary to his right to education (Article 33.1 of the Charter).

II. The Constitutional Court first considered whether the applicant had standing. It concluded that, because part of Article 50 of the PPHA that sets the requirement for accepting a child into “A facility providing day care for a child of up to 3 years of age” was not applied in the present matter, it did not have any negative effect on the applicant. The situation was analogous in the case of Article 34.5 of the Education Act, which imposes an obligation when accepting children for pre-school education. The requirements are set by a special legal regulation and merely provide the general principle of *lex specialis derogat legi generali*. Therefore, the contested decisions would have been issued even in the absence of this provision.

The Constitutional Court determined that the applicant did not have standing to file a petition to annul these provisions and rejected the request. It conducted a substantive review only of Article 50 of the PPHA,

concerning the text: “pre-school facilities may accept only a child that has undergone the prescribed regular vaccination, and has documentation that he is immune to infection or cannot undergo vaccination due to permanent contraindication,” because the requirement of the applicant’s active standing was met only for this part of the request.

The applicant claimed that Article 50 of the PPHA is unconstitutional because the scope of mandatory vaccination is defined by a decree of the Ministry of Health. Thus, it does not meet the requirements of statutory reservation. The Constitutional Court, referring to its settled case-law, emphasised that it is bound only by the requested judgment of the application, not by its reasoning. The applicant’s objections are basically directed against Article 46 of the PPHA, which establishes the obligation to be vaccinated. However, the application does not seek its annulment; therefore, the Constitutional Court denied this part of the request as being obviously unjustified. It also referred to Judgment no. Pl. ÚS 19/14, ruling that the legislative framework for mandatory vaccination was constitutional and in accordance with the requirement of statutory reservation.

The Constitutional Court also considered whether the interference in the right to education was unconstitutional, applying the reasonableness test. It concluded that the legislative framework did not interfere in the essential content (core) of the right to education. The reason is that it did not (also in view of the exceptions to the requirement for cases of immunity to infection and permanent contraindication) result in interference that would be discriminatory or would make it impossible for all non-vaccinated children, without exception, to be accepted into pre-school facilities.

The Constitutional Court then stated that the contested provision pursues the legitimate aim of protecting public health in order to turn to the last step of the test, i.e. the rationality of the legislative framework. Vaccination, as a means of immunisation against selected infections, is a social benefit that requires shared responsibility by members of society. It requires a certain act of social solidarity from those who undergo the minimal risk arising from it in order to protect the health of the entire society. Vaccinating a sufficient majority of the population prevents the spread of infection of certain diseases, which creates “collective” immunity. As the vaccination of the population increases, the effectiveness of vaccination increases as well. The Constitutional Court concluded that the contested provision did not violate the applicant’s right to education, as the child vaccination requirement for kindergarten entry is a rational means for achieving the pursued aim (protection of public health). Therefore it denied this part of the complaint.

III. The judge rapporteur in the matter was Jaroslav Fenyk. A dissenting opinion was filed by judge Kateřina Šimáčková.

The dissenting judge considered unconstitutional the obligation to undergo vaccination against nine diseases as a requirement for preschool entry. She referred to her dissenting opinion in a related judgment Pl. ÚS 19/14, emphasising the unconstitutionality of the vaccination requirement. The present legislative framework for mandatory vaccination is inconsistent with the fundamental right to inviolability of the person, as the scope of mandatory vaccination is left completely up to the will of the Ministry of Health and is not set forth by statute. At the same time, the legislative framework does not meet the requirement of proportional interference in a fundamental right because the aim pursued could be achieved by less intrusive means. The legislative framework also does not contain objective liability on the part of the state for harm to the health of an individual who underwent mandatory vaccination. Finally, the list of diseases for which vaccination is mandatory is excessive.

In the present matter, the key right for reviewing the legislative framework was the right to education. Although the judgment applied the rationality test to the contested legislative framework, the dissenting judge pointed out that the European Court of Human Rights reviews interference in the right to education using the standard test of weighing opposing interests, although the applied test is more relaxed. Without the dissenting judge having to address possible violation of the Convention, the legislative framework also fails the rationality test.

The reasonableness of the framework must be reviewed with regards to the obligation to be vaccinated separately against each of the nine diseases. It could be rational to forbid the acceptance into a pre-school facility of a child who has not had any vaccination, not of children who have had some vaccinations, if, with regards to the rest, there is no reasonable connection with the legitimate aim being pursued.

The dissenting judge also pointed to the fact that vaccination against tetanus has no rational relationship with the pursued aim of limiting the spread of contagious diseases because its contagiousness from one child does not endanger other children. Similarly, with vaccination against hepatitis B, the requirement of vaccination does not appear reasonable because its contagiousness among small children is very limited. Although vaccination against hepatitis B may have advantages for a specific vaccinated child, the requirement to have this vaccination is not reasonable

with regards to protecting the health of other children in the pre-school community. The legislative framework is also unreasonable in that the vaccination requirement applies to all pre-school facilities or providers of child care services. The reason is that it is not reasonable to order the vaccination requirement for those private pre-school facilities that are openly established also for children who are not vaccinated, and parents are aware of this and agree to it.

The dissenting judge criticised the majority opinion, claiming it was limited to general declarations that vaccination is good for children and individuals must show solidarity without showing a clear relationship between the social benefits that vaccination brings and the aim pursued by the statute. Moreover, the legislative framework is strict on children taking part in pre-school education, but it does not in any way ensure protection by imposing an analogous mandatory vaccination requirement, without exceptions, to the personnel in pre-school facilities.

The foregoing circumstances indicate that non-acceptance into a pre-school facility is in fact one of the penalties for violating the obligation to have one's child receive all the prescribed vaccinations. Similarly, the majority of the Plenum defends the constitutionality of the legislative framework for vaccination by the general suitability of vaccination. However, if the current framework for mandatory vaccination (see the dissenting judge's dissenting opinion to judgment Pl. ÚS 19/14) is inconsistent with the constitutional order, then penalties for failure to meet it must also be unconstitutional. Here too the majority of the Plenum did not convincingly evaluate whether the reviewed legal obligation is rational and constitutional. In both of vaccination cases, the Constitutional Court was not faced with the question of whether mandatory vaccination should be included in the legal order but with the question of what form the framework should take in order to be constitutional. The majority only spoke generally in favour of mandatory vaccination without sufficiently reviewing the quality of all aspects of the legislative framework.

Languages:

Czech.



Identification: CZE-2015-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 03.02.2015 / **e)** II. ÚS 2051/14 / **f)** Review of conflict of freedom of speech and the right to protection of personality / **g)** <http://nalus.usoud.cz/> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

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

5.1.2 Fundamental Rights – General questions – **Horizontal effects.**

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:

Freedom of speech / Speech, political / Personality, protection / Personality, right to protection / Public debate, contribution / Value judgment.

Headnotes:

In a civil law dispute for protection of personality involving a conflict between two subjective constitutional rights – the right to free speech guaranteed by Article 17 of the Charter of Fundamental Rights and Freedoms and the right to the protection of personality rights under Article 10.1 – general courts must review the factual circumstances of the case through the prism of relevant criteria arising from case-law of the Constitutional Court or the European Court of Human Rights.

Summary:

I. The Regional Court denied a complaint from a third party who sought an apology from the applicant for stating on public television channel ČT 24 that her illegal conduct cost the city 8 million crowns (EUR 330 000). The applicant made the statement at a time when the media published information that the city (the entitled party) would pay a court executor costs of CZK 8,112,000 to make social welfare benefit payments to debtors, to which the secondary party publicly agreed. Later the executor stopped the execution proceedings and cancelled the decision on reimbursement of costs, such that the entitled party paid only part of the amount demanded.

The Regional Court concluded that the factual core of the disputed statement was not false, but “merely” careless and imprecise, which the applicant could not have determined before making the statement in question. However, the degree of imprecision and the expressive form of the statements did not exceed the bounds of acceptable criticism of a public figure.

The third party appealed to the High Court, which annulled the decision of the first level court and required the applicant to send the third party a written apology and pay the costs of proceedings before both courts. The High Court reasoned that the execution was not proved to be illegal, and it was not true that most executions were performed on welfare benefit payments of persons in material need. The Supreme Court rejected as impermissible an appeal on a point of law. The applicant objected that he had been entitled to make a statement on a public matter based on available information.

II. In the context of public debate, the Constitutional Court has previously stated that the fundamental right to free speech must be considered a constitutive element of a democratic, pluralistic society. Everyone is allowed to express his opinions on public affairs and make value judgments about them (cf. no. IV. ÚS 23/05). In its case-law, the Court has set criteria by which value judgments are considered permissible or impermissible. Generally, in public or political debate, exaggerated and excessive opinions are constitutionally protected (cf. nos. I. ÚS 367/03 and I. ÚS 453/03). If the criticism of public affairs or of action of public figures completely lacks a substantive basis and no justification can be found for it, the criticism can be considered disproportionate (cf. also no. IV. ÚS 23/05).

In the present matter, the Court stated that this is a civil law dispute for the protection of personality. A conflict exists between two subjective constitutional rights: freedom of speech guaranteed by Article 17 of the Charter and the right to the protection of personality rights under Article 10.1 of the Charter. The applicant’s arguments are based on free speech while these of the third party are based on the protection of personality. Therefore, the general courts were faced with the need to review a dispute concerning protection of personality through the prism of conflicting subjective constitutional rights of the applicant, on the one side and the third party on the other side.

In its case-law, the Court summarised the general starting points for resolving conflicts between the fundamental right to free speech and the fundamental

right to protection of dignity and honour of an individual. It considers these to be:

1. nature of statement (i.e., statement of fact or a value judgment),
2. content of statement (e.g., “political” or “commercial” speech),
3. form of statement (particularly, the extent that statement is expressive or even vulgar),
4. status of criticised person (e.g., public figure or a person active in political life, perhaps a publicly known figure – typically “show business stars”),
5. statement (criticism) concerns private or public sphere of the criticised person,
6. conduct of criticised person (e.g., “provoked” the criticism himself or reacted to the criticism subsequently),
7. who made statement (e.g., journalist, ordinary citizen, political, etc.) and finally,
8. when statement was made (i.e., particular time, specific information available to author on which he based the statement, and situation of the of the statement made).

Each factor plays a certain role in seeking a fair balance between the conflicting fundamental rights. Their relative weight, however, always depends on the individual circumstances of the particular case. Also, the list of relevant factors is not exhaustive; the full context of the matter must always be taken into account. In specific cases, there may be significant circumstances that cannot be classified in any of the cited categories.

The Constitutional Court analysed the present matter in terms of the cited factors relevant for reviewing conflict of fundamental rights. It summarised that the statement in question (or a certain part of it) was a statement of fact that, as was subsequently shown, was not completely in accordance with objective reality. However, the core of the statement was rationally based on publicly available documents, the correctness of which the applicant had no reason to doubt, and against which the third party herself made no public objections. Although it was later shown that the statement in question was misleading and inaccurate in certain respects, it cannot, with nothing further, be considered to be unjustified interference in the personality rights of the plaintiff. This is in light of the fact that the applicant subsequently apologised to the third party for disseminating proven inaccuracies (whereby the interference in her personality rights was redressed).

Other relevant factors that the Court took into account in seeking a fair balance between the conflicting fundamental rights also spoke in favour of giving precedence to the applicant’s freedom of speech. The

statement in question was political speech criticising a person who was politically active, as regards to her functioning in the public sphere. The statement was somewhat expressive, but did not exceed the bounds of generally accepted rules of decency. The third party, in view of her controversial statements, must have expected that she would be publicly criticised. In view of the applicant's status, we also cannot conclude that the courts acted negligently in verifying the truthfulness of the statement. Nonetheless, in the contested decisions, the High Court and the Supreme Court did not sufficiently take into account the circumstances. As a result, they incorrectly (and not "as necessary in a democratic society") gave precedence to the third party's personality rights over the applicant's right to free speech.

For the foregoing reasons, the Court granted the complaint and annulled the contested decisions due to conflict with the right to free speech under Article 17 of the Charter, Article 10 ECHR and Article 19 of the International Covenant on Civil and Political Rights.

Languages:

Czech.



Identification: CZE-2015-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 10.02.2015 / **e)** III. ÚS 3673/14 / **f)** Elections to the city council of the city district Brno-north; extremely flawed interpretation of conditions for declaring elections invalid in Article 60.3 of the Elections Act / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

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

4.9.8.2 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Campaign expenses.**

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

Keywords of the alphabetical index:

Election, campaign, restriction / Election, invalidity / Election, municipal / Election, unfair / Municipal autonomy, violation / Municipal Council, election / Political will, formation / Voting / Voting, irregularity.

Headnotes:

Court intervention may not endanger people's free expression of their opinions to elect their representatives and must reflect, or at least not hamper, the effort to preserve the integrity and effectiveness of the election process aimed at determining the will of the people through general elections. The subsequent casting of doubt upon election results without proving serious election defects threatens to undermine the democratic legitimacy of elected representative bodies and the actions they take. If the will of the people was expressed freely and democratically, no subsequent intervention may cast doubt on this selection, unless there are convincing reasons in the interest of the democratic order.

Summary:

I. A constitutional application by Rostislav Hakl and a joint constitutional application by the Statutory City of Brno, the city district of Brno-North and the Council of the city district Brno-North contested the Regional Court in Brno's ruling that the City Council elections in district Brno-North (the representative body) held on 10 and 11 October 2014 were invalid.

They disputed the court's conclusion that the elections were corrupt and its failure to properly apply the case-law of the Constitutional Court, particularly Judgment no. Pl. ÚS 57/10 regarding city council elections in the city of Krupka. The applicants alleged that the election court incorrectly applied Article 60.3 of the Elections Act. In their opinion, elections are *de facto* not repeatable, as a result of which courts should declare them invalid only in exceptional cases. The number of problematic votes identified by the court was insignificant and incapable of affecting the elections.

II. The Constitutional Court reviewed whether the two applications met the necessary conditions for the proceeding, concluding that the Council of the city district Brno-North did not have standing to file a municipal constitutional complaint.

The Court pointed to its case-law regarding Articles 21 and 22 of the Charter, deciding that, through its flawed application of principles arising from Constitutional Court judgments nos. Pl. ÚS 57/10 and Pl. ÚS 4/10, the Regional Court substantially and in an impermissible manner lowered the limit for permitted judicial interference with the results of elections defined by the Constitutional Court in the cited judgments. The circumstances in which municipal elections were held in Krupka and in which municipal elections were held in the city district Brno-North were distinctly and substantially different. The existence of a system of corruption and impermissible pressure on the will of voters analogous to that in Krupka was not proven in the elections in the city district Brno-North.

The Constitutional Court opined that this case also did not involve a “commercial market method” of running the election campaign. No indications were found of impermissible campaigning “in the form of terror which creates physical and psychological pressure on the free will of voters to such a degree that even secret voting is not able to ensure the voter’s free decision.” Merely campaigning in favour of a particular candidate by “promising free entry and hospitality at a post-election party,” with a recommendation of who to vote for, without any pressure at all, cannot without anything further be considered unlawful (in light of the right to free speech). Also, it cannot be deemed an exceptional event that distorts the will of voters to such a degree as to justify annulling the entire election.

The court’s decision to annul the elections was arbitrary and disproportionate to the required legitimate aim. The factual situation, on the basis of which the Regional Court ruled that the elections were invalid, was not determined reliably enough to conclude on election defects and on a possible causal relationship between the defects and the resulting composition of the council. The election court interpreted Article 60.3 of the Elections Act, which sets conditions for declaring elections invalid, in an extremely flawed manner, thereby violating the fundamental right to a fair trial.

Therefore, the Constitutional Court granted the constitutional complaints for the foregoing reasons. It annulled the Regional Court’s decision because it violated the fundamental right of the applicant Ing. Rostislav Hakl to access to elected and other public offices under Article 21.4 of the Charter. The decision also violated the right of the other applicants (the Statutory City of Brno and city district Brno-North) to exercise the right to self-government through an elected representative body under Article 101.1 of the Constitution, in conjunction with Articles 100.1 and 8 of the Constitution, which violated the prohibition on

illegal state interference in the activities of a territorial self-governing unit under Article 101.4 of the Constitution. The Constitutional Court also annulled the decision of the Minister of the Interior of 8 December 2014, on Calling Repeat Elections to the City Council of the municipality Brno-North, announced in notification no. 289/2014 Coll.

Languages:

Czech.



Identification: CZE-2015-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 26.02.2015 / **e)** III. ÚS 3808/14 / **f)** Passengers’ right to compensation for flight delays caused by a technical fault and a collision between a plane and a bird; the obligation to submit a preliminary question to the Court of Justice of the European Union / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

2.2.1.6.4 Sources – Hierarchy – Hierarchy as between national and non-national Sources – Law of the European Union/EU Law and domestic law – **EU secondary law and domestic non-constitutional instruments.**

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

Keywords of the alphabetical index:

Court of Justice of the European Union, preliminary question, referral, obligation / Delay, undue, compensation / Preliminary question, condition.

Headnotes:

In applying European law, a Czech court (decisions cannot be contested through further legal remedies) violates the right to a lawful judge when it arbitrarily fails to submit a preliminary question to the European Court of Justice, an omission that conflicts with the principle of a state governed by the rule of law (Article 1.1 of the Constitution). The inaction can also

be considered an act of arbitrariness by the court of the last instance applying European Union law if the court does not examine whether it should submit a preliminary question to the European Court of Justice without adequate justification, including a review of exceptions developed in the European Court of Justice case-law.

Summary:

I. The applicant, an airline, claimed that its right to a fair trial and right to a lawful judge were violated after a district court ruled that it was obliged to compensate each third party the amount of 250 EUR. The district court's contested decision was pursuant to Regulation (EC) no. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EEC) no. 295/91 (hereinafter, the "Regulation"). The applicant contended that the district court did not apply the case-law of either the European or national courts, which indicate that a collision between a plane and a bird is considered an extraordinary circumstance under the Regulation. The applicant agreed with the Constitutional Court's conclusion that the subject of review in its 20 November 2014 judgment, file no. III. ÚS 2782/14, was legally and substantively identical to this case.

II. The Constitutional Court reviewed the complaint after confirming it was properly filed. It noted that the matter in this case involves a legally and factually analogous dispute analysed in the 20 November 2014 Judgment no. III. ÚS 2782/14, such that it could apply the legal conclusions to the contested decision.

The Court examined the right to a lawful judge guaranteed by Article 38.1 of the Charter. From its case-law, this right in the context of applying European law is violated when a Czech court (whose decision cannot be contested through further remedies provided by sub-constitutional law) arbitrarily fails to submit a preliminary question to the European Court of Justice. The omission conflicts with the principle of a legal state governed by the rule of law (Article 1.1 of the Constitution). According to the Court, it can also be considered an act of arbitrariness by the court of last instance if it completely fails to examine whether it should submit a preliminary question to the European Court of Justice without adequate justification, including a review of exceptions developed in the Court of Justice's case-law.

For the Court, the key issue is whether the applicant is responsible for the delayed flight, among others things, as a consequence of the plane colliding with a bird. The Court pointed to the fact that the European Court of Justice has yet to comprehensively interpret the Regulation regarding the nature and liability arising from this collision, in conjunction with another circumstance of a different (technical) nature. Hence, its case-law is not clear on whether the collision and the subsequent measures required of the airline can be classified as an extraordinary circumstance under Article 5.3 of the Regulation.

Therefore, the Court opined that the district court, as the court of final instance under Article 267 of the Treaty on the Functioning of the European Union, was obliged to submit a preliminary question to the European Court of Justice. By not fulfilling this requirement, the district court violated the applicant's right to a fair trial under Article 36.1 of the Charter and the right to a lawful judge under Article 38.1 of the Charter. Therefore its decision was annulled.

Languages:

Czech.



France

Constitutional Council

Important decisions

Identification: FRA-2015-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 23.01.2015 / **e)** 2014-439 QPC / **f)** Mr Ahmed S. (Deprivation of nationality) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.01.2015, 1150 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Nationality, deprivation / Penalty, proportionality / Terrorism.

Headnotes:

Persons who have acquired French nationality and persons to whom French nationality was assigned at birth have the same status. However, different treatment instituted with the aim of combating terrorism does not violate the principle of equality.

In view of the particularly serious nature of acts of terrorism, the challenged provisions permitting the revocation of French nationality institute a punishment that is not manifestly disproportionate to the seriousness of these acts and does not constitute a breach of the requirements of Article 8 of the Declaration of 1789 regarding the principle of necessity of misdemeanours and punishment.

Summary:

I. The Constitutional Council received an application from the Council of State on 31 October 2014 relating to a priority question of constitutionality raised by Mr Ahmed S. This question concerned the conformity of indent 1° of Article 25 and Article 25-1 of the Civil Code with the rights and freedoms guaranteed by the Constitution.

Article 25 of the Civil Code makes it possible to deprive a person having acquired French nationality of that nationality unless this would have the effect of making them stateless. Among the cases where such deprivation is permitted, indent 1° of Article 25 provides for the case of an individual who is convicted of an action classified as a crime or misdemeanour that constitutes a violation of the fundamental interests of the Nation, or for a crime or misdemeanour that constitutes an act of terrorism.

Article 25-1 stipulates that deprivation of nationality shall be incurred only if the actions with which the person concerned was charged occurred before they acquired French nationality or within a period of ten years as from the date of acquiring French nationality. Deprivation may be pronounced only within ten years of the perpetration of those actions. If the actions with which the person concerned was charged are referred to in indent 1° of Article 25, each of these periods shall be extended to fifteen years.

In 1996, the Constitutional Council had already considered the introduction of a conviction for a crime or misdemeanour constituting an act of terrorism in indent 1° of Article 25 of the Civil Code (Decision no. 96-377 DC of 16 July 1996) to be in conformity with the Constitution. At that time Article 25-1 did not mention actions carried out prior to acquiring French nationality and did not include the extension of the periods in question to fifteen years. Those amendments were made by Law no. 2003-119 of 26 November 2003 and Law no. 2006-64 of 23 January 2006 respectively.

II. By Decision no. 2014-439 QPC of 23 January 2015, the Constitutional Council ruled that the provisions challenged conformed to the Constitution.

First, the Constitutional Council pointed out, as in 1996, that persons who had acquired French nationality and persons to whom French nationality had been assigned at birth had the same status, but different treatment instituted with the aim of combating terrorism did not violate the principle of equality. It held that consideration of actions carried out before acquiring French nationality and the extension of time periods introduced in 2006 conformed to the Constitution. In particular it pointed out that the period of fifteen years between acquiring French nationality and the actions with which an individual was charged related only to particularly serious actions.

Second, in view of the particularly serious nature of acts of terrorism, the Council held that the challenged provisions instituted a sanction entailing punishment that was not manifestly disproportionate to the seriousness of these acts and did not constitute a breach of the requirements of Article 8 of the

Declaration of 1789 regarding the principle of necessity of misdemeanours and punishment.

Languages:

French.



Identification: FRA-2015-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 18.03.2015 / **e)** 2015-453/454 QPC and 2015-462 QPC / **f)** Mr John L. and others (Cumulative prosecutions for insider dealing and insider misconduct) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 20.03.2015, 5183 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

1.6.5 Constitutional Justice – Effects – **Temporal effect.**

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

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

Keywords of the alphabetical index:

Ne bis in idem / Penalty, necessity, principle.

Headnotes:

The sanctions for insider dealing and insider misconduct may not be regarded as being of a different nature pursuant to separate sets of rules being applied before their respective jurisdictional systems, in which case Articles L. 465-1 and L. 621-15 of the Monetary and Financial Code (CMF) constitute a breach of the principle of necessity of misdemeanours and penalties, in that they may be applied to a person or entity other than those mentioned in paragraph II of Article L. 621-9. These provisions are contrary to the Constitution, as are the challenged provisions of Articles L. 466-1, L. 621-15-1, L. 621-16 and L. 621-16-1 of the CMF which are inseparable therefrom.

Summary:

I. The Constitutional Council received applications from the Court of Cassation on 19 December 2014 and 4 February 2015, relating to three priority questions of constitutionality, concerning the conformity of certain provisions of Article 6 of the Code of Criminal Procedure (CPP) and Articles L. 465-1, L. 466-1, L. 621-15, L. 621-15-1, L. 621-16, L. 621-16-1 and L. 621-20-1 of the Monetary and Financial Code (CMF) with the Constitution.

On the one hand, the Constitutional Council ruled that the challenged provisions of Article 6 of the CPP and Article L. 621-20-1 of the CMF conformed to the Constitution.

On the other hand, the Council examined Article L. 465-1 of the CMF relating to insider dealing punishable before a criminal court judge and Article L. 621-15 of the CMF relating to insider misconduct punishable before the sanctions commission of the Financial Markets Authority.

II. The Constitutional Council reiterated its constant case-law according to which the principle of necessity of misdemeanours and penalties set forth in Article 8 of the Declaration of human and civil rights of 1789 was not an obstacle to the same actions committed by the same person being the subject of different proceedings seeking sanctions of a different nature pursuant to separate sets of rules being applied before their respective jurisdictional systems.

The Council reviewed Articles L. 465-1 and L. 621-15 of the CMF in the light of that principle in a four-fold examination:

- Firstly, the Council compared the definitions of insider dealing and insider misconduct, noting that Articles L. 465-1 and L. 621-15 of the CMF sought to punish the same actions. Furthermore, either insider dealing and insider misconduct could be committed only in the exercise of certain functions, or they could be committed, in the case of insider dealing, only by a person in possession of privileged information “knowingly” and, in the case of insider misconduct, by a person “who knows or should have known” that the information in their possession constituted privileged information. Consequently, the Constitutional Council held that the two challenged articles defined and classified insider misconduct and insider dealing in the same manner.

- Secondly, the Council examined the purpose of punitive action against insider dealing and insider misconduct. Article L. 465-1 was part of a chapter of the CMF devoted to “infringements relating to

protection of investors” and Article L. 621-1 entrusted the Financial Markets Authority with the task of ensuring “protection of invested savings” in financial instruments. Accordingly, the Council noted that punitive action against insider misconduct and that of insider dealing pursued one and the same purpose of protecting the proper functioning and integrity of financial markets. In both cases, punitive action against breaches of the economic public order was exercised not only against professionals but also against any person having made illegal use of privileged information. The Constitutional Council held that, consequently, both these punitive actions protected the same societal interests.

- Thirdly, the Council examined the actual punishments for insider dealing and insider misconduct. A perpetrator of insider dealing was liable to punishment of two years’ imprisonment and a fine of 1,500,000 euros. A perpetrator of insider misconduct was liable to pecuniary punishment of 10 million euros. Accordingly, the Council noted that, while only a criminal court judge could sentence a perpetrator of insider dealing to imprisonment in the case of a physical individual and to dissolution in the case of a corporate entity, the pecuniary sanctions pronounced by the Financial Markets Authority’s sanctions commission could be very severe indeed and could be up to six times higher than those incurred before a criminal court for insider dealing.

Moreover, pursuant to paragraph III of Article L. 621-15, the Financial Markets Authority’s sanctions commission had to set the level of penalties in line with the seriousness of the misconduct committed, as must the criminal court judge under Article 132-26 of the Criminal Code. This meant that the actions punishable under Articles L. 465-1 and L. 621-15 had to be regarded as liable to sanctions that were not of a differing nature.

- Fourthly, the Council observed that, where a perpetrator of insider misconduct was not a person or entity mentioned in paragraph II of Article L. 621-9 of the CMF, the sanction to which they were liable and the sanction to which a perpetrator of insider dealing was liable both fell within the jurisdiction of the judiciary.

Following this four-fold examination, the Constitutional Council found that the sanctions imposed for insider dealing and insider misconduct could not be regarded as being of a different nature pursuant to separate sets of rules being applied before their respective jurisdictional systems, in which case Articles L. 465-1 and L. 621-15 constituted a breach of the principle of necessity of misdemeanours and penalties. The Constitutional Council therefore declared these provisions unconstitutional, as well as

the challenged provisions of Articles L. 466-1, L. 621-15-1, L. 621-16 and L. 621-16-1, which were inseparable therefrom.

The Constitutional Council postponed the date of repeal of these provisions to 1 September 2016, as their immediate repeal would have manifestly excessive consequences by preventing any prosecutions and halting those launched against persons having committed actions classified as insider dealing or insider misconduct.

In addition, in order to curtail the unconstitutionality declared, as from the publication of the present decision, proceedings may not be lodged or continued on the basis of Article L. 621-15 of the CMF against a person other than those mentioned in paragraph II of Article L. 621-9 of the CMF, where initial proceedings have already been lodged in respect of the same actions and against the same person before a court judge ruling in a criminal law case on the basis of Article L. 465-1 of the CMF or already having delivered a final judgment on proceedings for the same actions against the same person. Similarly, proceedings may not be lodged or continued on the basis of Article L. 465-1 of the CMF where initial proceedings have already been lodged in respect of the same actions and against the same person before the Financial Markets Authority’s sanctions commission on the basis of the challenged provisions of Article L. 621-15 of the CMF or where the commission has already delivered a final ruling on proceedings for the same actions against the same person.

Languages:

French.



Identification: FRA-2015-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 20.03.2015 / **e)** 2015-458 QPC / **f)** Mr and Mrs L. (Compulsory vaccination) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.03.2015, 5346 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Vaccination, compulsory.

Headnotes:

The legislature did not breach the constitutional requirement of health protection as guaranteed by the 1946 Preamble by imposing compulsory vaccination against diphtheria, tetanus and poliomyelitis for minor children under the responsibility of their parents.

The legislature intended to combat three diseases that were very serious and contagious or could not be eradicated. In particular, the legislature has specified that each of these vaccinations is compulsory only on condition of there being no known medical contra-indication.

The legislature is free to frame a vaccination policy to protect individual and public health.

Summary:

I. The Constitutional Council received an application from the Court of Cassation on 15 January 2015 relating to a priority question of constitutionality raised by Mr and Mrs L. This question concerned the conformity of Articles L. 3111-1 to L. 3111-3 of the Public Health Code with the rights and freedoms guaranteed by the Constitution.

These provisions related to compulsory vaccination against diphtheria, tetanus and poliomyelitis for minor children under the responsibility of their parents. The applicants claimed that the compulsory vaccinations could entail a health risk in breach of the constitutional requirement of health protection guaranteed by the eleventh paragraph of the Preamble to the Constitution of 1946.

II. The Constitutional Council dismissed this complaint and ruled that these provisions conformed to the Constitution.

The Constitutional Council observed that, by making these vaccinations compulsory, the legislature had intended to combat three diseases that were very serious and contagious or could not be eradicated. In particular, the legislature had specified that each of these vaccinations were compulsory only on condition of there being no known medical contra-indication.

The Constitutional Council ruled that the legislature was free to frame a vaccination policy to protect individual and public health. It was not for the Constitutional Council, which had only general powers of appraisal and decision along the same lines as Parliament, to call into question, in terms of knowledge and technology, the steps taken by the legislature or to seek to establish whether the objective of health protection taken upon itself by the legislature might have been attained by other means, as the procedures determined by the law were not manifestly inappropriate to the objective sought.

The Council concluded that, through the challenged provisions, the legislature did not violate the constitutional requirement of health protection as guaranteed by the 1946 Preamble.

Languages:

French.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2015-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 08.12.2014 / **e)** 2 BvR 450/11 / **f)** / **g)** / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2015, 361-367; CODICES (German).

Keywords of the systematic thesaurus:

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

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:

Asylum, seeker / Asylum, document, forgery / Entry, illegal / International law, national law, relationship / International treaties, interpretation / Norms, national-international, interaction.

Headnotes:

The principle of *nullum crimen sine lege* under Article 103.2 of the Basic Law covers any application of criminal law including legal reasons for the exemption from punishment, i.e. § 95.5 of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (hereinafter, “Residence Act”).

A person may be qualified as a refugee in the sense of Article 1.A of the Convention Relating to the Status of Refugees (Geneva Refugee Convention – hereinafter, “GRC”) if he or she enters Germany with the intention to apply for asylum. This even applies in the case of entry via a safe third country as long as it has to be assumed that the country, due to systemic deficiencies, does not provide for adequate protection in accordance with the standards required by the Geneva Refugee Convention.

A refugee does not lose the protection provided by the Geneva Refugee Convention by entering via a third country if he or she only uses that country as a country of transit. The term “directly” only excludes those who have already resided elsewhere.

The privilege of not being punished for illegal entry or presence accorded to refugees by the Geneva Refugee Convention does not place the contracting states under an obligation not to punish other criminal offences, even if committed concomitantly. This follows from an interpretation of Article 31.1 GRC in accordance with the international law on treaty interpretation.

Even if there was such an obligation, the exemption from being punished would only come into play if there was a situation tantamount to necessity. Such a situation may arise if entry is impossible without forged documents. In the case of arrival by plane, § 18a of the Asylum Procedure Act provides for a procedure where an application for asylum is possible without presentation of such documents.

Summary:

I. The applicant left Iran in 2009 with his spouse. They travelled to Turkey by plane and then took a boat to Greece, where they spent forty days, always with the intention to leave for Germany in order to apply for asylum. Having procured a false Romanian identity card and a false refugee identity card presumptively issued by Germany, they took a plane to Germany on 27 November 2009. When “IDed” by the Federal Police, the applicant presented the false identity card and was arrested on the grounds of it having been forged. During questioning, he applied for asylum for himself and his wife. A detention order for the purpose of transferring him to Greece was rejected by a court order on the basis that, by applying for asylum, he had obtained permission to stay (§ 55.1 of the Asylum Procedure Act). In 2010, criminal proceedings were commenced against him due to the circumstances when entering Germany. In the end, the Chemnitz Local Court convicted him of falsification of documents without discussing the possibility of exemption from punishment due to § 95.5 of the Residence Act in conjunction with Article 31.1 GRC. The Dresden Higher Regional Court dismissed the appeal on points of law. It held that Article 31.1 GRC was only applicable to illegal entry and presence, not to other criminal offences committed concomitantly, as in the present case. It also doubted the applicability of the Geneva Refugee Convention as such on account of the prior stay in and entry via a safe country. In addition, it excluded the application of the doctrine of necessity to the situation at hand.

The applicant challenged both court decisions. He claimed that the principle of *nulla poena sine lege* (Article 103.2 of the Basic Law) had been violated because he had been convicted; although § 95.5 of the Residence Act in conjunction with Article 31.1 GRC should have been applied.

II. The Federal Constitutional Court held that no violation had occurred of the principle of *nulla poena sine lege*, as enshrined in Article 103.2 of the Basic Law, basing its decision on the following reasoning:

While the non-application of the provisions of § 95.5 of the Residence Act in conjunction with Article 31.1 GRC by the courts was, in part, wrong, the decisions were not based on this potential violation of Article 103.2 of the Basic Law.

Seeking asylum, the applicant was a refugee under the Geneva Refugee Convention. Entering Germany via Greece, which is considered a safe country under § 26a.2 of the Asylum Procedure Act, did not change this. At the time of his entry in November 2009, Greece could not be regarded as a completely safe country due to systemic deficiencies in its asylum proceedings (European Court of Human Rights, *M.S.S. v. Belgium and Greece*, no. 30696/09, 21 January 2011).

In the sense of Article 31.1 GRC, he had come “directly” from a country where his life was threatened, even if he had stayed in Greece for forty days before entering Germany. This is due to the fact that he had always intended to move on to Germany to apply for asylum and had not taken up residence in Greece.

The use of forged identity documents did not fall within the scope of application of § 95.5 of the Residence Act in conjunction with Article 31.1 GRC in the case at hand. Under an interpretation in accordance with international legal methods of interpretation (here: the rules of customary international law as codified by Articles 31 and 32 of the Vienna Convention on the Law of Treaties), which is the standard to be applied insofar as it is methodically possible under German law in the context of applicable international law, the provision does not impose a duty on the state to exempt the criminal offences committed upon illegal entry from punishment. The relevant authentic English and French versions of Article 31.1 GRC only cover an exemption from punishment for criminal offences relating to illegal entry or presence. Under a systematic interpretation, the result is inconclusive. While the articles following Article 31.1 GRC suggest the intention of a high level of protection for refugees and therefore a broad interpretation of the provision,

both the Preamble of the Geneva Refugee Convention and Article 31.1 GRC itself rather suggest a strict reading; the protection afforded can be restricted for state reasons and the refugee should only mention justifying circumstances with regard to the above criminal offences vis-à-vis the authorities. The statements of the UN High Commissioner for Refugees and the decisions of the Executive Committee recommending a broad interpretation do not constitute a subsequent agreement of the parties to the Convention. Neither is there relevant subsequent practice, as a study of Goodwin-Gill of 2003 has shown; only some of the contracting parties include entry via forged documents into the scope of application of Article 31.1 GRC. In the light of the object and purpose of the provision, which has to be construed as balancing the interests of the refugee and of the state, and also according to the *travaux préparatoires*, only criminal offences relating to entry which are necessary to reach protection are covered. This was not the case for the applicant.

There were no exceptional circumstances justifying the applicant’s criminal offence. He could have applied for asylum without presenting the forged identity card using the procedure pursuant to § 18a of the Asylum Procedure Act (entry by air) when he was questioned by the Federal Police at the airport.

Supplementary information:

Legal norms referred to:

- Article 103.2 of the Basic Law; § 95.5 of the Residence Act; §§ 13, 18a, 26a.2 and 55.1 of the Asylum Procedure Act;
- Article 31.1 of the 1951 Geneva Convention Relating to the Status of Refugees;
- Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

Cross-references:

European Court of Human Rights:

- *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21.01.2011, *Special Bulletin – Inter-Court Relations* [ECH-2011-C-001].

Languages:

German.



Identification: GER-2015-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 18.12.2014 / **e)** 2 BvR 209/14; 2 BvR 240/14; 2 BvR 262/14 / **f)** / **g)** / **h)** *Strafverteidiger Forum* 2015, 100-102; *Neue Juristische Wochenschrift* 2015, 1083-1086; *Europäische Grundrechte-Zeitschrift* 2015, 259-265; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal conviction, crime, incitement, police informant / Rule of law, public interest, protection.

Headnotes:

The fact that the crime was incited in a way that violated the rule of law does not necessarily preclude a conviction.

Summary:

I. The Federal Constitutional Court had to decide on three constitutional complaints that challenged criminal convictions on the basis that the crimes committed had been incited by a police informant in violation of the rule of law.

II. The Federal Constitutional Court held that a conviction is precluded only if the Court does not take due account of the incitement. A discontinuance of proceedings may only be derived from the rule of law in extremely exceptional cases since the rule of law also protects the public interest in a prosecution that serves material justice. This holds true even taking into account the jurisprudence of the European Court of Human Rights.

The decision is based on the following considerations:

1. The challenged decisions do not violate the applicants' right to a fair trial under Article 2.1 in conjunction with Article 20.3 of the Basic Law.

a. The task of shaping the right to a fair trial pertains primarily to the legislator and subsequently to the courts when interpreting and implementing the law. The right to a fair trial is violated only if an overall view of the procedural law – including the way it is interpreted and implemented by the courts – reveals that conclusions compelling under the rule of law were not reached or that procedural elements required under the rule of law were relinquished. This overall view must also take into account the requirements of a functioning criminal justice system.

b. The criminal courts adequately took into account the fact that the crime was incited in a way that violated the rule of law; they were not required to discontinue the proceedings.

aa. To date, the jurisprudence of the Chambers of the Federal Constitutional Court has left unanswered the question whether participation of a police informant in convicting a criminal may prevent the realisation of the state's right to punish the person concerned. However, even if such a prevention were possible, it could only in extremely exceptional cases be derived from the rule of law, since the rule of law protects not only the interests of the accused but also the public interest in a prosecution that serves material justice.

bb. This particular case seems to fit into that category. The public prosecutor's office has failed to exercise its oversight over the police. This failure must be taken into account during the further course of the proceedings. Considering the scope of the misconduct as well as the corresponding illegal pressure put on the applicants during the investigation, it would not have been unreasonable to assume an extremely exceptional case.

cc. Nevertheless, the courts were permitted under the Constitution to not assume an extremely exceptional case since the crimes were not entirely instigated by state authorities. Despite continued pressure by the police informant, the applicants remained largely free in their decisions. One cannot therefore assume that they became mere objects of state action.

2. Even in light of jurisprudence from the European Court of Human Rights, there is no violation of the right to a fair trial; the violation of Article 6.1.1 ECHR that occurred during the investigation was adequately compensated by the regular courts.

a. In terms of inciting conduct on the part of investigative authorities, the European Court of Human Rights follows a different path; it focuses on the permissibility of conducting a trial at all as well as on the admissibility of evidence and has held that evidence obtained by police incitement is not

rendered admissible by a public interest. The Chamber agrees insofar as the state may not incite innocent citizens to commit crimes. It does not follow, however, that the national legal system must adopt the European Court of Human Rights's concept of legal dogmatics. As long as the substantive requirements for a fair trial under Article 6.1.1 ECHR are met, the national courts may decide on how to implement them within their criminal justice systems.

b. The Chamber cannot decide whether the solution of adjusting the sentence will meet the European Court of Human Rights's standards in every individual case. At least in the way it was applied in the case at hand, it does not violate the constitutional principle of a fair trial – even in view of the requirements set out by Article 6.1.1 ECHR – since the criminal court expressly found and acknowledged a violation of Article 6.1.1. It also considerably and specifically reduced the sentencing and, relying largely on confessions by the applicants, treated the evidence in a way that came close to regarding the incriminating evidence provided by the police informer and the undercover investigator as being expressly inadmissible.

Supplementary information:

Legal norms referred to:

- Article 2.1 in conjunction with Article 20.3 of the Basic Law.

Languages:

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



Identification: GER-2015-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 14.01.2015 / **e)** 1 BvR 931/12 / **f)** Shop opening hours / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Zeitschrift für die Anwaltspraxis EN* no. 240/2015; *EzA-Schnelldienst* 2015, no.7, 6; *Arbeit und Recht* 2015, 157; *Der Arbeitsrechtsberater* 2015, 97; CODICES (German).

Keywords of the systematic thesaurus:

- 4.8.8 Institutions – Federalism, regionalism and local self-government – **Distribution of powers.**
- 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**
- 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Shop, opening hours / Competence, legislative, concurrent / Working hours.

Headnotes:

1. Provisions in *Land* law that restrict work in retail shops on Saturdays are based on Article 74.1.12 of the Basic Law. The legislative competence for shop opening hours in Article 74.1.11 of the Basic Law does not include regulations on working hours.
2. As of yet, the Federation has not made use of its concurrent legislative competence for regulating work in retail shops on Saturdays in a way that is exhaustive under Article 72.1 of the Basic Law.

Summary:

I. The Federal Constitutional Court had to decide on a constitutional complaint challenging a provision of the Thuringian Shop Opening Hours Act (hereinafter, the “Act”) that grants employees in retail shops two work-free Saturdays per month on the basis of a lack of *Land* legislative competence and an alleged violation of the applicant's freedom to practise an occupation.

II. The Federal Constitutional Court held that the *Land* Thuringia was competent to enact the provision in question and that the provision did not violate the applicant's freedom to practise an occupation.

The decision is based on the following considerations:

1. The *Land* legislator was competent to issue the challenged provision.
 - a. According to Article 70.1 of the Basic Law, the *Länder* have the right to pass legislation unless the Basic Law confers this right on the Federation. Pursuant to Article 70.1 in conjunction with Article 74.1.11 of the Basic Law, the *Länder* have the legislative competence in the field of shop opening hours, whereas, according to Article 74.1.12 of the Basic Law, labour laws, including occupational health and safety law, are subject to the concurrent legislative competence of the Federation.

b. The challenged provision does not regulate “shop opening hours” and does therefore not fall within the field excepted under Article 74.1.11 of the Basic Law in favour of the *Länder*.

aa. According to the general meaning, the term “shop opening hours” denotes the daily opening hours of retail stores and does not comprise conditions of employment.

bb. A regulation on the working hours on Saturdays that entitles employees to work-free time is not intertwined so closely with the law on shop opening hours that it would also be subject to this legislative competence of the *Länder*. A legislative competence of a *Land* does not ensue by virtue of related contents. Regulations on working hours affect many parts of working life and are not specifically limited to shop opening hours.

c. Article 74.1.12 provides for a concurrent legislative competence of the *Land* Thuringia for the challenged provisions. In such cases, the *Länder* have legislative competence pursuant to Article 72.1 of the Basic Law as long and in so far as the Federation does not make use of its competence. This is the case here.

aa. The Federation makes use of its competence if a federal law exhaustively regulates a particular issue. The wording, the regulatory purpose, and the legislative history of a law are essential for determining its scope. What is decisive is whether a law regulates a specific matter comprehensively and completely, or whether the legislator’s intention to regulate the matter exhaustively is objectively recognisable.

bb. Accordingly, the federal Shop Opening Hours Act does not have a blocking effect preventing the *Länder* from going beyond the stipulated entitlement to only one work-free Saturday per month by prescribing an additional work-free Saturday. At the time of its adoption, the federal regulation had a *de facto* exhaustive effect since the *Länder* had no legislative competence regarding shop opening hours. However, there is no indication that the federal Shop Opening Hours Act was to apply to work on Saturdays in such a final manner after the legislative competence for shop opening hours was transferred to the *Länder*. While the wording of the federal provision limits the entitlement to work-free time to one Saturday per calendar month, it does not objectively determine this to be the final mandatory regulation of working hours; it does not indicate that the entitlement to work-free time will be specifically limited to one Saturday. As a consequence, it may also be regarded as a minimum guarantee. Within its constitutional competence, the federal legislator is free to issue uniform or exhaustive working hours

provisions in connection with shop opening hours. If such federal provisions were adopted, a blocking effect pursuant to Article 72.1 of the Basic Law would apply, resulting in the nullity of the *Land* law.

2. The provision in the Act is compatible with the Basic Law under substantive review. Although it interferes with the applicant’s freedom of practicing an occupation under Article 12.1 of the Basic Law by limiting the engagement of employees in retail shops on Saturdays, this interference is constitutionally justified.

a. The Act is intended to ensure occupational health and safety and to protect compatibility of employment and family, which are common good interests that justify restrictions of the freedom of practicing an occupation. Through this act, the legislator intends to react to the deterioration of working conditions for employees in the retail sector resulting from longer shop opening hours, which may have a negative impact on health and family life.

b. The provision is proportional and, in particular, reasonable, posing only a slight restriction on the freedom of practicing an occupation. The provision does not prevent shops from opening on Saturdays, the day with high sales. It does however force enterprises to reorganise their personnel. This might result in additional costs and reductions in sales if experienced and qualified staff are not fully available on all Saturdays. However, the legislator is permitted to give more weight to the interests of employee protection. It may be that the challenged provision does not only have the desired positive effects on the compatibility of family and employment, but that it also has negative effects since it might be a hindrance to flexibly sharing responsibilities of care. In this particular instance, the legislator has not exceeded its legislative discretion.

III. A separate opinion held the order to be neither compatible with the previous jurisprudence of both Panels nor with the Basic Law’s separation of powers between the Federation and the *Länder* since, according to the author, the Federation has made exhaustive use of its competence for regulating working hours and the *Land* legislation deviates from federal legislation without the constitutional competence to do so.

Supplementary information:

Legal norms referred to:

- Articles 12.1, 70.1, 72.1, 74.1.11, 74.1.12 of the Basic Law;
- Thuringian Shop Opening Hours Act.

Languages:

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

*Identification:* GER-2015-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 27.01.2015 / **e)** 1 BvR 471/10, 1 BvR 1181/10 / **f)** Ban on headscarves / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2015, 181-204; CODICES (German).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.17 General Principles – **Weighing of interests**.
 5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.
 5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

Keywords of the alphabetical index:

Religion, clothing, restriction / Religion, headscarf, symbol / Religion, freedom, negative / Religion, freedom, positive / Teacher, wearing a headscarf / School, interdenominational, religious symbols.

Headnotes:

1. The protection afforded by the freedom of faith and the freedom to profess a belief (Article 4.1 and 4.2 of the Basic Law) guarantees teachers at interdenominational state schools the freedom to cover their head in compliance with a rule considered to be binding due to religious reasons. This can apply to an Islamic headscarf.
2. A statutory prohibition on expressing religious beliefs at *Land* level (in this case: pursuant to § 57.4 of the North Rhine-Westphalia Education Act (hereinafter, the "Act") by outward appearance in an interdenominational comprehensive state school based on the mere abstract potential to endanger peace at school or the neutrality of the state is disproportionate if this conduct can be

plausibly attributed to a religious duty considered to be compulsory. An adequate balance between the constitutional interests at issue – the educators' freedom of religion, the pupils' and parents' negative freedom of religion, the fundamental right of parents and the educational mandate of the state – can only be struck via a restrictive interpretation of the prohibitive provision, i.e. there has to be at least a sufficiently specific danger for the protected interests.

3. Should there be a sufficiently specific risk of danger or impairment of the peace at school or the neutrality of the state in specific schools or school districts in a substantial number of cases due to substantial situations of conflict with respect to correct religious conduct, there might be a constitutionally recognised need to generally prohibit expressions of religious beliefs by outward appearance for specific schools or school districts for a certain time, and not only in a specific individual case.
4. If expressions of religious belief by outward appearance made by educators in interdenominational comprehensive state schools are prohibited by law for purposes of protecting the peace at school and the neutrality of the state, in principle, this has to apply to all religions and ideologies without distinction.

Summary:

I. Both applicants are German Muslims and worked as educators at interdenominational state schools. The constitutional complaints were directed against sanctions, as confirmed by the labour courts, imposed on them after they had refused to remove a headscarf (1 BvR 1181/10), worn at school for religious reasons, or a woollen hat worn as a replacement (1 BvR 471/10). Indirectly, they also challenged § 57.4 and the second sentence of § 58 of the Act.

Pursuant to the first sentence of § 57.4 of the Act at school, teachers may not publicly express views of, *inter alia*, a religious nature which are likely to endanger, or interfere with, the neutrality of the *Land* with regard to pupils and parents, or to endanger or disturb, *inter alia*, the religious and ideological peace at school. Under sentence 2, conduct that might create the impression among pupils or parents that a teacher advocates against human dignity, the principle of equal treatment, fundamental freedoms or the free democratic order is prohibited. Pursuant to sentence 3, carrying out the educational mandate in accordance with the Constitution of the *Land* and presenting Christian and occidental educational and cultural values accordingly do not contradict the prohibition set out in sentence 1. These provisions

apply to other educational staff, including socio-educational staff, employed by the *Land*, second sentence of § 58 of the Act.

II. The Federal Constitutional Court, by a majority of 6 to 2, held that the applicants' freedom of faith and right to equal treatment were violated. The labour courts' decisions were reversed and remanded to the Regional Labour Courts for decision; third sentence of § 57.4 of the Act was declared to be void. The decision was based on the following considerations:

1. With regard to educational staff expressing religious beliefs by outward appearance, the first and second sentence of Article 57.4 and the second sentence of Article 58 of the Act are only compatible with the Basic Law when interpreted restrictively in the light of the freedom of faith. Without a differentiating legislative regime, this requires a sufficiently specific danger.

As such, the interference with the applicants' freedom of faith was disproportionate as the labour courts had based it on an interpretation of first sentence of § 57.4 of the Act according to which a mere abstract danger was sufficient for a prohibition.

While the legislator's aims were legitimate, it failed to strike a fair balance between the different constitutional values concerned, in particular in the case of an interdenominational school. The pupils' freedom of faith and the fundamental rights of the parents were not interfered with, the state's educational mandate also includes teaching tolerance, and the duty of neutrality is a supportive one encouraging the exercise of the freedom of faith. The educators' positive freedom of faith is seriously interfered with due to the perceived imperative nature of the religious duty and the other fundamental freedoms affected.

In the light of the freedom of faith, it is wrong to presume that wearing headgear indicating a specific religious denomination in itself constitutes conduct mentioned in the second sentence of § 57.4 of the Act.

Nothing else follows from the case-law of the European Court of Human Rights: the contracting states possess a wide margin of appreciation in that field.

2. The third sentence of § 57.4 of the Act aims at conferring a privilege on presenting Christian and occidental educational or cultural values and traditions. This discriminates against adherents of other religions and violates the prohibition of discrimination on grounds

of faith and religious beliefs (first sentence of Article 3.3, Article 33.3 of the Basic Law).

This unequal treatment cannot be justified. Such a prohibition, in general, has to be indiscriminate. There are no tenable reasons for discrimination. It is not permissible to generally assume that wearers of a headscarf are proponents of unequal treatment between men and women. There are no tenable justifications for favouring expressions relating to Christian or Jewish faith. The educational mandate of the state cannot justify favouring office holders of a certain denomination. It is not possible to interpret the third sentence of § 57.4 of the Act restrictively in conformity with the Constitution as the Federal Labour Court has done due to the unequivocal intent of the legislator to the contrary. Such an interpretation would not be compatible with the principle that the judiciary is bound by the law (Article 20.3 of the Basic Law).

III. Two Justices issued a separate opinion based on the following considerations:

The constitutional complaint of the applicant in the proceedings 1 BvR 471/10 was well-founded as, *inter alia*, the coverage used did not have a religious connotation as such. However, the constitutional complaint in the proceedings 1 BvR 1181/10 was not founded.

Restrictive interpretation of the first sentence of Article 57.4 of the Act was not necessary. The Panel attached too much weight to the educators' positive freedom of faith and curtailed the freedom of discretion the *Land* legislator enjoys when weighing legal interests in multipolar fundamental rights situations and for which criteria, particularly for religious references in state schools, had been developed in the Headscarf Decision (Judgment of 24 September 2003, cf. cross-references). Those criteria should have been applied.

On that basis, the *Land* legislator had good reason to design the ban in the way it did; the specific dependency on educators to which pupils and parents are subjected, not just for a brief period and with no opportunity of avoiding it, the nature of educators as role models at school, the suggestibility of pupils and the risk of conflict. The Panel did not attach enough weight to the duty of neutrality also incumbent upon educators at state schools. As to the necessity of relying on abstract danger, the legislator was able to base its decision, *inter alia*, on expert opinions. Therefore, the legislative design of the ban complies with the Constitution. However, in accordance with the jurisprudence of the European Court of Human Rights, the application of this

provision must be limited to cases in which the clothing has a strong religious connotation.

The Federal Labour Court's interpretation of the third sentence of § 57.4 of the Act was in line with the principle that the judiciary is bound by the law, and did not contradict the unequivocal intent of the legislator, as its meaning had changed during the legislative process.

Cross-references:

Federal Constitutional Court:

- no. 2 BvR 1436/02, 24.09.2003, *Bulletin* 2003/3 [GER-2003-3-018]; abridged English version available on the Federal Constitutional Court's website.

Languages:

German; the press release in English is available on the website of the Federal Constitutional Court, an abridged English version of the decision will be available later.



Identification: GER-2015-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.02.2015 / **e)** 1 BvR 472/14 / **f)** Apparent father / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Neue Zeitschrift für Familienrecht* 2015, 355-359; *Monatsschrift des Deutschen Rechts* 2015, 465-466; *Zeitschrift für das gesamte Familienrecht* 2015, 729-733; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Law, development, judicial / Apparent father, compensation, claim / Personality, general right / Mother, intimate sphere / Mother, partner, relationship, disclosure.

Headnotes:

1. By encompassing the private and intimate spheres, the general right of personality, which is enshrined in Article 2.1 in conjunction with Article 1.1 of the Basic Law, also protects the right to decide oneself if and how one discloses information on one's intimate sphere and on one's sex life. This includes not having to disclose sexual relations with a specific partner.
2. A court ruling ordering the mother to disclose information on the identity of the child's presumptive father to facilitate enforcement of the apparent father's claim to compensation (§ 1607.3 of the Civil Code) transcends the constitutional boundaries of judicial development of the law, since such a development has no adequately specific basis in statutory law.

Summary:

I. The Federal Constitutional Court had to decide on a constitutional complaint challenging a court order that required the mother of a child to disclose to the former legal father (the so-called apparent father), who had been required to pay child support, information on who might be the child's biological father.

II. The Federal Constitutional Court held that such an order constitutes a severe interference with the mother's right of personality and as such requires an adequately specific statutory basis.

The decision is based on the following considerations:

1. The challenged decisions violate the applicant's general right of personality since they fail to recognise the scope of this fundamental right. By encompassing the private and intimate spheres, the general right of personality also protects the right to decide oneself whether and how to disclose information on one's intimate sphere and on one's sex life. This includes not having to disclose sexual relations with a specific partner.

The courts correctly opposed this right to the apparent father's interest in enforcing his claim to compensation under statutory law. Although the interest in deciding oneself if and to whom one wishes to disclose information on one's sex life carries large constitutional weight, the mother's interest in secrecy may in certain cases – e.g. because of her prior conduct – be less worthy of protection than the apparent father's interest in financial compensation. It is, therefore, not *a priori* impossible under constitutional law to force the mother to provide the apparent father with

information on the identity of the father to facilitate enforcement of his claim to compensation.

In this particular case, the courts misjudged the importance of the applicant's right to decide herself whether she wished to disclose information on her intimate sphere and her sex life and if so, how. The mother's constitutionally protected intimate sphere particularly encompasses information on her sex partners. This right was not exhausted by disclosing that she had further sexual relations.

2. Irrespective of the case at hand, a court ruling ordering the mother to disclose information on the identity of the child's presumptive father to facilitate enforcement of the apparent father's claim to compensation transcends the constitutional boundaries of judicial development of the law, since such a development has no adequately specific basis in statutory law. Therefore, the applicant's fundamental rights were violated (Article 2.1 in conjunction with Article 20.3 of the Basic Law).

a. In principle, there are no constitutional objections to courts basing rights to information within special relationships on the blanket clause of § 242 of the Civil Code. The blanket clauses of civil law enable the civil law courts to enforce the protection provided by the fundamental rights and thereby to support the legislator in fulfilling its mission of enforcing the fundamental rights; in doing so, the courts enforce these rights to an extent the legislator alone would not be able to achieve considering the obvious diversity of possible cases.

However, there are constitutional limits to judicial development of the law that may derive from the fundamental rights. If the solution chosen by the court by way of judicial development of the law serves to enforce the Constitution, and in particular the constitutional rights of individuals, these limitations are less narrow, since such a development implements superior constitutional requirements that also bind the legislator. Conversely, the limits of judicial development of the law are narrower if the solution chosen negatively affects an individual's legal position; the more important the affected legal position is under constitutional law, the more the court must apply existing requirements of statutory law.

b. The limits the fundamental rights impose on judicial development of the law are narrower in these cases. The obligation to provide the information sought severely interferes with the applicant's fundamental rights. In the case at hand, this interference is opposed merely by the apparent father's interest in facilitating enforcement of his claim to compensation under statutory law. There are no constitutional

reasons for correcting the fact that the legislator designed the claim to compensation in a manner that makes it difficult to enforce. It lies within the legislator's discretion to decide how to balance the mother's interest in protecting the intimate data of her sex life with the apparent father's interest in compensation.

c. Accordingly, in cases like this, the courts may not base a right to information merely on the blanket clause of § 242 of the Civil Code. Court rulings ordering the mother to disclose information on partners of sexual relations rather require specific statutory points of departure that show that the mother is required to provide information of the type in question. In this particular case, there are no such points of departure. There is no statutory obligation on the part of the mother to provide information on sexual relations with a partner, even though it is obvious that enforcement of claims to compensation requires knowledge of the biological father and it is further obvious that the mother will often be the only person able to provide indications as to who the biological father might be. Reinforcing the apparent father's claim to compensation would require action on the part of the legislator. The latter, however, would have to take the mother's opposing general right of personality into account, which carries great weight in these cases.

Languages:

German; English press release on the Court's website; English translation of the decision is being prepared by the Court.



Identification: GER-2015-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 26.02.2015 / **e)** 1 BvR 1036/14 / **f)** / **g)** / **h)** CODICES (German).

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.**

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

Keywords of the alphabetical index:

Insult, criminal liability / Libel, group.

Headnotes:

To be compatible with the freedom of expression, a conviction for insult to a group under § 185 of the Criminal Code (hereinafter, the “Code”) presupposes that the relevant expression of opinion made in the public sphere refers to a determinable and definite group of people. Otherwise, the interference with the freedom of expression is not justified.

Summary:

I. The applicant was intercepted whilst wearing a button marked “FCK CPS”. A Local Court convicted her for insult under § 185 of the Code, on the basis that “FCK CPS” was an abbreviation for “Fuck Cops” and constituted an expression of disdain that referred to the social value attached to that public office and was aimed at deprecating it. The appeal by the applicant to the Higher Regional Court was unsuccessful.

II. The Federal Constitutional Court held that the court decisions violated the applicant's freedom of expression under Article 5.1 of the Basic Law. The decision is based on the following considerations:

1. Wearing a button bearing the legend “FCK CPS” constitutes an expression of opinion that, *inter alia*, shows a general disapprobation towards the police. It also qualifies as an expression of opinion under Article 5.1 of the Basic Law. A criminal conviction based on that fact interferes with the right to freedom of expression.

2. While § 185 of the Code is an adequate legal basis for an interference that meets the requirement of a general provision set by Article 5.2 of the Basic Law, the courts have not adhered to the constitutional standards of interpreting and applying the law. They wrongly considered the expressed opinion as sufficiently individualised.

a. A deprecating expression of opinion that neither names a specific person nor obviously refers to specific persons, but that encompasses a whole group, might constitute an insult to individual members of the group. The bigger the group concerned, the smaller the personal impact on an

individual member, the more additional indications for an individualisation are necessary. Under constitutional law it is not permissible to treat an opinion expressed about a group in general as an opinion expressed about a determinable and definite group of people solely based on the fact that the latter is a subgroup of the former.

b. The Local Court did not adhere to these standards. It did not mention the facts necessary to find that the opinion was addressed to a sufficiently determinable and definite group of people. Solely relying on the fact that the local police officers formed a subgroup of the police as whole was not sufficient. The necessary individualisation was not established through the mere encounter between the applicant and the police officers. Simply being present in the public sphere does not suffice to individualise an opinion that, from its wording, is only directed at a group as a whole.

3. As the Higher Regional Court considered the appeal to be manifestly unfounded, its decision is based upon the same mistakes made by the Local Court. Therefore, the court decisions were reversed and the case remitted to the Local Court.

Supplementary information:

The Federal Constitutional Court has confirmed its case-law with regard to insults to a group.

Cross-references:

Federal Constitutional Court:

- Order 1 BvR 1476/91, 1 BvR 1980/91, 1 BvR 102/92, 1 BvR 221/92, 10.10.1995, *Bulletin* 1995/3 [GER-1995-3-030].

Languages:

German.



Identification: GER-2015-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 09.04.2015 / **e)** 2 BvR 221/15 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Asylum seeker, suspected terrorist / Extradition,
assurance by receiving state / Extradition, detention.

Headnotes:

The right of asylum under Article 16a of the Basic Law does not only provide for a substantive right, it also imposes a procedural duty upon the state. In the context of extraditions and if there are any indications for political persecution, the relevant bodies reviewing the pending extradition are under a duty to assess autonomously whether the person to be extradited might face political persecution. They have to ascertain the relevant facts *ex officio*. In such cases, this usually entails the duty to consult the files relating to the asylum application, unless it is clear from the statements of the person concerned that no further insights can be gained by doing so.

Political assurances may remove an obstacle to extradition unless it is to be expected, in exceptional cases, that the assurance will not be complied with. However, the obligation to examine the asylum application arises even if the requesting state submits political assurances. This is due to the fact that the examination may give rise to indications that the assurances might not be complied with.

Should a court not have taken into account the asylum application in the context of an extradition decision, the detention of the requested person for extradition purposes as such is not necessarily incompatible with the Constitution. With regard to sentence 2 of Article 2.2 of the Basic Law and the precept to expedite proceedings that follows from it, as well as the requisite proportionality of the extradition detention, the standards to be met for continuing or enforcing the detention may be stricter the longer it lasts.

Summary:

I. The applicant, a Russian national and a devout Muslim, told the Court that, after studying the Turkish language and the Quran in Istanbul/Turkey from September 2013, he entered Germany in May 2014. On 25 July 2014, he applied for asylum in Germany based on an alleged persecution by Russian

authorities. In October 2014, he was arrested provisionally on the basis of an Interpol arrest warrant. Later, in two decisions dating from November and December 2014, the courts ordered his detention for extradition purposes. One of those court orders explicitly mentioned his application for asylum. In December 2014, the Russian Attorney-General formally requested that the applicant be extradited for criminal prosecution. In the request, it was alleged that he had spent September to December 2013 in a Syrian militia camp in order to gain knowledge and practical skills intended for the use in the context of participating in terrorist acts on the territory of the Russian Federation punishable under Russian law as undergoing a training with the purpose of performing terrorist activities. The Russian Attorney General has given political assurances not to persecute the applicant politically, only to prosecute the criminal offence mentioned in the extradition request, and to permit him to leave the country after having served the sentence.

The applicant contended that he should not be extradited for the following reasons:

It was not true that he had been trained in a Syrian terrorist camp; the alleged crime would be a political one; the Russian Federation suspected any devout Muslim from the Caucasus who had left the country of terrorist activities and persecuted them. He would therefore face persecution for religious reasons, among others. In its order dating from January 2015, the Schleswig-Holstein Higher Regional Court declared the extradition for criminal prosecution to be permissible and ordered continuation of the extradition detention.

The applicant challenged the order of the Higher Regional Court by claiming that it violated his fundamental rights as protected by the second sentence of Article 1.1, Articles 1.3 and 2.1, sentences 1 and 2 of Article 2.2 and Articles 3.3, 4.1 and 16a of the Basic Law. He submitted that he, as a devout Muslim, wanted to escape from the risks of persecution by Russian authorities at home and had therefore applied for asylum in Germany. According to him, the allegations of the Russian Secret Service form part of the persecution. In his opinion, devout people who are at risk of state persecution due to their religious belief and irrespective of their relationship to terrorism should, if doubts exist, be granted asylum.

II. To the extent that the court order permitted the applicant's extradition, it violated his right to asylum under Article 16a of the Basic Law. The Higher Regional Court did not take into account the significance and scope of Article 16a of the Basic Law when deciding on the permissibility of extradition.

While the Court was aware of the applicant's application for asylum and while the statements he submitted in the extradition proceedings gave clear indications of the possibility of an entitlement to asylum, the Court did not take the right to asylum into account when deciding. Nor did it consult the asylum case file, or question the applicant in this regard. Neither the challenged decision nor the file of the proceedings indicate that the Court recognised the relevance of Article 16a of the Basic Law to these proceedings at all.

Even in the case of political assurances with regard to non-political prosecution, to speciality of prosecution and to the right to leave the country after serving the prison term, the asylum claim must be examined and assessed in order to ascertain whether those assurances might be complied with in the case at hand.

With regard to the court order relating to extradition detention, the Federal Constitutional Court did not admit the complaint for decision. The aim of the detention, to enable proceedings to be conducted and the extradition to be enforced, allows for ordering and continuing the detention if the conditions for extradition might be met and if this can only be ascertained during the proceedings. At the time of the decision, it was not clear whether the applicant was entitled to asylum or whether there were other obstacles to extradition. These questions could be resolved during the further proceedings by consulting the file relating to the application for asylum. Due to the gravity of the alleged crime and the duration of the extradition detention until then, the order continuing the extradition detention did not violate sentence 2 of Article 2.2, sentence 1 of Article 104.1 of the Basic Law.

Languages:

German.



Ireland

Supreme Court

Important decisions

Identification: IRL-2015-1-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 15.04.2015 / **e)** SC 398/2012 / **f)** The People at the Suit of the Director of Public Prosecutions v. JC / **g)** [2015] IESC 31 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal law, evidence admissibility, exclusionary rule.

Headnotes:

The consideration by a trial judge of whether evidence obtained in breach of the constitutional rights of an individual should be admitted or excluded should involve the application of a test which represents an appropriate balance of the constitutional rights and values at issue.

Summary:

I. The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland) and in certain instances direct from the High Court. The decision of the Supreme Court summarised here is an appeal brought by the Director of Public Prosecutions under Section 23 of the Criminal Procedure Act 2010 seeking a review of the decision of the trial judge in the Circuit Criminal Court to exclude evidence on the basis of the application of the exclusionary rule as set out by the Supreme Court in *Director of Public Prosecutions v. Kenny* [1990] 2 IR 110. By way of background, in the case of *The People (Attorney General) v. O'Brien* [1965] IR 142, the Supreme Court stated that where there has been a deliberate and conscious violation of constitutional

rights, evidence obtained by such violation should in general be excluded, save in extraordinary and excusing circumstances. Subsequently, in *The People (DPP) v. Kenny*, the Supreme Court held that an act could amount to a “deliberate and conscious” violation of rights even though the person is unaware of the unlawfulness of the act.

In *DPP v. JC*, the accused/respondent was on trial before the Circuit Criminal Court for alleged offences involving robberies. Applying the rule governing the exclusion of evidence set out by the Supreme Court in *DPP v. Kenny*, the trial judge excluded evidence. As a result, the case against the accused/respondent collapsed.

The two key issues for the Supreme Court to consider were:

- i. the scope of appeals which can be brought to the Supreme Court by the DPP under Section 23 of the Criminal Procedure Act 2010; and
- ii. the rule governing the admission or exclusion of evidence obtained in breach of the constitutional rights of a person.

The Supreme Court considered the key question of whether *DPP v. Kenny* was correctly decided. If not, a question arose as to what is the appropriate test to be applied when considering whether evidence obtained in circumstances involving a breach of constitutional rights should be admitted or excluded.

A preliminary question for consideration was whether an appeal lay under Section 23 of the Criminal Procedure Act 2010. Section 23 provides that the Director of Public Prosecutions may appeal an acquittal on a question of law, where a ruling was made during the course of a trial which “erroneously excludes compelling evidence.” Section 23.14 provides that such evidence must be:

- a. reliable;
- b. of significant probative value; and
- c. be such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person’s guilt in respect of the offence concerned.”

Historically, no appeal lay from an acquittal in criminal proceedings. Before the enactment of Section 23 of the Criminal Procedure Act 2010, the only appeal which lay to the Supreme Court from an acquittal was a consultative appeal by the Attorney General or Director of Prosecutions without prejudice to the verdict or decision in favour of an accused person pursuant to Section 34 of the Criminal Procedure Act

1967, as substituted by Section 21 of the Criminal Justice Act 2006. Section 23 of the 2010 Act provides for an appeal which, if directed by the Court, can be with prejudice to an accused person, as it can lead to a retrial which could result in the conviction of an accused. An issue for consideration was whether the statutory criteria under Section 23 of the Criminal Procedure Act 2010, which requires “compelling evidence”, were satisfied.

II. Written judgments were delivered by Murray J, Hardiman J, O’Donnell J, McKechnie J, Clarke J and MacMenamin J. On the issue of whether an appeal lay under Section 23 of the Criminal Procedure Act 2010, a majority of the Supreme Court (Denham CJ, O’Donnell J, Clarke J and MacMenamin J) was of the view that the exclusionary rule could properly be raised under the section. A minority of the Court (Murray J and Hardiman J) dissented on this point. Murray J was of the view that an appeal did not lie under Section 23 of the Criminal Procedure Act 2010 as the decision of the trial judge to exclude the evidence was one which she was bound to make and was not erroneous within the meaning of Section 23 of the 2010 Act. Hardiman J was of the view that, where a trial judge follows a binding authority of which a higher court subsequently disapproves, the judge does not commit an error. The law which the trial judge applied in this case appeared to be clear since the decision of *DPP v. Kenny*. Therefore, it was for the Supreme Court to decide whether a trial judge could be found to have erroneously excluded evidence if the judge properly applied the established case-law of a higher court even if the higher Court concludes that the established case-law ought to be reviewed. A majority of the Court (Denham CJ, O’Donnell J, Clarke J and MacMenamin J) considered that the incorrect exclusion of the evidence in question was an error. This was the case even if the trial judge was bound to follow the decision of *DPP v. Kenny*, unless *Kenny* was redefined by the Supreme Court.

On the substantive legal issue concerning the exclusionary rule, the Court considered the proper balance to be struck in vindicating the constitutional rights and principles engaged. O’Donnell J reviewed the sequence of Irish case-law concerning the question of admissibility of evidence and international authorities from the United States, the United Kingdom, Canada, New Zealand and South Africa. A majority of the Supreme Court took the view that the exclusionary rules as stated in *The People (AG) v. O’Brien* and *DPP v. Kenny* failed to adequately balance the competing constitutional rights involved, including the rights of the accused, the entitlement of society to the proper and legitimate conviction of those guilty of crime and the rights of victims to

ensure that those who commit crimes are brought to justice when there is sufficient probative evidence to establish the guilty of the accused to the criminal standard. The Supreme Court held that there should be a clear test to be applied, which should appropriately balance competing factors at issue. Clarke J (with whom Denham CJ, O'Donnell J and MacMenamin J agreed) set out the following test to be applied:

- i. "The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.
- ii. Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:
 - a. that the evidence was not gathered in circumstances of unconstitutionality; or
 - b. that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis.
- iii. Any facts relied on by the prosecution to establish any of the matters referred to at ii. must be established beyond reasonable doubt.
- iv. Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of

that type generally or in putting in place policies concerning evidence gathering of the type concerned.

- v. Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.
- vi. Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority."

On the application of the above test to the facts of the case, a majority of the Supreme Court held that although the trial judge was bound to follow the decision of the Court in *DPP v. Kenny*, her decision to exclude the evidence was erroneous within the meaning of Section 23 of the Criminal Procedure Act 2010. The Court must yet determine a final issue of whether the acquittal of the respondent should be quashed and a retrial ordered or whether his acquittal should be affirmed as it would not be in the interests of justice to order a retrial. The final decision on whether the appeal should be allowed was, therefore, adjourned.

In summary, a majority of the Supreme Court held that an appeal lay under Section 23 of the Criminal Procedure Act 2010. If the decision of the trial judge to exclude evidence was incorrect, such a decision was an error even if the trial judge was bound by the decision of the Supreme Court in *DPP v. Kenny*. The Supreme Court set out a new test to be applied when considering the exclusion of evidence obtained in breach of the constitutional rights of a person which involves a balancing of competing factors.

Languages:

English, Irish.



Identification: IRL-2015-1-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 24.04.2015 / **e)** SC 432/2013 / **f)** Re: Referendum Act & re: Jordan and Jordan v. Minister for Children and Youth Affairs & ors / **g)** [2014] IESC 26 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

3.3 General Principles – **Democracy.**

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

Keywords of the alphabetical index:

Referendum, amendment to Constitution / Referendum, outcome, query, violation of human rights and freedoms / Referendum, campaign, public fund, confirmation, validity, procedure, test.

Headnotes:

For the purpose of the legislative procedure which provides for petitioning a provisional referendum certificate, evidence of a “material effect on the outcome of a referendum” involves establishing that it is reasonably possible that the irregularity or interference identified affected the result. The object of this test is to identify the point at which it can be said that a reasonable person could be in doubt about, and no longer trust, the provisional outcome of the election or referendum.

Summary:

I. The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland) and in certain instances directly from the High Court. The decision of the Supreme Court summarised here relates to two appeals from the High Court. One appeal was from a judgment of the High Court delivered on 18 October 2013 [2013] IEHC 458 in proceedings relating to a provisional referendum certificate, which is a document issued following a referendum containing the results. Part V of the Referendum Act 1994 provides for a statutory procedure for challenging a provisional referendum certificate. In light of the necessity for any interference with a decision of the People of Ireland in a referendum to be strictly compliant with the law and the Constitution, it involves a two stage process. The

first stage is an application to the High Court for leave, which requires an applicant to prove that there is *prima facie* evidence of the matter required by the statute and the said matter is such as could affect materially the result of the referendum as a whole. The second stage is a hearing at trial. The second appeal was from a judgment of the High Court delivered on 20 June 2014 [2014] IEHC 327 from plenary proceedings challenging the constitutionality of provisions of the Referendum Act 1994.

By way of background, a referendum took place on 10 November 2012. The referendum asked the eligible electorate to vote on whether Article 42.5 of the Constitution of Ireland should be replaced with a new Article 42A, with the heading ‘Children’. The proposed amendment was provided for in the Thirty First Amendment of the Constitution (Children) Bill 2012. 33.49% of persons eligible voted in the referendum. 58% of voters voted in favour of the proposed amendment and 42% voted against it. A provisional referendum certificate was published in *Iris Oifigiúil* (Official Gazette of the Government of Ireland) on 13 November 2012.

On the 8 November 2012, two days before the referendum in question, the Supreme Court ruled in *McCrystal v. The Minister for Children and Youth Affairs and ors* [2012] 2 IR 726 that a booklet and website entitled “Children’s Referendum” and advertisements published and distributed by the Department of Children and Youth Affairs using moneys voted by the *Oireachtas* (Irish Parliament) breached the principles set out by the Supreme Court in *McKenna v. An Taoiseach* (no. 2) [1995] 2 IR 10. In *McKenna*, the Supreme Court held that in light of Article 40.1 of the Constitution relating to equality, Article 47.1 of the Constitution, which concerns referenda, requires equal treatment of the ‘Yes’ and ‘No’ sides of a referendum. Consequently, spending of public money by the Government to promote one side of a referendum campaign represented a breach of equality, freedom of expression and the constitutional right to a democratic process in referenda. In *McCrystal*, the Court did not grant an injunction postponing the referendum, but declared that the respondent acted unlawfully in the manner in which it had allocated funds.

On 19 November 2012, the appellant, via a plenary summons, sought a declaration that the provisions of the Referendum Act 1994 are unconstitutional; a declaration under Section 5 of the European Convention on Human Rights Act 2003 that sections of the Referendum Act 1994 are incompatible with the European Convention on Human Rights; the respondent Minister had acted in breach of the constitutional rights of the applicant under certain provisions of the Constitution; and that the State had

acted in violation of certain rights of the appellant under the European Convention on Human Rights. The applicant argued that Sections 42.3 and 43 of the Referendum Act 1994 made it practically impossible for an applicant to prove that an unlawful interference had a "material effect on the outcome of a referendum." She submitted that once it was established that an irregularity or interference had been committed the burden of proof should shift to the State to prove that it had not materially affected the outcome of the vote. The High Court held that Sections 42 and 43 of the Referendum Act 1994 employ a rational and proportional onus and standard of proof which may on occasion be difficult, but is not impossible to discharge. The trial judge found that an absolute rule requiring the referendum to be set aside does not follow from a breach of the McKenna principles. Such an approach, it held, would be incompatible with the sovereignty of the People. The appellant had not rebutted the presumption of constitutionality from which the impugned provisions benefited. The High Court held that a declaration that the respondent breached the McKenna principles was a sufficient remedy.

On 21 November 2012, the applicant sought the leave of the High Court to present a petition pursuant to Section 42 of the Referendum Act 1994 in respect of the aforementioned referendum. The High Court granted the appellant leave to present the petition, but was not satisfied on the balance of probabilities that the appellant had adduced cogent and reliable evidence to show that the result of the referendum as a whole was materially affected by the unconstitutional wrongdoing.

II. The Supreme Court unanimously dismissed the appeals brought by Ms Jordan. The argument in the Supreme Court focused mainly on the question of which party bore the burden of proof in applications pursuant to Section 42 of the Referendum Act 1994. In addition, the Court considered the contention of the appellant that the question of the material affect of any established wrongdoing was only relevant at the *ex parte* leave stage and not at the second full hearing stage. The Supreme Court held that the burden of proof is on the applicant and the issue of materiality remains before the Court at the full hearing.

The Supreme Court set out the following test to be applied when the outcome of a referendum is challenged, in order to appropriately balance making too easy the overturning of a decision made by the People, and making a genuine challenge so difficult so as to be practically impossible. The Supreme Court set out the following test:

"material affect on the outcome of a referendum' involves establishing that it is reasonably

possible that the irregularity or interference identified affected the result. Because of the inherent flexibility of the test, it may be useful to add that the object of this test is to identify the point at which it can be said that a reasonable person could be in doubt about, and no longer trust, the provisional outcome of the election or referendum."

The Court stated that in applying the test in cases, the individual factors of each case will have to be considered. The factors to be considered will depend on the circumstances of each case. The Court was of the view that the relevant factors in the present case included:

- the matter raised, i.e. the decision of the Supreme Court in *McCrystal*;
- the actions of the Minister; and
- the statistics of the referendum (the Court found that the margin between those who voted in favour of the referendum and those who voted against was a significant factor); and
- a remedy had been already ordered in *McCrystal*.

Applying the test to the factors in the case, the Court found that it had not been established that it was reasonably possible that the actions of the Minister materially affected the outcome of the referendum as a whole. The Court was satisfied that a reasonable person could not have a doubt about, and would trust, the provisional outcome of the referendum. The Supreme Court dismissed both appeals and confirmed the provisional referendum certificate which, on return to the referendum returning officer, would become final and be conclusive evidence of the result of the referendum.

Languages:

English.



Italy

Constitutional Court

Important decisions

Identification: ITA-2015-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 25.02.2015 / **e)** 37/2015 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 12, 25.03.2015 / **h)**.

Keywords of the systematic thesaurus:

4.6.9.1 Institutions – Executive bodies – The civil service – **Conditions of access.**

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

Keywords of the alphabetical index:

Civil service, appointment, competitive examination / Equality / Administration, proper functioning.

Headnotes:

Legislation permitting the assignment by contract of civil servants to senior management posts, pending the filling of such posts by competitive examination, violates Articles 3 and 97.1 of the Constitution, which require the law to ensure “the efficiency and impartiality of administration”, and Articles 3 and 51 of the Constitution, under which appointment to public offices must be on equal terms and according to the conditions established by law.

Summary:

I. The Council of State referred to the Constitutional Court a question of constitutionality concerning Article 8.24 of Decree Law no. 16 of 2 March 2012, as amended by Article 1.1 of Law no. 44 of 26 April 2012 (hereinafter, “the challenged article”). Given the urgent need to ensure the proper functioning of the customs, revenue and real estate and land registry agencies so as to combat tax evasion effectively, the article in question allowed the said agencies to hold competitive examinations, the procedures for which were to be completed by 31 December 2013, to fill administrative managers’ posts.

The challenged article provides, first, that the management posts already assigned by the agencies to replacement officials are maintained and that the said agencies may assign management duties to new officials by concluding contracts with those selected by the administration for such time as necessary to fill the posts by means of competitive examination. The article prohibits the agencies from concluding new contracts once the successful candidates from the competitive examinations have been appointed by the administration.

The question of constitutionality was raised in connection with a judgment on an appeal by the revenue agency against an Administrative Court decision. That decision had set aside a decision by the agency’s management board which extended until 31 December 2010 the possibility – provided for in the agency’s regulations – of dealing on an urgent basis with operational requirements and assigning temporarily, by contract, management duties, with the corresponding remuneration, to officials in the agency. The Administrative Court had held that, in assigning management posts to individuals who were not in that category, the regulation breached the general law on the civil service and therefore set it aside. In the course of the appeal proceedings, the regulation was transposed in Article 8.24 of Decree Law no. 16 of 2 March 2012, converted, with amendments, by Article 1.1 of Law no. 44 of 26 April 2012.

The Council of State referred the latter to the Constitutional Court on the ground that it violated Articles 3 and 97.3 of the Constitution, which require competitive examinations for access to employment in public administration. The impugned article established a selection procedure for candidates for management posts which was not a genuine competitive examination and which, by excluding outside candidates, violated Articles 3 and 97.1 of the Constitution, which require the law to ensure “the efficiency and impartiality of administration”. Lastly, the Council of State held that the article breached Articles 3 and 51 of the Constitution, under which appointment to public offices must be on equal terms and according to the conditions established by law.

II. The Court ruled that the challenged article was in breach of the Constitution. According to the Court’s consolidated case-law, there can be no doubt that appointment to a management post in public administration must always be by means of competitive examination, even if it concerns existing staff. At first sight, the impugned article is not in breach of the aforementioned articles of the Constitution: it does not permanently assign management posts to individuals not in that category and merely makes it possible for officials

to hold such posts until the completion of the competitive examination procedure, in other words, for a supposedly limited period.

However, closer consideration of the impugned article and the actual circumstances preceding and following its referral to the Court shows that the competitive examination rule was actually circumvented. For years, the revenue agency availed itself of the possibility offered by Article 24 of its regulations of concluding, where necessary, individual contracts with its officials assigning them to vacant management posts for such time as necessary to fill the posts by means of competitive examination and, in any case, for a specific term, such term being extended many times from 2006 by decisions of the agency's management board. At the time when the question of constitutionality concerning Article 8.24 of Decree Law no. 16 of 2 March 2012 was submitted, the deadline was 31 December 2010. Subsequent to the question of constitutionality, it was extended twice (the last time to 31 May 2012).

These repeated extensions clearly show that an instrument which had been designed to deal with exceptional circumstances had been used as an ordinary means of filling temporarily vacant posts. Administrative law makes provision for a system of "acting officials" to deal with unforeseeable vacancies, under which an official may be assigned to a management post, pending the completion of the procedure initiated to fill the vacancy. However, this is an extraordinary and temporary measure. In contrast, the revenue agency extended the deadlines set in its regulations for conducting competitive examination procedures several times and continued to assign its officials to managerial duties with the same remuneration as managers. The administrative courts held these repeated extensions to be unlawful.

This was the legislative and case-law background to the challenged article. In fact, this provision was not strictly necessary to the functioning of the agency, as the possibility of holding competitive examinations was already provided for in existing legislation and, in any case, the agency could have used the system of delegation to enable ordinary officials to perform managerial tasks. The real purpose of the provision was to validate the existing contracts and enable the agency to conclude new contracts for such time as necessary to complete competitive examination procedures. However, the second point in Article 8 introduces a degree of uncertainty in that it provides that the agencies may not assign management posts to their officials once the successful candidates from the competitive examinations have been appointed by the administration. It is therefore possible that new management posts continue to be assigned during

the period from the approval of the ranking of the successful candidates from the competitive examination until their appointment, and such period is of an uncertain duration. A practice defined as temporary and extraordinary which could accordingly be tolerated becomes the normal method of appointment for the management staff of a key branch of the public administration.

The Court set aside the challenged article for breaches of Articles 3, 51 and 97 of the Constitution, on the ground that it extended indefinitely the allegedly temporary assignment of management duties. In application of Article 27 of Law no. 87 of 1953, the Court also set aside the provisions of successive laws which extended until 31 December 2014 and 30 June 2015 the terms provided in Article 8.24 of Decree Law no. 16 of 2 March 2012 for temporary assignment to management duties.

Supplementary information:

An issue arose regarding the validity of the measures decided by the managers removed from their posts following the Court's judgment. According to some tax boards, the theory of "*de facto*" officials means that the relationship between the public administration and its officials has no impact on the relationship with citizens and the measures signed by the officials concerned, who to all intents and purposes were competent, were therefore perfectly valid. However, some other boards voided the measures as the decisions of individuals not holding proper authority.

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 at the latest.

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. 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 at present. 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 at the latest. 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 been recognised more clearly. 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 even 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 at the latest. 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-2015-1-001

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 08.07.2014 / **e)** KI 99/14, KI 100/14 / **f)** Shyqyri Sylja and Laura Pula requesting constitutional review of the Decisions of the Kosovo Prosecutorial Council related to the election procedure of Chief State Prosecutor (Decisions KPK/146/2014, 5 June 2014 and KPK 151/201, 6 June 2014) / **g)** *Gazeta Zyrtare* (Official Gazette), 10.07.2014 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

4.7.4.3.2 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Appointment.**

4.7.4.3.3 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Election.**

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

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

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:

Election, Chief State Prosecutor / Prosecutorial council, Prosecutor general, election, procedure / Prosecutor general, appointment, procedure.

Headnotes:

In the procedure for the election of the Chief State Prosecutor by the Prosecutorial Council, the participation of a candidate for their position in the vote on other candidates, violates the right to a fair and impartial trial (Article 31 of the Constitution and Article 6 ECHR).

Summary:

I. On 27 March 2014 the Kosovo Prosecutorial Council (hereinafter, the “KPC”) published the internal announcement for the position of Chief State Prosecutor.

On 31 May 2014 the KPC published the list with the final evaluation scores for each candidate. The second applicant (Mrs Laura Pula, KI 100/14) was ranked fifth and therefore not subject of further selection proceedings. In her request for reconsideration, the applicant, claimed that the procedures were violated in terms of awarding scores to the candidates. The applicant, stated that, one of the members of the Panel awarded five points, for the submitted concept document whereas according to the table of evaluation scores, considered as an integral part of the Regulation, no less than ten points should have been awarded.

According to the list with the final evaluation scores of 31 May 2014, the first applicant (Mr Shyqyri Sylja) was among the three highest ranking candidates and therefore subject of the voting procedure by the KPC. On 6 June 2014 the KPC, composed of seven members, held a secret vote and, with four votes elected the one of the candidates (hereinafter, the “nominee”) for the position of Chief State Prosecutor. Mr Shyqyri Sylja, received three votes and, thus, was not elected as Chief State Prosecutor.

One of the seven members of the KPC, who voted for the nominee, was also a candidate in the election procedure for the position of the Chief State Prosecutor. This member was selected as a candidate in the final list of eight candidates of 25 April 2014, but was not selected as a candidate in the final list of the three highest ranking candidates of 31 May 2014, which was the subject of the secret voting by the KPC Panel.

Consequently, on 12 June 2014, the applicants filed referrals with the Constitutional Court against the Decisions of the KPC. In their individual referrals, the applicants allege that during the election procedure for the position of Chief State Prosecutor the KPC violated their rights guaranteed by the Constitution, namely Article 3 of the Constitution (equality before the law) and Article 7 of the Constitution (values).

In addition, applicant Mr Shyqyri Sylja requested from the Constitutional Court to impose an interim measure, namely to suspend the appointment procedure of the nominated candidate by the President, awaiting the outcome of the proceedings before the Court.

II. On 4 July 2014, the Court granted the applicant's request for an interim measure holding that there is a *prima facie* case of the referral and that the applicant put forward enough convincing arguments that the appointment of the candidate for the Chief State Prosecutor by the President of the Republic of Kosovo may result in unrecoverable damages for the applicant.

As to the admissibility criterion of non-exhaustion of legal remedies, the Court concluded that the applicants had no available remedies to exhaust before pursuing their claims of a constitutional violation. Hence, upon assessment of the other admissibility criteria, the Court concluded that the referrals were admissible.

Mr Shyqyri Sylja's case, the Court considered that the circumstances serve objectively to justify the Applicant's apprehension that, during its voting procedure for the Chief State Prosecutor by including the member, who was also a candidate for the position of Chief State Prosecutor the KPC lacked the necessary appearance of impartiality. The Court considered that the member who was a candidate for the position of the Chief State Prosecutor should have been excluded from the voting and nomination procedure and replaced by another member.

In relation to the applicant Mrs Laura Pula, the Court noted that the KPC accepted that the aforementioned annex with the evaluation procedure is an integral part of the Regulation. Therefore, the Court held that the annex clearly established the evaluation method by providing the minimum and maximum points for the concept documents and other evaluation components during the election procedure. Therefore, the KPC, by ignoring its own established rules, created an arbitrary situation. Thus, the Court considered that the failure of the KPC, to accept its own established rules and to provide a clear reasoning with respect to the essential aspects of the Applicant's factual and legal procedural argument is in breach of the right to fair proceedings.

As concerns the applicant's allegation on violation of principle of non-discrimination, the Court held that although there are appearances raising serious questions that the applicant may have been discriminated against because of her gender in the testing procedure, the Court held that it had not been substantiated that she was actually discriminated against in the testing procedure because of her gender. Thus, the aforementioned principle of non-discrimination has not been violated.

The Court assessed that the election procedure conducted by the Kosovo Prosecutorial Council constituted a violation of the right to fair proceedings, guaranteed by Article 31 of the Constitution (right to a fair and impartial trial) and Article 6 ECHR (right to a fair trial) and therefore the election procedure for the position of Chief State Prosecutor is to be repeated, without prejudice as to the outcome of that repeated procedure.

Cross-references:

European Court of Human Rights:

- *Scavuzzo-Hager and Others v. Switzerland*, no. 41773/98, 07.02.2006;
- *Ștefănică and others v. Romania*, no. 38155/02, 02.11.2010;
- *De Cubber v. Belgium*, no. 9186/80, 26.10.1984;
- *Torija v. Spain*, no. 18390/91, 09.12.1994;
- *Wettstein v. Switzerland*, no. 33958/96, 21.12.2000.

Languages:

Albanian, Serbian, English, Turkish (translation by the Court).



Identification: KOS-2015-1-002

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 13.11.2014 / **e)** KO 155/14 / **f)** Constitutional Review of Decree no. DKGJK-001-2014 of the President of the Republic of Kosovo, on Confirmation of the Continuation of Mandate of the International Judges of the Constitutional Court of the Republic of Kosovo, dated 31 August 2014 / **g)** *Gazeta Zyrtare* (Official Gazette), 17.11.2014 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**
1.3.5.6 Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State.**

1.4.10.4 Constitutional Justice – Procedure – Interlocutory proceedings – **Discontinuance of proceedings.**

2.2.1 Sources – Hierarchy – **Hierarchy as between national and non-national sources.**

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

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

4.4 Institutions – **Head of State.**

4.4.3.1 Institutions – Head of State – Term of office – **Commencement of office.**

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.4.3.5 Institutions – Head of State – Powers – **International relations.**

4.16 Institutions – **International relations.**

Keywords of the alphabetical index:

Constitutional Court, judge, international, appointment / International agreement, constitutional requirements, parliamentary approval / Treaty, ratification, effects / Treaty, incorporation / Treaty, non-self-executing.

Headnotes:

I. A presidential decree which incorporates an international agreement into the domestic legal system of the Republic of Kosovo, previously ratified by the Assembly, does not create new legal obligations, but it only complies with the obligations taken through an international agreement. In the present case, the Decree of the President of Kosovo served as an implementing act of those provisions of the International Agreement which are non-self-executing, while the consent of the State to be bound by the Agreement was formalised by the ratification of the Assembly.

Summary:

Pursuant to the provisions of Articles 113.2.1 and 135.4 of the Constitution, the Ombudsperson of the Republic of Kosovo (the applicant) requested a constitutional review of Decree no. DKGJK-001-2014 of the President of the Republic of Kosovo, which confirmed the Continuation of Mandate of the International Judges of the Constitutional Court of the Republic of Kosovo. The applicant claimed that the challenged Decree has not been adopted in accordance with the applicable constitutional provisions, which regulate the procedure for the election of the judges of the Constitutional Court. Namely, Article 114.2 provides that Judges of the Constitutional Court are appointed by the President upon the proposal of the Assembly, while Article 84.19, regulating the competences of the

President, states that the President of the Republic of Kosovo appoints judges to the Constitutional Court upon proposal of the Assembly. According to the applicant, the President had exceeded her competences by circumventing the Assembly's role in this process. Furthermore, the applicant argued that, despite the fact that the Assembly ratified the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, which among others, foresees continuation of the mandate of international judges; according to the applicant this cannot justify the circumvention of the Assembly in continuing the mandate of the three international judges.

In its decision KO 155/14 of 13 November 2014, the Constitutional Court, referred to Articles 11 and 13 of the Vienna Convention on the Law of Treaties which regulate the means of expressing consent to be bound by a treaty and the consent of States to be bound by a treaty, expressed by an exchange of instruments constituting a treaty. In this respect, the Constitutional Court noted that that the President of the Republic of Kosovo and the High Representative of the European Union exchanged letters in accordance with these above-mentioned provisions of the Vienna Convention on the Law of Treaties, which consequently had been ratified by the Assembly, by a law with two third majority vote, thus it became part of the legal system of Kosovo. Further to its Judgment of 9 September 2013 in case K095/13, (applicant: Visar Ymeri and 11 other deputies of the Assembly requesting constitutional review of Law no. 04/L-199, on Ratification of the First International Agreement of Principles governing the Normalisation of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this Agreement), the Constitutional Court further reiterated that it does not have jurisdiction *ratione materiae* to deal with the question of whether international agreements are compatible with the Constitution following ratification by the Assembly.

Even though the applicant alleged that he challenged the constitutionality of the decree, the Constitutional Court noted that the applicant's arguments are mainly related to the content of the International Agreement concluded between the Republic of Kosovo and the European Union through exchange of letters and ratified by the Assembly on 23 April 2014. The Constitutional Court concluded that the applicant did not substantiate his claim.

As to the applicant's request for interim measures, to exclude the international judges from deliberation and the decision making process in this Referral,

the Constitutional Court, pursuant to its Rules of Procedure, concluded that since the applicant's referral is manifestly ill-founded and, therefore, inadmissible, the request for interim measure can no longer be subject of review, and, therefore must be rejected.

Languages:

Albanian, Serbian, English, Turkish (translation by the Court).



Identification: KOS-2015-1-003

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 26.01.2015 / **e)** KI 72/14 / **f)** Besa Qirezi requesting constitutional review of the Decision, CA. no. 712/2013 of Court of Appeal of Kosovo, 21 October 2013 / **g)** *Gazeta Zyrtare* (Official Gazette), 06.02.2015 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

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

4.7.3 Institutions – Judicial bodies – **Decisions.**

4.7.13 Institutions – Judicial bodies – **Other courts.**

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

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

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

Keywords of the alphabetical index:

Court, judgment, execution, failure / Ministry, employee, salary, payment / Employment, salary, payment, judgment, non-execution / Property, financial compensation.

Headnotes:

The non-execution of a Decision of the Kosovo Independent Oversight Board in its entirety by the competent administrative authorities and the regular

courts constitute a violation of right to fair and impartial trial and judicial protection of rights (Articles 31 and 54 of the Constitution), in conjunction with Article 6 ECHR (right to a fair trial) and Article 13 ECHR (right to an effective remedy). As a result of this violation, the applicant was deprived from her right to compensation for the unpaid salaries. Thus, the right to protection of property (Article 46 of the Constitution and Article 1 Protocol 1 ECHR) was violated.

Summary:

I. The applicant filed a referral challenging the Decision of the Court of Appeal of Kosovo, of 21 October 2013, which annulled the Decision of the Basic Court in Prishtina, of 11 February 2013, rendered in the execution procedure. Independent Oversight Board of Kosovo is an independent body, which oversees the compliance with rules and principles governing the Civil Service of the Republic of Kosovo, and reports directly to the Assembly of the Republic of Kosovo. The procedure before the court concerned the execution of an administrative decision, namely that of the Kosovo Independent Oversight Board regarding the compensation of the unpaid salaries by the applicant's employer, the Ministry for Communities and Return of Kosovo.

The applicant claimed before the Constitutional Court that the Court of Appeal of Kosovo violated her rights guaranteed by Article 24 of the Constitution (Equality Before the Law), Article 31 of the Constitution (Right to Fair and Impartial Trial), Article 54 of the Constitution (Judicial Protection of Rights), as well as the rights guaranteed under Article 6 ECHR (right to a fair trial) and Article 1 Protocol 1 ECHR (protection of property).

II. The Constitutional Court declared the applicant's referral admissible and held that the Court of Appeal, when annulling the Decision of the Basic Court in Prishtina to execute a final and executable administrative decision of the Kosovo Independent Oversight Board, violated the applicant's right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 ECHR. Therefore, the Court concluded that the impossibility to bring any further legal actions for the non-execution of the decision of the Kosovo Independent Oversight Board also constitutes a violation of Article 54 of the Constitution and Article 13 ECHR. The Court further held that as a result of these violations, the applicant was deprived from her right to receive compensation for the unpaid salaries. Thus, the right to protection of property guaranteed by Article 46 of the Constitution and

Article 1 Protocol 1 ECHR was violated. Finally, the Constitutional Court concluded that the decision of the Independent Oversight Board of Kosovo for the part of compensation of the unpaid salaries from the moment of her dismissal until the moment of her return to the working place is still to be executed.

Cross-references:

European Court of Human Rights:

- *Hornsby v. Greece*, no. 14307/88, 19.03.1997;
- *Pecevi v. the Former Yugoslav Republic of Macedonia*, no. 21839/03, 06.11.2008;
- *Pressos Compania Naviera SA and Others v. Belgium*, no. 17849/91, 20.11.1995;
- *Gratzinger and Gratzingerova v. the Czech Republic*, no. 39794/98, 10.07.2002.

Languages:

Albanian, Serbian, English, Turkish (translation by the Court).



Identification: KOS-2015-1-004

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 09.03.2015 / **e)** KI 118/14 / **f)** Raiffeisen Bank Kosovo J.S.C requesting constitutional review of Judgment E. Rev. no. 24/2013 of the Supreme Court of Kosovo, 5 February 2014 / **g)** *Gazeta Zyrtare* (Official Gazette), 23.03.2015 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

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

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

4.7 Institutions – **Judicial bodies.**

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

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

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

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

Keywords of the alphabetical index:

Constitutional Court, civil law, interpretation / Constitutional Court, “fourth instance” / Constitutional matter.

Headnotes:

The determination by the courts of the scope of their jurisdiction in civil proceedings, and the interpretation by the courts of the meaning of legal provisions in civil law, does not lead to a finding by the Constitutional Court of a violation of the right to a fair trial under Article 31 of the Constitution or under Article 6 ECHR. Where the courts have found, through a fair hearing, that in their interpretation of civil law there exists no property right, the Constitutional Court does not need to examine whether there has been a violation of a property right under Article 46 of the Constitution or under Article 1 Protocol 1 ECHR.

Summary:

I. An individual had contracted a loan with a commercial bank (Raiffeisen Bank Kosovo J.S.C.). Under the terms of this loan agreement, in addition to the regular monthly interest payments due to the bank, in case of default by the debtor, a supplementary interest was to be paid for each month that the debtor failed to pay. Following several periods of default and a renegotiation of the loan, eventually the debtor paid all outstanding sums.

Subsequently, the debtor initiated proceedings under Article 211 of the Law on Contracts and Torts claiming that the bank had not had any legal right to this supplementary interest. The court proceedings were focused on the legal definition of this supplementary interest, whether it was a lawful “default interest”, as provided under Article 277 of the Law on Contracts and Torts, or an unlawful “penalty interest” under Article 270 of the Law on Contracts and Torts, which expressly forbids penalty interest for pecuniary obligations. The courts found in favour of the debtor and ordered the bank to repay the amount of supplementary interest payments it had received.

II. The Raiffeisen Bank Kosovo submitted a Referral to the Constitutional Court claiming that the courts had violated the procedural law by accepting the claim that the payment of the supplementary interest was not required and had been paid erroneously. Furthermore, the Bank claimed that the supplementary interest had been lawful, but that the courts had not examined the evidence that the Bank had submitted. The Bank claimed that, as a consequence of failing to provide the Bank with a fair trial, the courts denied the Bank its legitimate interest payments and thereby had violated its right to the free enjoyment of its property.

The Constitutional Court considered that it could not enter into an assessment of the interpretations of law and fact made by the regular courts. The Court referred to both its own case-law and that of the European Court of Human Rights that it was not a court of “fourth instance”. The Court found that the court proceedings had afforded to the Bank all opportunities to present its arguments, and that the courts had fully assessed those arguments in their decisions. Therefore, the Constitutional Court found that the Bank had benefitted from a fair trial.

Given that the Bank had benefitted from a fair trial in the determination of its rights, the Constitutional Court found that there was no need to examine the complaint of a violation of the Bank’s right to property.

Languages:

Albanian, Serbian, English, Turkish (translation by the Court).



Identification: KOS-2015-1-005

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 16.03.2015 / **e)** KO 13/15 / **f)** Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by fifty five Deputies of the Assembly and referred by the President of the Assembly by letter no. 05-259/DO-179 / **g)** *Gazeta Zyrtare* (Official Gazette), 18.03.2015 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution**.
 2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
 3.10 General Principles – **Certainty of the law**.
 4.6.4.1 Institutions – Executive bodies – Composition – **Appointment of members**.
 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
 5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.
 5.2.3 Fundamental Rights – Equality – **Affirmative action**.

Keywords of the alphabetical index:

Affirmative, action, temporal scope / Constitution, amendment, validity / Government, member, appointment, gender / Government, member, professional merit.

Headnotes:

Existing procedural safeguards in the Constitution with regards to gender equality are sufficient to guarantee the principle of equal representation of both genders in public institutions. Imposition of a gender-related quota for Ministerial and Deputy Ministerial positions narrows the applicability of the constitutional safeguards for gender equality. Thus, it diminishes the rights to gender-balanced participation in public bodies. Insufficient implementation of legislation does not provide a justification for the introduction of new constitutional provisions.

Summary:

Pursuant to the provisions of Articles 113.9 and 144.3 of the Constitution, the President of the Assembly referred a Constitutional Amendment proposed by 55 Deputies for prior assessment by the Constitutional Court to confirm that the Amendment to the Constitution does not diminish any of the rights and freedoms guaranteed by Chapter II of the Constitution (Fundamental Rights and Freedoms).

The Amendment proposed to add a new paragraph 8 to Article 96 of the Constitution (Ministers and Representation of Communities), which states:

“8. None of the genders can be represented less than 40% in the positions of Ministers and Deputy Ministers of the Government of the Republic of Kosovo.”

The Deputies claim that so far, women in government were not represented more than 10-15% in ministerial positions, although the women/men ratio of the population is 50% to 50%. Based on that, they consider that there is a necessity to introduce a gender quota in the executive branch as an affirmative mechanism to change the situation. According to them, Article 24.3 of the Constitution (Equality before the Law) justifies the affirmative measures that should be taken towards “the less represented groups”.

In addition, the Deputies argued that the imposition of a gender quota in the Constitution establishes an obligation, which the Government cannot ignore, and which is similar to the guarantees that the Constitution provides to minorities. According to the Deputies, the negative experience of the non-implementation of Law no. 2004/2 on Gender Equality of 19 February 2004, which includes all institutions and leading bodies, is another reason for this norm to be a constitutional norm and for the Constitution to be a guarantor thereof.

II. The Constitutional Court examined whether the proposed Amendment diminishes the rights and freedoms guaranteed by Chapter II of the Constitution (Fundamental Rights and Freedoms) as well as under Chapter III of the Constitution (Rights of Communities and Their Members) and its letter and spirit as established in the Court’s case-law.

In its Judgment KO 13/15 of 16 March 2015, the Constitutional Court, after analysing the existing constitutional safeguards for gender equality, found that the Constitution contains the internationally recognised safeguards for guaranteeing equal participations of both genders in public life. Further the Constitutional Court noted that a constitutional regulation of a gender quota for Ministerial and Deputy Ministerial positions may further, in practice, turn into a formal replacement of a person of the same gender that could diminish the rights of the other people being Deputies or qualified persons to become part of the government.

After analysing the Constitutions of a number of democratic countries and Court decisions of Constitutional courts, it found that that it is not a common practice to have constitutional provisions regulating the participation in public bodies through gender quotas. Rather, the principle of equal opportunities for both women and men should be applied. The constitutional practice does not establish a qualified form of positive discrimination whereby preference is automatically and unconditionally based on gender, notwithstanding the requirement of professional merit.

The Constitutional Court also explained that the nature of the positive discrimination or affirmative action, in general is temporary, until a certain goal has been achieved as per Article 24.3 of the Constitution. On the other hand, any constitutional norm is perceived to be of a permanent nature, in order to ensure a stable constitutional and legal order. This is in compliance with the principle of legal certainty.

Finally, the Court emphasised that the responsibility for implementing legislation lies with the Government, which is subject to the control of the Assembly, but it reiterates that it is the Assembly itself that votes and elects the Government.

Languages:

Albanian, Serbian, English, Turkish (translation by the Court).



Identification: KOS-2015-1-006

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 15.04.2015 / **e)** KO 26/15 / **f)** Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter no. 05-433jDO-318 / **g)** *Gazeta Zyrtare* (Official Gazette), 20.04.2015 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.1.2.7 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Subdivision into chambers or sections.**
 1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**
 4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**
 4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**
 4.7.12 Institutions – Judicial bodies – **Special courts.**
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

Keywords of the alphabetical index:

Constitution, amendment, validity / Court, special chamber / Court, powers, delimitation / Court, competence, exclusive.

Headnotes:

Constitutional provisions which regulate the separation of powers in Article 4 of the Constitution, general principles of judicial system in Article 102 and organisation and jurisdiction of the courts in Article 103 of the Constitution, do not prohibit the establishment of special chambers, which would have jurisdiction to deal with specific type of crimes, within the existing institutions. The proposed amendment to the Constitution entails the procedural guarantees for persons who will be subject to the jurisdiction of the Special Chambers and the Special Prosecutor's Office. Therefore, it does not diminish the constitutional rights guaranteed by Chapter II of the Constitution as well as under Chapter III of the Constitution and its letter and spirit as established in the Court's case-law.

Summary:

Pursuant to the provisions of Articles 113.9 and 144.3 of the Constitution, the President of the Assembly of the Republic of Kosovo referred a constitutional amendment proposed by the Government of the Republic of Kosovo to confirm that the amendment to the Constitution does not diminish any of the rights and freedoms guaranteed by Chapter II of the Constitution (Fundamental Rights and Freedoms), Chapter III of the Constitution (Rights of Communities and their Members) and the letter and spirit.

The amendment proposed to add a new article following Article 161 of the Constitution, which would establish the constitutional basis for creation of special chamber within the ordinary courts of all instances, a special chamber within the Constitutional Court and a Special Prosecutor's Office. The organisation, functioning and jurisdiction of these institutions shall be regulated by this Article (The Special Chambers and the Special Prosecutor's Office) and by a specific law. The aim of establishing of these structures within the existing justice system is to comply with its international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011.

II. In its Judgment KO 26/15 of 14 April 2015, the Constitutional Court, after analysing the proposed amendment noted that the proposed amendment to the Constitution contains four structural elements

related to the justice system of the Republic of Kosovo: establishment of Special Chambers within the courts system; creation of a Special Prosecutor's Office within the prosecutorial system; introduction of a Special Chamber within the Constitutional Court composed of three international judges, who shall exclusively decide any constitutional referrals under Article 113 of the Constitution relating to the Special Chambers and Special Prosecutor's Office; and appointment of an Ombudsperson of the Special Chambers with exclusive responsibility for the Special Chambers and Special Prosecutor's Office.

The Constitutional Court explained that the constitutional provisions regulating the organisation and structure of the judicial system allow and foresee creation of new special structures within the existing judicial system, with a special jurisdiction to deal with specific type of crimes. In addition, the creation of these new structures is similar to the Special Chamber of the Supreme Court of Kosovo on matters related to the Privatisation Agency of Kosovo. This Special Chamber was established by the Law on the Special Chamber of the Supreme Court of Kosovo on the Privatisation Agency of Kosovo.

Furthermore, the Constitutional Court referred to the case-law of the European Court of Human Rights, more specifically the case of *Fruni v. Slovakia*, which confirmed that Article 6.1 ECHR cannot be read as prohibiting the establishment of special criminal courts if they have a basis in law.

Finally, in its unanimous decision, the Constitutional Court confirmed that the proposed amendment is in compliance with the Constitution, since it does not diminish the constitutional rights guaranteed by Chapter II as well as under Chapter III of the Constitution and its letter and spirit as established in the Court's case-law.

Cross-references:

European Court of Human Rights:

- *Fruni v. Slovakia*, no. 8014/07, 21.06.2011.

Languages:

Albanian, Serbian, English, Turkish (translation by the Court).



Identification: KOS-2015-1-007

a) Kosovo / b) Constitutional Court / c) / d) 30.04.2015 / e) KO 22/15 / f) Request for reconsideration of Resolution on Inadmissibility in Case KO 155/14 of the Constitutional Court of the Republic of Kosovo, dated 13 November 2014 / g) *Gazeta Zyrtare* (Official Gazette), 04.05.2015 / h) CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.2.1.8 Constitutional Justice – Types of claim – Claim by a public body – **Ombudsman**.
 1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.
 1.5.1.3.1 Constitutional Justice – Decisions – Deliberation – Procedure – **Quorum**.
 1.5.1.3.2 Constitutional Justice – Decisions – Deliberation – Procedure – **Vote**.
 4.12.3 Institutions – Ombudsman – **Powers**.
 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:

Constitutional Court, quorum / Constitutional Court, decision making process / Ombudsman, Constitutional Court, appeal, scope.

Headnotes:

Judges of the Constitutional Court are independent in exercising their functions, including decision-making process and they cannot be subject to any investigation with respect to performing their functions in compliance with the Constitution. Neither the Ombudsman, nor any other public institution, has any constitutional competence to investigate the decision making process of independent judicial bodies. In addition, judges of the Constitutional Court enjoy immunity for decisions made or opinion expressed within the scope of their mandate. Any investigative action, by any public body, as to the decision making process within the Constitutional Court, may seriously jeopardise the independence of the Constitutional Court as the final interpreter of the Constitution.

Summary:

I. Pursuant to the provisions of Articles 113.2.1 and 135.4 of the Constitution, the Ombudsman of the Republic of Kosovo (the applicant) requested a reconsideration of the resolution on inadmissibility in Case KO 155/14 of the Constitutional Court of the

Republic of Kosovo, dated 13 November 2014. According to the applicant, when the Constitutional Court decide in Case KO 155/14, it did not follow procedures for taking decisions, as provided by Article 19 of the Law on the Constitutional Court, because it lacked the required quorum for taking decisions. The applicant claims that it came up with this conclusion, based on results of an investigation initiated *ex officio*, by the Office of the Ombudsman, into the proceedings that lead to the resolution on Inadmissibility in case KO 155/14 and a reply that he received by one of the judges of the Constitutional Court, in which he informed the Ombudsman that he had not participated in the deliberations and decision making process in this case.

II. In its decision KO 22/15 of 30 April 2015, the Constitutional Court noted that the referral does not come within the scope of the applicant's constitutional mandate and its competences. The Constitutional Court reiterated that the constitutional responsibilities of the Ombudsman are to monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities; and that the Ombudsman independently exercises its duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo. In referral KO 22/15, the applicant did not raise any issue that possibly could fall within its competence, as provided by the Constitution. In this respect, the Constitutional Court referred to the case-law of other constitutional courts of democratic countries, as to the limits of constitutional competence of ombudsmen to refer cases to the Constitutional Court, which confirmed that the powers of the ombudsmen in relation to the judicial branch of power may only be such that they do not jeopardise the independence of judges and their impartiality in making judicial decisions.

Moreover, the Constitutional Court explained that the judges of the Constitutional Court are fully independent and impartial in the decision making process and in expressing their opinions in the deliberations of the cases referred to this Court. Any investigation related to the functions of the judges of the Constitutional Court, by any other public institution would seriously hinder the independence of the Constitutional Court in exercising its constitutional powers as the final interpreter of the Constitution. Furthermore, the Constitution in its Article 117 provides immunity to the Judges of the Court for decisions made or opinions expressed within the scope of their mandate.

However, the Constitutional Court provided a thorough explanation with respect to the decision-making process in Case KO 155/14. Namely, the provisions of the Law on the Constitutional Court and the Rules of Procedure of the Constitutional Court regulate precisely the procedure which the Court has to follow when deciding on admissibility and inadmissibility of referrals. In this respect, after a Referral having been assigned by the President of the Court to a judge rapporteur and a review panel of three judges, the judge rapporteur presents a report to the review panel in which she or he can recommend admissibility or inadmissibility of the referral. If the review panel unanimously considers that the referral is inadmissible, no further deliberation and voting takes place. Following this part of the procedure, a resolution on inadmissibility is submitted to all the judges of the Constitutional Court, who can oppose the proposal of inadmissibility, within 10 days. If none of the judges submits any objection as to the inadmissibility of the referral, the resolution on inadmissibility is considered to be adopted, and it becomes final upon publication in Official Gazette.

In this respect, the Constitutional Court explained each and every step of the procedure which was taken in case KO 155/14 and it concluded that all procedural actions as required by the Law on the Constitutional Court and the Rules of Procedure were completed, therefore the decision taken in this case is valid. As a conclusion, the Court rejected referral KO 22/15, submitted by the Ombudsperson, as manifestly ill-founded.

Languages:

Albanian, Serbian, English, Turkish (translation by the Court).



Lithuania Constitutional Court

Important decisions

Identification: LTU-2015-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 14.01.2015 / **e)** KT1-S1/2015 / **f)** On the construction of the provisions of the Constitutional Court's ruling of 29 June 2010 related to the state pensions of judges / **g)** TAR (Register of Legal Acts), 650, 15.01.2015, www.tar.lt / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

4.7.8 Institutions – Judicial bodies – **Ordinary courts.**

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:

Judge, independence / Court, independence / Judge, status / Pension, judge / Economic crisis.

Headnotes:

When the legislator reorganises the system of state pensions of judges, the statutory level of social (material) guarantees of judges may not be reduced.

After the legislator has provided that the remuneration received by judges is one of the criteria for differentiating the size of the state pensions of judges, the Constitution prohibits any regulation that would increase the remuneration of judges, but would not influence the size of the granted and paid state pensions of judges.

Summary:

I. The President of the Supreme Court requested the Constitutional Court to review the ruling on 29 June 2010, finding that the social (material) guarantees of judges (e.g. state pensions of judges) may not be differentiated according to when they were established, such that they may not be reduced or

denied altogether when the system of such guarantees is reorganised. The Constitutional Court was asked whether the legal regulation could be changed to reduce the said pensions and whether the size of the pension of judges must be linked to the remuneration received by those judges.

II. The Constitutional Court recalled that the independence of judges and courts is not a privilege, but one of the most important duties of judges and courts. A judge, who is obligated to consider conflicts arising in society as well as those between a person and the state, must not only be highly qualified professionally and of impeccable reputation, but also materially independent and feel secure as to his or her future. The imperative of constitutionally protecting the social (material) guarantees of judges stems from the principle of the independence of judges and courts consolidated in the Constitution. As such, judges are protected while administering justice against any influence of the legislative and executive branches, other state establishments and officials, political and public organisations, commercial economic structures, and other legal and natural persons. The legislator must provide social (material) guarantees of judges, which may be varied, not only when judges are in office but also upon the expiry of their powers.

The state pension of judges is not an end in itself. Under the Constitution, it is not regarded as a privilege – it is one of the social (material) guarantees of the principle of the independence of judges consolidated in the Constitution. Only the provision of real rather than nominal social (material) guarantees for the future (among other things, pension of judges) in line with the constitutional status of judges and their dignity would ensure their impartiality. That is, they would not be influenced by the decisions of the legislative or executive branch and any institutional interference of state authority and governance or their officials or other persons in the activities of judges. The provision may also protect judges against any possible decisions of the legislative, executive, or public administration subjects that would put pressure on decisions taken while administering justice as well as reduce the risk of corruption.

Consequently, the state pension of judges established by law is one of the types of pensions not directly specified in Article 52 of the Constitution. The legislator has certain discretion to establish the conditions for granting and paying the said pensions and their sizes and also in reorganising the system of pensions. However, the discretion to regulate the judges' pensions is narrower than other state pensions since, among other constitutional requirements, the legislator is bound by the principle of the

independence of judges and courts and the imperative of the reality of the social (material) guarantees of judges.

Thus, the prohibition on reducing the statutory level of the social (material) guarantees of judges (e.g., laws established [applied] to judges upon the expiry of their powers) stem from the principle of the independence of judges and courts consolidated in the Constitution. This prohibition is not absolute. The level of the said guarantees may be reduced by law on a temporary basis when the economic and financial condition of the state is extremely difficult. However, such reduction must not give rise to any preconditions for the violation of the independence of courts by any other state authority institutions and their officials. If the level of social (material) guarantees of judges could be reduced in other cases as well (i.e. when there is no extremely difficult economic and financial situation in the state), the independence of judges would be endangered. The reason is that preconditions could be used to influence judges, such as decisions of the legislative or executive branch. Their independence would also be compromised if there were preconditions for institutions of state authority and governance or their officials or other persons to interfere in the activities of judges, for taking the decisions of the legislative, executive, or public administration subjects (e.g., social (material) guarantees of judges would be reduced by putting pressure on the decisions taken while administering justice), as well for increasing the risk of corruption.

In case the economic or social situation changes, the guarantees applied to them upon expiry of their powers could become nominal rather than real – thus fictitious – if they were not appropriately reviewed with respect to the judges whose powers have already expired. The constitutional principle of the independence of judges and courts, the imperative of the reality of the social (material) guarantees of judges and the equal legal status of judges all give rise to the prohibition on differentiating the level of the social (material) guarantees of judges, which are applied upon the expiry of the powers of judges, according to when relevant guarantees (including the pension of judges) start to apply to a person. The principle also gives rise to the requirement to review, as appropriate, the level of the guarantees applied to the judges whose powers have already expired if, in a changing economic or social situation, higher relevant guarantees are established to the judges of the courts of the same system and the same level whose powers will expire later.

Languages:

Lithuanian, English (translation by the Court).

*Identification:* LTU-2015-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.01.2015 / **e)** KT3-N1/2015 / **f)** On competition in the sphere of carrying passengers / **g)** TAR (Register of Legal Acts), 683, 16.01.2015, www.tar.lt / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Competition / Municipality, competence / Public services / Individual economic activity / Welfare, nation / Contract, direct / Carriage passengers.

Headnotes:

In light of the general welfare of the nation, the legislator, when establishing regulations governing the organisation of the provision of the public services to carry passengers, is obliged to reconcile various constitutional values. They include the freedom and initiative of individual economic activity, freedom of fair competition, the protection of consumer interests, the equality of rights of economic entities, and the protection of human health and the environment. Thus, only in exceptional cases, without holding competitive tendering, municipalities could assign the companies established by them to provide public services, in order to not violate the principle of the balance of constitutional values.

Summary:

I. The application was initiated by the Vilnius regional administrative court that considered the case related to the public services of carrying passengers provided

by municipalities. The applicant challenged the legal regulation establishing that municipal institutions can select carriers for the provision of public services under public service obligations through a competition or by awarding a contract for the provision of public services directly. Without competition or another procedure ensuring competition, the applicant holds that a municipality's selection may create the preconditions for giving privileges unreasonably to one economic entity and discriminating against other possible participants in the market for transport services. Therefore, a legal regulation that denies fair competition, limits individual economic freedom and initiative, and promotes the creation of a monopoly, may conflict with the Constitution.

II. The Court stated that the protection of fair competition is the main method to ensure harmony between the interests of the person and society while regulating economic activity. Competition, it noted, also creates the self-regulation of the economy as a system, which promotes the optimal distribution of economic resources, their efficient use, an increase in economic growth and an improvement in the welfare of consumers. The constitutional provision that the law protects freedom of fair competition means that the legislator has an obligation to establish legal regulations in order that production and the market would not be monopolised, freedom of fair competition would be ensured and the means and methods would be provided for its protection. The constitutional guarantee of the protection of fair competition implies that state authority and municipal institutions that regulate economic activity are prohibited from adopting decisions that distort or can distort fair competition and obliges state authority and municipal institutions to ensure freedom of fair competition by legal means. The state, when regulating economic activity, must pay heed to the constitutional requirement for the equality of rights of economic entities.

The legislator, when regulating economic activity in the area of the carriage of passengers, may, and in some cases also must, delegate some functions of the organisation of this activity to municipalities. In such case, the legislator must note the imperatives stemming from Article 46 of the Constitution (economic activity serve the general welfare of the nation, as well as fair competition and the protection of consumer rights). The legislator must also consider the imperative of the equality of rights of persons consolidated in Article 29 of the Constitution and establish the legal regulation under which municipalities would ensure freedom of fair competition (among others things, the means and methods for its protection are provided and also that the market for the carriage of passengers is not

monopolised). The legislator must uphold consumer rights in the area of the carriage of passengers (consumers receive quality and affordable services in line with their interests even where the provision of such services is disadvantageous), as well as not deny the equality of rights of carriers of passengers.

Thus the municipalities, when organising the carriage of passengers on local lines and selecting carriers for the provision of these services, must follow the principles of the transparency of activities, the lawfulness of the decisions taken and the equality of rights of persons. When performing the functions assigned to them, municipalities must ensure freedom of fair competition in the area of the carriage of passengers. They must not take any decisions that give privileges or discriminate against any individual economic entities or their groups operating in the market for carriers and that give rise or may give rise to differences in the conditions of competition with regard to economic entities competing in a respective market. This means that municipalities, which have the duty to ensure the provision of the road passenger transport services that are in line with general interests, do not have absolute discretion to decide on the method for the selection of carriers providing these services. When deciding on the method to select a provider of public road passenger transport services, a municipality must take account of whether there are any other economic entities willing and able to provide public road passenger transport services and if there are any, to ensure that they are in a competitive position to provide these services.

A different method for the selection of carriers providing public road passenger transport services is established to enable municipal institutions to take necessary action to ensure the provision of public road passenger transport services in the general economic interest even when it is commercially disadvantageous to carriers. This includes the selection of a carrier on a non-competitive basis, but by directly awarding a contract for the provision of public services.

Thus, municipalities, under the duty to ensure freedom of fair competition when organising the carriage of passengers on local lines, may select a carrier for the provision of these services by directly awarding contracts for the provision of public services rather than through a competition. This occurs only in two cases where action is needed in order to ensure the provision of public road passenger transport services which, considering their commercial interests, would not be taken up or would be taken up not in full by carriers, however, which is indispensable in order to satisfy general interests. It

also occurs if such decisions do not give any privileges or discriminate against individual economic entities or their groups.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2015-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.02.2015 / **e)** KT6-N2/2015 / **f)** On right-hand-drive vehicles on public roads / **g)** TAR (Register of Legal Acts), 1856, 06.02.2015, www.tar.lt / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
 5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement**.
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.

Keywords of the alphabetical index:

Discrimination / Registration, national / Traffic, safety / Vehicle, right-hand-drive, restriction / Public roads, participation / Temporary stay / Freedom, movement.

Headnotes:

Legal regulation prohibiting citizens whose permanent residence was in Lithuania from driving, on public roads, motor vehicles designed to be driven on the left-hand side of the road and/or equipped with the steering wheel on the right, is in conflict with the Constitution, as it creates unequal situation between Lithuanian citizens residing in the country and any other drivers coming to Lithuania.

Summary:

I. The case was initiated by the district court. Under the impugned legal acts, it was not prohibited to drive right-hand-drive motor vehicles on the public roads

for a temporary period of time (up to 90 days per year). This occurs *inter alia* in cases where Lithuanian citizens whose permanent place of residence was in a foreign state arrived in Lithuania in such vehicles registered abroad. However, it was forbidden to do so for Lithuanian citizens residing in the country (for example, if they would like to take a car belonging to their foreign friend visiting Lithuania).

II. The Constitutional Court construed provisions related to freedom of movement. It noted that the freedom of movement guaranteed to a citizen is a significant element of the constitutional status of a member of a civil community. A citizen has the right to decide in which place of the territory of Lithuania to stay, when to leave this place and move to another place, to freely decide as to which permanent or temporary place of residence to choose, and to decide whether to stay in Lithuania or leave, as well as the right to choose the time of departure. The constitutional principles of the equality of rights of persons and a state under the rule of law give rise to the prohibition according to which, when establishing by law a legal regulation based on which a person acquires certain rights, the legislator has certain limitations. It is not allowed without objective justification to consolidate a differentiated legal regulation depending on whether a citizen, having exercised his or her constitutional freedom of movement, has chosen his or her permanent place of residence in Lithuania or a foreign state.

The Constitutional Court concluded that there was no ground for stating that citizens whose permanent place of residence was in a foreign state, while temporarily driving, on public roads in Lithuania, foreign-registered right-hand-drive motor vehicles, in which they arrived in Lithuania, posed a lower risk to traffic safety than citizens whose permanent place of residence was in Lithuania. Thus, there was no legal ground to objectively justify the different treatment of the Lithuanian citizens falling under these two categories (based on their permanent place of residence), insofar as their different treatment was connected with the permission to temporarily drive, on public roads, foreign-registered motor vehicles designed to be driven on the left-hand side of the road and/or equipped with the steering wheel on the right. Therefore, the impugned legal regulation was judged as violating the constitutional principles of the equality of rights and a state under the rule of law.

The Constitutional Court drew attention to the judgment of the Court of Justice of the European Union of 20 March 2014 delivered in the case *The European Commission v. the Republic of Lithuania*. It involved prohibiting the registration of passenger

vehicles equipped with their steering wheel on the right-hand side in Lithuania, as well as regarding the requirement that the steering equipment of passenger vehicles with their steering wheel on the right-hand side be moved to the left-hand side for the purpose of registering these vehicles. However, the Constitutional Court also noted that the provisions of the Law on Road Traffic Safety had been assessed by the Court of Justice of the European Union in the aforementioned case from aspects other than those that were under investigation in the constitutional justice case in question.

Cross-references:

Court of Justice of the European Union:

- no. C-61/12, 20.03.2014.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2015-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26.02.2015 / **e)** KT8-N4/2015 / **f)** On prohibiting correspondence between convicts / **g)** TAR (Register of Legal Acts), 3023, 27.02.2015, www.tar.lt / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence**.

Keywords of the alphabetical index:

Convicted person / Marriage / Close family / Correspondence, prohibition / Liberty, deprivation / Significant circumstances / Imprisonment.

Headnotes:

The legal regulation prohibiting correspondence between convicts detained in places of deprivation of liberty in cases where they were not related by marriage or close family ties conflicts with the constitutional provisions establishing that personal correspondence, telephone conversations, telegraph messages and other communications are inviolable.

Personal correspondence is important in social relationships. Constitutional provisions also protect the right to inviolability of correspondence of convicted persons. However, this right is not absolute and can be restricted in certain cases provided by law.

Summary:

I. The case was initiated by the Supreme Administrative Court, which involved a convicted person who was forbidden to correspond with his girlfriend, who was also convicted, because they were not married. This situation was determined by the legal regulation according to which correspondence between convicts detained in pre-trial detention, arrest, and correctional facilities in cases where they are not spouses or close relatives, is prohibited. However, correspondence between convicts and persons other than convicts is not limited.

II. The Constitutional Court stated that the inviolability of correspondence is applicable to convicted persons as well as to every other individual, but this right is not absolute. The Court recalled that the legal concept of private life is linked with legitimate expectations of the private life of the person. If a person commits criminal deeds or those contrary to law, violates the interests protected by law, or inflicts damage on particular persons, society or the state, he or she is aware or should be aware of the fact that this will cause a corresponding reaction from state institutions. For breaching the law, the state may apply force measures that will influence his or her behaviour in a certain way. Thus a person who has committed a criminal deed cannot and may not expect that the protection of his or her private life will be the same as that of persons observing the law.

The Constitution provides that the freedom of a person who has committed a crime may be restricted on the grounds and according to the procedure established by law. Upon the restriction on the freedom of such a person, his or her rights and freedoms may be subject to limitation, the inviolability of correspondence being amongst them.

While establishing limitations on human rights and freedoms of persons sentenced to a term of imprisonment as well as their right to the inviolability of correspondence, the legislator is bound by the Constitution. According to the Constitution, only a law specifying the grounds and procedure of such limitations may impose limitations on the right of the convicts to the inviolability of correspondence. The limitation should not violate the reasonable relationship between the means adopted and the legitimate and commonly important objective sought. To attain this objective, measures may be established which would be sufficient and which would not limit the rights of the person more than is necessary.

The legislator must establish preconditions to personalise the restrictions of correspondence of convicted persons, consider an individual evaluation of their situation and other relevant circumstances.

The Constitutional Court found that the impugned legal regulation limited the right to correspondence between convicts held in places of deprivation of liberty more than necessary in order to achieve the legitimate and universally important objectives.

The Code of Enforcement of Punishments lays down the general prohibition on correspondence between convicts held in places of deprivation of liberty in cases where they were not related by marriage or close family ties, i.e. this prohibition applies irrespective of any circumstances. In either case, such correspondence could pose a risk to public security, to the internal order of the places of deprivation of liberty, or to the rights and freedoms of other persons, or any other significant circumstances. Thus, the legal regulation in question had failed to create preconditions for assessing the individual situation of the convicted persons concerned and in view of all important circumstances, for subsequently individualising concrete applicable measures limiting correspondence between these persons.

Supplementary information:

European Court of Human Rights in relation to the right to secrecy of correspondence, as consolidated in Article 8 ECHR.

It also referred to the 18 December 2009 judgment of the Constitutional Court of Latvia, where the analogous provision of the Latvian Sentence Execution Code, prohibiting correspondence between convicted persons, was similarly ruled to be unconstitutional.

Cross-references:

Constitutional Court of Latvia:

- no. 2009-10-01, 18.12.2009.

European Court of Human Rights:

- *Silver and Others v. the United Kingdom*, nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, 25.03.1983, *Special Bulletin Leading Cases ECHR* [ECHR-1983-S-002];
- *Jankauskas v. Lithuania*, no. 59304/00, 24.02.2005;
- *Čiapas v. Lithuania*, no. 4902/02, 16.11.2006;
- *Puzinas v. Lithuania*, no. 63767/00, 09.01.2007;
- *Savenkovas v. Lithuania*, no. 871/02, 18.11.2008;
- *Mehmet Nuri Ozen and others v. Turkey*, nos. 15672/08, 24462/08, 27559/08, 28302/08, 28312/08, 34823/08, 40738/08, 41124/08, 43197/08, 51938/08, 58170/08, 11.01.2011.

Languages:

Lithuanian, English (translation by the Court).



Luxembourg Constitutional Court

Important decisions

Identification: LUX-2015-1-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 04.10.2013 / **e)** 00101 / **f)** / **g)** *Mémorial* (Official Gazette), A, no. 182, 14.10.2013 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expropriation, compensation / Property, attributes, substantial changes / Compensation, exceptions / Compensation, right / Restriction, public interest.

Headnotes:

The provision (Article 22 of the law) concerning municipal planning and urban development is contrary to Article 16 of the Constitution insofar as it lays down the principle that restrictions on property resulting from a general development plan do not give rise to any right to compensation. It is also unconstitutional because it provides for exceptions that do not cover all the possible cases where the loss of enjoyment of the property subject to such a restriction may be disproportionate to the public interest.

Summary:

I. In connection with the procedure to adopt the municipality's revised general development plan (GDP), the owners of a plot of land applied to the administrative court to set aside a decision by the Minister of the Interior and the Greater Region approving the municipal council's decision to finally adopt the draft revised GDP and reject as unfounded the owners' complaint concerning the land belonging to them. The administrative court found that the plot had been designated under the old GDP as "residential zone – dense section", whereas it was re-designated under the new GDP as non-building land.

Since the owners raised the issue whether the legal provisions allowing plots of land in a building zone to be re-designated as non-building land conformed to Article 16 of the Constitution, the administrative court asked the Constitutional Court for a preliminary ruling on the following question:

“Do the relevant articles of the amended law of 19 July 2004 on municipal planning and urban development comply with Article 16 of the Constitution on the right to private property insofar as they allow plots of land in a building zone to be re-designated as non-building land?”

Article 16 of the Constitution reads as follows: “No one may be deprived of his property except on grounds of public interest in cases and in the manner laid down by the law and in consideration of prior and just compensation”.

The Court noted that the question referred to it by the administrative court was actually whether the amended law of 19 July 2004, insofar as it allowed land in a building zone to be re-designated without compensation as non-building land through a modification of the GDP, complied with Article 16 of the Constitution on the right to property, given that this article permits expropriation only on grounds of public interest and subject to just compensation.

Article 22 of the law provides as follows: “Restrictions on property resulting from a general development plan shall not give rise to any right to compensation. However, compensation may be granted where such restrictions result in an infringement of established rights or a material change in the state of the property causing direct material damage...”.

II. The Court held that Article 16 of the Constitution guarantees the protection of property rights and prohibits expropriation except on grounds of public interest and subject to just compensation. A change in the attributes of property that is so substantial as to deprive it of one of its essential aspects may constitute expropriation. By establishing the principle that restrictions on property resulting from a general development plan do not give rise to any right to compensation and providing for exceptions to this principle which do not cover all the possible cases in where the loss of enjoyment of the property subject to such a restriction may be out of proportion to the public interest, Article 22 of the amended law of 19 July 2004 is contrary to Article 16 of the Constitution.

The Court further noted that the fact that this provision is contrary to the Constitution does not fetter the right of public authorities to place

restrictions on property on public interest grounds. The principle that general development plans are subject to change was thus left intact and the administrative courts were not authorised to sanction the re-designation of building land as non-building land. However, the property owners affected may, in accordance with ordinary law and depending on the particular circumstances, assert, where appropriate, a right to compensation before the judicial courts. This will depend, among other things, on the location of the land, the binding nature of the restriction and concrete plans for servicing of the land.

Languages:

French.



Mexico

Electoral Court

Important decisions

Identification: MEX-2015-1-001

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 30.05.2012 / **e)** SUP-JDC-1640-2012 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

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

5.5.4 Fundamental Rights – Collective rights – **Right to self-determination.**

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

Keywords of the alphabetical index:

Community, indigenous, self-government, practices, customs, protection / Indigenous people / Indigenous right / Tradition / Local autonomy, rights.

Headnotes:

A failure by local legislative and electoral authorities to hold an extraordinary election for the municipal authorities cannot be justified by rules permitting municipal elections to be conducted, in certain circumstances, in accordance with traditional indigenous decision-making procedures. The use of this Traditions and Customs System cannot exceed the boundaries of the fundamental rights of individuals, given that these traditional practices cannot be regarded as a transcendental right.

Summary:

I. In December 2010, The General Council of the State Electoral Institute and Civic Participation of Oaxaca declared the town council election to be invalid and called on the citizens of diverse municipalities, among them Santiago Choapam, to

participate in extraordinary elections for the town councils governed under the norms of Customary Law. Nevertheless, when the applicant (Andrés Nicolás Martínez) presented his appeal before the High Chamber of the Electoral Tribunal of the Federal Judiciary in April 2012, these elections had still not been held. The applicant therefore requested the High Chamber to address the failure of the local legislative and electoral authorities to hold an extraordinary election for the town councils.

II. The High Chamber held that, although Mexican law permits municipal elections in certain circumstances to be conducted on the basis of traditional indigenous decision-making procedures, the use of this Traditions and Customs System cannot exceed the boundaries of the fundamental rights of individuals, given that these traditional practices cannot be regarded as a transcendental right. Should the traditional practices infringe on the exercise of fundamental rights, they infringe on the principles of equality and non-discrimination.

The High Chamber found that indigenous people have the right to retain their own customs and institutions, as long as these are not incompatible with the internationally recognised fundamental and human rights. The High Chamber emphasised that the use of the Traditions and Customs System for the selection of authorities is not an absolute right, but is subject to the system of respect of the fundamental rights of all members of the community. This position is in accordance with Article 8.2 of Convention no. 169 of the International Labour Organisation (ILO) concerning Indigenous and Tribal Peoples in Independent Countries, as it forms part of the Mexican legal system and its obligatory application in the State.

The High Chamber ordered the Sixty-First Legislature of the Oaxaca Congress and the Oaxaca State Institute of Elections and Civic Participation to prepare the necessary and reasonable means, in accordance with a pertinent reconciliation, consultations with the citizens and the corresponding decisions, in order to hold the town council elections in the municipality of Santiago Choapam, adding that, if possible, the voting should be carried out in the various municipality and police agencies of the municipality in question.

Supplementary information:

Project presented by: Justice Manuel González Oropeza.

Languages:

Spanish.

*Identification:* MEX-2015-1-002

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 05.03.2014 / **e)** SUP-JDC-19/2014 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

Keywords of the alphabetical index:

Benefit, right / Payment, retrospective / Public office, holder.

Headnotes:

The right of a previous public office holder to make a claim against a failure to pay subsistence allowances remains effective even though the claimant has ceased to occupy the public position to which this payment is related. However, the existence of that right cannot be considered absolute or perennial. Parameters regulating such claims (e.g. time-limits) should exist in order not to generate unlimited and irrational absolute rights that may injure the public service.

Summary:

I. The applicant, Esmeralda Guadarrama Alvarez, appealed a ruling of the Electoral Court of the State of Mexico to the High Chamber of the Electoral Tribunal of the Federal Judiciary in order to protect her political-electoral rights. She presented a complaint to the Administrative Office of the City of Zinacantepec, State of Mexico, arguing that the Constitutional Municipal President failed to give her the complete payment of subsistence allowances, such as rewards, bonuses, incentives, commissions

and compensations, to which she was entitled as the holder of a “Third Council” (*Tercer regidora*) position.

II. The High Chamber held that the right to make a claim against an evasion in the payment of subsistence allowances remains effective even though the claimant has ceased to occupy the public position to which this payment is related. However, although subsistence allowances protect the integration, performance, autonomy and independence of the body, it is also true that the existence of that right cannot be considered absolute or perennial. Parameters regulating such claims (e.g. time-limits) should exist in order not to generate limited and irrational absolute rights that may injure the public service.

The High Chamber revoked the decision of the Electoral Court of the State of Mexico and ordered it to admit and support the demand statement and to perform any act aimed at the protection of the political-electoral rights of the applicant.

Supplementary information:

Project presented by: Justice, María del Carmen Alanis Figueroa.

Languages:

Spanish.

*Identification:* MEX-2015-1-003

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 14.05.2014 / **e)** SUP-JDC-357/2014 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.
5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Election, candidate, independent / Election, candidature / Election, ineligibility / Legislative omission.

Headnotes:

The failure to enact legislation cannot make the exercise of fundamental rights nugatory. Specifically, in the instant case, the failure to enact legislation concerning independent candidature in elections cannot remove from an individual the right to participate in elections as an independent candidate.

Summary:

I. The applicant, Luis Alberto Zavala Díaz, had been denied the possibility to participate as an independent candidate in the electoral process. He therefore lodged a complaint before the High Chamber of the Electoral Tribunal of the Federal Judiciary to protect his political-electoral rights. His submitted brief, entitled “Complaint of excess in the compliance with ruling” presented in May 2014 before the Administrative Office of the Electoral Institute and Citizen Participation of the State of Coahuila, argued that the failure of the constitutional obligation to enact legislation concerning independent candidates cannot invalidate the exercise of that human right, as the principle of the rule of law in the Constitution implies the immediate protection of that right. He argued that the administrative or judicial authority must conduct the necessary measures to ensure the full enjoyment of the right, subject to relevant rules and constitutional principles, on the basis of the obligation of the Mexican State to contribute to constitutional procedures, policies, legislation and other measures to enforce the law.

II. The High Chamber instructed the General Council of the Electoral Institute and Citizen Participation of the State of Coahuila, within the time-limit of three days counted from the date of notification of this ruling, to hear the applicant’s complaint. The High Chamber held that if the applicant meets all of the relevant constitutional requirements (based on Article 19 of the Constitution of the State of Coahuila de Zaragoza) the Electoral Institute and Citizen Participation of the State of Coahuila should protect his electoral-political rights and guarantee his right to participate as an independent candidate in the electoral process.

Supplementary information:

Project presented by: Justice, María del Carmen Alanis Figueroa.

Languages:

Spanish.



Moldova

Constitutional Court

Important decisions

Identification: MDA-2015-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 20.01.2015 / **e)** 2 / **f)** Interpretation of Articles 1.3, 69 and 70 of the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 33-38, 13.02.2015 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.5.3.4.1 Institutions – Legislative bodies – Composition – Term of office of members – **Characteristics.**

4.5.3.4.3 Institutions – Legislative bodies – Composition – Term of office of members – **End.**

4.5.9 Institutions – Legislative bodies – **Liability.**

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

Keywords of the alphabetical index:

Sentence, enforcement / Immunity, parliamentary, lifting / Judgment, foreign / Member of Parliament, breach of privileges / Parliament, inviolability.

Headnotes:

According to the Fundamental Law, the powers ascribed to any Member of Parliament (hereinafter, “MP”) cease with the lawful assembly of the newly-elected Parliament, on the member’s resignation, on withdrawal of the mandate, in cases of incompatibility, or death. As a guarantee of exercising parliamentary mandate, the Constitution provides immunity for criminal proceedings conducted against him or her, without elaborating on the situation of the mandate in the case when immunity was lifted by Parliament at the moment of referring the case to trial, and consequently against the convicted MP by a final judgment.

Summary:

On 20 January 2015, the Constitutional Court delivered its judgment on the interpretation of Articles 1.3, 69 and 70 of the Constitution. The case was originally lodged on 6 February 2014 by an unaffiliated MP, requesting it

to clarify the above-mentioned articles in relation to the scope of parliamentary immunity and the possibility of terminating the mandate without the MP’s consent if convicted by final judgment, including by a court of a foreign state.

Within the limits of its competences, the Court examined the following issues:

- Whether parliamentary immunity impacts the case of a convicted MP by a final judgment for intentional crimes;
- Whether parliamentary immunity impacts the proceedings for recognition and enforcement of the final judgment delivered by a court of a foreign state, by which an MP has been convicted for intentional crimes; and
- The fate of the mandate of the MP convicted by final judgment for intentional crimes.

II. Regarding the impact of parliamentary immunity of a convicted MP by a final judgment, the Court held that under Article 70.3 of the Constitution, the parliamentary inviolability provides protection for MPs against prosecution for acts unrelated to parliamentary office. The protection of inviolability operates only for certain procedural measures expressly and exhaustively enumerated in the Constitution: detention, arrest and search. There is an exception in the case of “flagrant crime”. Thereby, only under these reservations, the criminal prosecution of the MP can be launched and exercised with no need to lift the immunity. At the same time, at the final stage of the criminal prosecution, the reference of the case to court may be carried out only following the lifting of immunity of the MP under conditions set by the Regulations of Parliament.

With the condition that a certain stage of the procedure has been reached, the proceedings launched prior to acquiring the mandate continue under the general law. Thus, the following distinction operates:

1. Provided that the person was already “brought to trial” for a criminal offense prior to the day of his or her election, the procedure continues as for every citizen without the necessity to lift the immunity;
2. Provided that the person was not “brought to trial” prior to the day of his or her election, he or she shall enjoy inviolability, there being required the lifting of immunity.

In this respect, the suspension of case examination and the request to lift the immunity of the person “brought to trial” prior to the day of his or her election are contrary to constitutional provisions.

Taking into account the fact that the immunity of the MP is lifted at the stage when the case is referred to court, the enforcement of a criminal sentence against the MP does not require a separate lifting of immunity. In other words, this is an integral part of the judicial process when the MP no longer enjoys the protection of inviolability.

Regarding the impact of parliamentary immunity in proceedings to recognise and enforce a final sentence delivered by a court of a foreign state, the Court stressed that, in line with domestic legislation, international legal assistance is granted under an international treaty or through diplomatic channels based on the principle of reciprocity. Thus, Moldova cannot invoke the provisions of its internal legislation to justify the failure to enforce a treaty to which it is a party.

The Court held that the procedure to recognise a foreign criminal judgment by the national courts does not involve judicial debates on the merits and management of evidence, as the case was examined on the merits by the courts of the respective foreign state. In this context, the procedure to recognise a foreign criminal judgment is of a non-contentious nature, which is limited to verifying that national courts complied with procedural guarantees of the courts of the foreign state. Thereby, the procedure to recognise a foreign criminal judgment does not equal to “referring the case to court”. In this case, lifting the MP’s immunity is not necessary.

Regarding the fate of the mandate of the MP convicted by final judgment for intentional crimes, the Court held that, the regulation of cases of forced cessation of the MP’s mandate is the prerogative of Parliament, including withdrawal of the MP’s mandate or incompatibility. The Court stressed that, to date, Parliament has not adopted regulations relating to cases of withdrawal or cessation *de jure* of the MP’s mandate.

The Court held that in the absence of express regulations, the rules governing the forced cessation of the MP’s mandate shall be deducted from those applied in the case of election to office.

The Electoral Code, which is an organic law, provides for restrictions on the right to be elected. Because the restrictions are conditions that validate the MP’s mandate, the Court stated that breaching the conditions of eligibility constitutes a reason of absolute nullity. In other words, these vices of validity cannot be covered. The eligibility conditions must be fulfilled both prior to the elections, as well as throughout the exercise of their mandate. If such restrictions are imposed on the candidate, they must be satisfied *a fortiori* by the office holder.

The Court stated that, in the absence of express legal regulations, *mutatis mutandis*, the breach of eligibility conditions following the mandate validation constitutes a reason of absolute incompatibility with the capacity of the MP. The mandate shall cease *de jure*, for reasons which derive from fundamental conditions inherent to the constitutional principle of rule of law.

Moreover, in a final and irrevocable judgment, it produces direct effects. The possibility of censoring it through a decision of Parliament (eminently a political body) is inadmissible and contrary to the rule of law. Thereby, the judgment of a court generates the loss of the MP’s mandate – generally called “forfeiture”. Subsequently, Parliament would declare the vacation of the office of the MP. The mandate of the MP convicted by the courts of a foreign state for crimes committed intentionally ceases *de jure* on the date when the decision of recognising the conviction remains final and irrevocable.

Supplementary information:

Legal norms referred to:

- Articles 1.3, 69 and 70.3 of the Constitution;
- Electoral Code no. 1381-XIII, 21.11.1997;
- Regulations of Parliament, adopted through Law no. 797-XIII, 02.04.1996;
- Law no. 371-XVI on international legal assistance in criminal matters, 01.12.2006.

Languages:

Romanian, Russian.



Identification: MDA-2015-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 19.03.2015 / **e)** 18 / **f)** On the constitutionality of Annex 2, Section 3 of Law no. 1593-XV of 26 December 2002 on the size, order and terms of payment of premiums for compulsory health insurance / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 2015/224-233 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State.**

3.18 General Principles – **General interest.**

3.23 General Principles – **Equity.**

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

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

Keywords of the alphabetical index:

Insurance, health, statutory / Right to health, minimum content / Health, risk / Insurance fund, contribution / Contribution, compulsory / Unemployment, lack of income.

Headnotes:

Citizens possess the constitutional right to health protection. The State must ensure that every citizen enjoys a decent standard of living, such that he or she and their family are afforded health protection and welfare. To that end, citizens must contribute by paying duties and taxes toward public expenditures. The system of legal taxation must ensure a fair distribution of tax burdens.

Summary:

I. The case originated in an application lodged with the Constitutional Court on 4 March 2015 by a group of MPs. The challenged provision provides that unemployed citizens, who stay in the country for at least 183 days (during one budget year), shall pay for compulsory health insurance premiums.

According to the applicants, compelling unemployed citizens to pay for compulsory health insurance premiums affects the right to health, as enshrined in Article 36 of the Constitution.

II. The Court noted that the national health system operates under a compulsory health insurance. By collecting in advance the necessary funds, the State insures the cost risks for citizens who are ill.

Health insurance funds are established on the basis of insurance premiums paid by “payers”, as set forth in the legislation. Under the law, a payer of premiums is a natural or legal person, including the local or central authority of public administration

that has the duty to pay insurance premiums in the manner prescribed by law.

Although the challenged provisions state that an unemployed person must pay health insurance premiums, Article 4 of Law no. 1585 of 27 February 1998 on compulsory health insurance, exempts a broad category of persons from this duty, including unemployed persons. The exemption applies to pensioners, unemployed persons registered at territorial agencies for employment, people who take care of a person with severe disabilities requiring care and/or constant supervision from another person, mothers with four or more children, and people from underprivileged families receiving social assistance.

For these categories of persons, the Government undertakes the role of insurant, such that the compulsory health insurance of these persons is paid from the State budget. Thus, unemployed citizens, who lack the financial means, are insured by the State.

The Court pointed out that, according to constitutional and legal provisions, the legislator has some discretion to determine the contributions owed by citizens. Therefore, in order to qualify for healthcare, the person shall contribute to the system of compulsory health insurance, according to the law and principles governing this system.

Moldova is a socialist state. The presumption is that the political system allows for appropriate measures to redistribute property in accordance with the principles of social equity, so that citizens have a minimum, guaranteed social security.

As such, the Court held that the duty to contribute to the health insurance fund stems from the principle of solidarity, which, as a socialist state, underpins the state system of social security.

The Court emphasised that one of the main sources that enable the public health insurance system to achieve its main objective – ensure a minimum of healthcare for the population, including those categories of people who are unable to contribute to the health insurance funds – is the contribution to this system from those insured. Therefore, the principle of solidarity, which applies to this system, requires and justifies the duty of paying contributions by unemployed citizens.

The Court underscored that by exempting unemployed citizens from paying premiums for compulsory health insurance, a disproportionate burden will be established for employed citizens, payers of premiums for health insurance in the form of contribution rates from their salaries.

The Court also found that the protection of property rights cannot be invoked in order to deny the fulfilment of a constitutional duty.

By virtue of constitutional provisions, the legislator shall establish the legal framework for the exercise of the right to property, provided that the general or legal private interests of other subjects of the law are not contradicted. Hence, the limitation must be reasonable in its realisation as a guaranteed subjective right.

The Court held that the duty to contribute, with a revenue share, to the funds of compulsory health insurance does not constitute an infringement on constitutional provisions.

Supplementary information:

Legal norms referred to:

- Articles 36, 46, 47 and 58 of the Constitution;
- Law no. 1593-XV on the size, order and terms of payment of premiums for compulsory health insurance, 26.12.2002;
- Law no. 1585 on compulsory health insurance, 27.02.1998.

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2015-1-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 16.04.2015 / **e)** 6 / **f)** On the constitutionality of certain provisions of the Criminal Code and Criminal Procedure Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 115-123, 15.05.2015 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**

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

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

Keywords of the alphabetical index:

Property, guarantee / Property, confiscation / Property, protection / Sanction, confiscation, property / Enrichment, illicit / Security measure.

Headnotes:

According to constitutional principles, legally acquired property cannot be confiscated. Constitutional norms guarantee the presumption of lawful acquirement of property and the presumption of innocence.

At the same time, according to provisions of the Criminal Code, extended confiscation of property is allowed if its value substantially exceeds the legally received income. Also, the provisions of the same Code criminalise illicit enrichment.

Summary:

On 16 April 2015, the Constitutional Court delivered its judgment on the constitutionality of Articles 98.2.e, 106¹ and 330² of the Criminal Code in relation to the phrase “or extended confiscation” under Article 202.1, 202.3, 202.3¹ and of the phrase “or extended confiscation” under Articles 203.2 and 202.3 of the Criminal Procedure Code.

The application was lodged with the Constitutional Court on 3 December 2014 by the Ombudsman, who claimed that the challenged provisions are contrary to the principle of presumption of lawful acquirement of property, non-retroactivity of the criminal law and presumption of innocence.

II. The Court held that under the Article 46.3 of the Constitution, legally acquired property cannot be confiscated. The legality of acquirement shall be presumed.

At the same time, the Court emphasised that the presumption established by Article 46.3 of the Constitution does not prevent the investigation of the illegal nature of the acquired property. The burden of proof is on the invoker of the illegal nature. To the extent that the authorities prove the goods were acquisition by a person unlawfully and illegally, those goods may be ordered confiscation under the law. Under provisions of the law, the confiscation of illegally acquired goods may be ordered if the authorities prove that these goods were acquired in an illicit manner.

The Court noted that the recovery of assets held by criminals is an effective way to fight organised crime and prevent criminals from using wealth as a source

of funding other criminal activities. The need to fight organised crime is also in the sights of the international community.

At the same time, the Court pointed out that, according to principles of criminal procedural law, no one is obliged to prove his or her innocence. The burden of proof is on the prosecution and the situation of doubt is interpreted in favour of the accused. Thus, under the constitutional norm, the responsibility to present evidence that would prove the illegality of acquiring goods is assigned to the authorities.

With regard to the application of the extended confiscation, the Court held that under Article 106.1 of the Criminal Code, the extended confiscation is ordered if the value of the acquired goods by a convicted person, in a period of five years before and after committing the crime and prior to the date of passing the sentence, substantially exceeds the licit income of this person.

The Court noted that the provisions concerning extended confiscation came into force on 25 February 2014. Thus, based on the principle of non-retroactivity of criminal law, only the property acquired after the entry into force of the Law may be seized (25 February 2014).

With reference to the crime of “illicit enrichment” (Article 320² of the Criminal Code), the Court held that the burden of proof in cases of illicit enrichment is assigned exclusively to the state authorities. Hence, the constitutional norm concerning the presumption of lawful property is not violated.

Also, the Court noted that illicit enrichment has been incorporated into national legislation in order to enforce the United Nations Convention against Corruption which urges states to “adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”.

In light of the above considerations, the Court held that the contested provisions do not violate the constitutional norms.

Supplementary information:

Legal norms referred to:

- Articles 21, 22, 23.2 and 46.3 of the Constitution;
- Articles 202.1, 202.2, 202.3¹ and 203.2 of the Criminal Procedure Code no. 122-XV, 14.03.2003;

- Articles 98.2.e, 106¹ and 330² of the Criminal Code no. 985-XV, 18.04.2002.

Languages:

Romanian, Russian.



Identification: MDA-2015-1-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 16.04.2015 / **e)** 7 / **f)** On constitutional review of certain provisions of the Law no. 325 of 23.12.2013 on professional integrity testing / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) 115-123, 15.05.2015 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

- 1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of Fundamental Rights and freedoms.**
- 1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**
- 3.4 General Principles – **Separation of powers.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.16 General Principles – **Proportionality.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 4.6.2 Institutions – Executive bodies – **Powers.**
- 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**
- 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Public servant, integrity / Agent provocateur / Agent provocateur, integrity testing, justified risk.

Headnotes:

The Constitution guarantees free access to justice, a right that presumes an effective protection on the part

of competent courts against acts that violate the rights, freedoms and interests of a person. The Constitution also provides that the State respects and protects one's intimate, family and private life.

According to the Basic Law, the legislative, executive and judiciary powers are separate and cooperate in the exercise of their prerogatives.

The challenged Law on professional integrity testing targeted public servants.

Summary:

On 16 April 2015, the Constitutional Court delivered a judgment of constitutional review on certain provisions of the Law no. 325 of 23 March 2013 on professional integrity testing. The case originated in an application lodged with the Constitutional Court on 20 June 2014 by four Members of Parliament.

The applicants asked the Court to review the conformity of the phrases "The Constitutional Court" and "The Courts of all levels" provided by the Annex to Law no. 325 of 23 December 2013 on professional integrity testing with the constitutional provisions of the right to a fair trial, the right to respect for private life and the separation of powers.

Holding its jurisdiction, the Court mentioned that the Annex cannot exist separately from the Law and that it would be examined together with the provisions of the Law. The Court also noted that the rights and the principles invoked by the applicants do not only refer to the employees of the institutions mentioned in the application, but to all the public agents indicated in the Annex.

II. Because the contested Law provided for the application of some disciplinary sanctions when public agents received negative results on the professional integrity test, the Court noted that the guarantees of the right to a fair trial in criminal matters are equally applicable in cases of disciplinary proceedings, considering both the severity of charges against the public agent and the seriousness of consequences, i.e. job loss.

The Court observed that the professional integrity test can be initiated by the National Anticorruption Centre (hereinafter, the "NAC"). This institution can dispose the test's administration if there exist "risks and vulnerabilities to corruption" in case of some public agents or if it holds "information" and has received "notifications or motivated requests" from the management of a public entity. The Court notes that the legal provisions allow both testing focused on target

groups and random testing, so that the integrity tester has unlimited discretion in carrying out this task. The Court noted that the professional integrity tests could be justified only if there are existing preliminary and objective grounds to suspect that a certain public agent is inclined to commit acts of corruption.

The Court found that the legal provisions define the term "justified risk", the rationale of which is that the tester is allowed to enter into potentially criminal behaviour because less interfering measures would not make it impossible to reach the goal of the test. This concept is questionable not only because it allows for criminal behaviour to instigate the public agent but casts a general shadow of suspicion on the integrity of every public agent.

In terms of the right to defence and the right to a fair trial, the Court found that the legal provision does not allow the aggrieved public agent an effective assessment of evidence gathered within the professional integrity testing procedure since it is classified as "confidential".

The Court found that the legal provision according to which the public agents should "not admit in their activity any corruption acts, corruption-related acts and deeds of corruptive behaviour" are of a generic, hybrid and vague nature and even overlap. It bears serious risks related to the foreseeability of what would and what would not be considered as a disciplinary offence within professional integrity testing.

Regarding the applicable disciplinary sanctions for a negative test result, the Court noted that these should follow the principle of proportionality, between the seriousness of the offence and the quality and size of the sanction. However, the Law provides for the automatic dismissal from office of all public servants, who admit in their activity any corruption acts, corruption-related acts and deeds of corruptive behaviour.

The Court noted that the assessment of professional activity of the employees must be the competence of the public entities where they work. It is an improper competence of the NAC. The intervention of a body, which is part of the executive, into administrative matters of a body belonging to the judiciary is unacceptable in light of the principles of separation of powers and good governance.

The Court observed that the challenged Law permits the professional integrity tester the use of a false identity and admits the incitement of the public agents to commit offences. Thus, the testers should be considered as *agents provocateurs*. According to the relevant European Court of Human Rights case-law,

the public interest cannot justify any use by the courts of evidences gained by incitement, as it would expose the public agent to the risk of being abridged from the start of the right to a fair trial.

With regard to the incidence of the right to respect for private life, the Court noted that according to the challenged Law, in order to objectively assess the results of the professional integrity test, it shall be recorded on a mandatory basis by audio/video means and the communication means in the tester's possession or used by the tester. The Court mentioned that these means can be ordered only by the instruction judge or an authority that offers the largest guarantees of independence and impartiality. Their absence is equivalent with the inadequacy of the procedural guarantees necessary for protecting the right to respect of private life.

With reference to the professional integrity testing of judges, the Court observed that Article 123.1 of the Constitution provides that the authority that ensures the appointment, transfer, removal from office, upgrading and imposing of the disciplinary measures on the judges is the Superior Council of Magistracy. The professional integrity testing of the judges by the NAC employees contradict with this Article. Moreover, the Court noted that NAC, which is led by a director appointed and dismissed at the proposal of the Prime Minister, is a body under the control of the executive and therefore, it cannot meet the requirements of the independence.

In the light of the above arguments, the Court declared unconstitutional the legal provisions that regulated the execution mechanism of the professional integrity testing.

The Court noted, as a principle, that professional integrity testing may be applied to all professional categories of public agents. No professional category is, by its nature, excluded from professional integrity testing. At the same time, the legal provisions must respect the guarantees of the right to a fair trial and of the right to respect for private life, as well as those referring to the separation of powers and independence of the judiciary.

Supplementary information:

Legal norms referred to:

- Articles 6, 20, 28, 54, 123 and 134 of the Constitution;
- Law no. 325 of 23.12.2013 on professional integrity testing.

Languages:

Romanian, Russian.



Identification: MDA-2015-1-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 14.05.2015 / **e)** 6 / **f)** On the constitutionality of Article 287.1 of the Criminal Procedure Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 2015/254-257 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

- 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.**
- 5.3.13.1.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**
- 5.3.13.2.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**
- 5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem.**

Keywords of the alphabetical index:

Proceedings, resumption, grounds / Criminal proceedings, guarantees.

Headnotes:

According to the *ne bis in idem* principle, no one shall be punished or tried repeatedly for having committed the same cause of action. The observance of this principle is guaranteed by international and national rules.

Under the challenged criminal procedure rules, the resumption of criminal proceedings is allowed after termination of criminal investigation, dismissal of the case or when charges against someone have been dropped. The condition is that it must be shown that the cause triggering these measures had not existed or that the circumstances substantiating the aforementioned situations had disappeared.

Summary:

I. On 14 May 2015, the Constitutional Court ruled on the constitutionality of Article 287.1 of the Criminal Procedure Code.

The case originated in an exception of unconstitutionality raised by a lawyer before an ordinary court. On 9 April 2015, the Supreme Court of Justice lodged the application with the Constitutional Court.

The author of the exception of unconstitutionality claimed that the challenged provisions, under which the criminal proceedings could also be resumed in other cases than those concerning the appearance of new or newly discovered facts or of a fundamental defect in the previous criminal proceedings, are contrary to the *ne bis in idem* principle.

II. The Court emphasised that Article 21 of the Constitution guarantees the presumption of innocence. Any person accused of committing an offence shall be presumed innocent until proven guilty on legal grounds, brought forward in a public trial, and all the necessary guarantees for his or her defence are safeguarded.

The Court pointed out several constitutional and legal norms. It held that the guarantees provided for by Article 21 of the Constitution incorporate the right not to be tried or punished twice for the same offense (*ne bis in idem* principle). Also, under Article 4.1 Protocol 7 ECHR, no one shall be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he or she has already been finally acquitted or convicted, in accordance with the law and penal procedure of that State.

The Court also noted that under Article 4.2 Protocol 7 ECHR, the *ne bis in idem* principle shall not prevent the reopening of a case in accordance with the law and penal procedure of the State concerned. However, to reopen a case, there must be evidence of new or newly discovered facts or a fundamental defect in the previous proceedings, which could affect the outcome of the case. In line with Article 4.3 Protocol 7 ECHR, no derogation from this Article shall be made under Article 15 ECHR. Therefore, states are not entitled to provide for, by law, other grounds for reopening the previously terminated proceedings.

The Court underscored that under the European Convention on Human Rights, the two grounds for a criminal case to be reopened are the following:

1. evidence of new or newly discovered facts; or
2. fundamental defect in the previous proceedings.

The Court held that “new facts” represent information about circumstances that the criminal investigation authority was unaware of at the date of the issuance of the contested order or that could not have been known at that time. “Newly discovered facts” represent facts that existed at the date of issuing of the contested order, but could not be found.

The Court determined that the order to terminate the criminal investigation or dismiss the criminal case or to drop charges against someone may be cancelled, with the resumption of criminal proceedings, at any time within the statute of limitations if there were new or newly discovered facts.

Under Article 6.44 of the Criminal Procedure Code, “fundamental defect” is an essential violation of rights and freedoms guaranteed by the European Convention on Human Rights, other international treaties, the Constitution and other national laws.

The Court contended that if a fundamental defect is discovered, the criminal investigation may be resumed no later than one year from the date of entering into force of the order terminating the criminal investigation, dismissing the criminal case or dropping the charges against someone.

The rules of criminal procedure provide for the resumption of criminal proceedings only where there is evidence of new or newly discovered facts or when a fundamental defect has been found. The national legislator has sought to establish a fair balance between the tasks of criminal proceedings – finding the truth and delivering a fair trial. In the course of the proceedings, criminal investigation authorities and the courts shall act in such a manner that no one is unjustifiably suspected, accused or convicted and no one is arbitrarily or unnecessarily subjected to coercive procedural measures.

In fact, Article 287.1 of the Criminal Procedure Code grants the higher-level prosecutor the right to resume criminal proceedings at any time and in the absence of clearly defined grounds that could be considered judicious in each individual case.

The challenged provisions place the person in a state of uncertainty for an indefinite period of time and for circumstances that may be invoked randomly at the reopening of the criminal case.

The Court underscored that, with the termination of the criminal investigation, dismissal of the criminal case and when dropping charges against a person, the individual shall have certainty and confidence that he or she will no longer be suspected and prosecuted. Omissions or errors of authorities must

serve the benefit of the suspect, accused and defendant. In other words, the risk of any errors committed by the criminal investigation authority or by a court shall be borne by the state and the person concerned should not be charged for its correction, with the exceptions mentioned above.

The Court concluded that the resumption of a criminal investigation following its termination, dismissal of a criminal case or when the charges against a person have been dropped by order of a higher-level prosecutor, if it is found that there were no grounds for these measures or that the circumstances substantiating the aforementioned situations have ceased to exist, is contrary to Article 21 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 6, 20, 21 and 23 of the Constitution;
- Articles 6, 22 and 287 of the Criminal Procedure Code;
- Article 4.1 and 4.2 Protocol 7 ECHR.

Cross-references:

European Court of Human Rights:

- *Maaouia v. France*, no. 39652/98, 05.10.2000;
- *Stoianova and Nedelcu v. Romania*, nos. 77517/01 and 77722/01, 04.08.2005;
- *Radchikov v. Russia*, no. 65582/01, 23.05.2007;
- *Sutyazhnik v. Russia*, no. 8269/02, 23.07.2009.

Languages:

Romanian, Russian (translation by the Court).



Montenegro Constitutional Court

Important decisions

Identification: MNE-2015-1-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 20.02.2015 / **e)** U-II 58/13 / **f)** / **g)** *Službeni list Crne Gore* (Official Gazette), no. 39/14 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

- 5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
- 5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Marriage, common law relationship, discrimination.

Headnotes:

Under Article 145 of the Constitution, the principle of the rule of law is one of the highest constitutional values. It is achieved by applying the principle of compliance of legal regulations. Under this principle, legislation must be in conformity with the Constitution and ratified international agreements and other regulations. In regulating legal relationships, the enacting authority is obliged to observe the limits set by the Constitution, particularly those arising from the rule of law and those protecting particular constitutional goods and values. In this case, these are the prohibition of discrimination and the principle of equality set out in the provisions of Articles 8.1 and 17.2 of the Constitution.

Family law regulates marriage and relationships within marriage, relationships between parents and children, adoption, placement within families such as fostering, custody, support, property relationships in the family and actions of authorised bodies with

regard to marriage and family relationships. A common law relationship is regarded as being on a par with a marital relationship in terms of the right to mutual support and other property and legal relationships. It is defined as a living arrangement between a man and a woman of a longer-lasting nature. Article 8.1 of the Constitution prohibits any direct or indirect discrimination, on any grounds. The prohibition of discrimination has a general meaning; it is not limited to the enjoyment of constitutional rights and freedoms.

The concepts of discrimination and discriminatory grounds in Montenegrin law is contained in the Law on Prohibition of Discrimination. It includes all discriminatory grounds set forth in Article 14 ECHR and Article 1 Protocol 12 ECHR, along with other specific forms of discrimination. From the principle of equality, guaranteed in Article 17.2 of the Constitution, the conclusion can also be drawn that there is an obligation to prohibit arbitrary interference, that is, an obligation to be strictly bound by the principle of proportionality in the event of different treatment of a person or group of persons on the basis of personal traits who are found to be in the same or similar legal or factual situations.

Protection of family life is not confined solely to marriage-based relationships; it may encompass other *de facto* family ties. Unmarried couples are one example, depending on factors such as whether they live together, the stability and length of their relationship and whether they have children together.

Summary:

I. The applicant in these proceedings sought a review of the constitutionality and legality of the provisions of Article 15.2 of the Rules on the Settlement of Residential Issues nos. 02-6170 and 02-4227 of 6 June 2003 and 16 April 2004 (hereinafter, the "Rules"), adopted by the Board of Directors of "Telekom Crne Gore" a.d. Podgorica. The suggestion was made that these provisions placed employees in common-law marriage relationships in an unequal and discriminatory position compared to employees living in matrimonial union, because they are evaluated differently in the settlement of residential issues. The Board of Directors of "Telekom Crne Gore" a.d. Podgorica argued that the provision under dispute did not violate the constitutional principles of equality and non-discrimination. In the process of settlement of residential issues, the provision was equally applied; employees were obliged to submit, with their applications, evidence of the number of household members, without specifying the marital status of partners. Thus, in this process, married and common law partners received equal evaluation.

II. The Constitutional Court found that the provision under dispute gave no grounds for initiation of proceedings for a review of its constitutionality and lawfulness. The Constitutional Court, in its decision-making, took into account the principle of unity of legal system defined in the provisions of Article 145 of the Constitution; the family relationships and employment rights of an employee in this regard are regulated by more than one law.

On the basis of the Law on Business Organisations, the Constitutional Court concluded that "Telekom Crne Gore", as the holder of the right to dispose of company assets, had the authority to adopt an act in which it would autonomously define the manner of addressing the residential needs of employees and the criteria and standards for determining the order of employees applying for settlement of residential issues.

It found that the provision of Article 15.2 of the Rules violated the constitutional principle of general prohibition of discrimination on any grounds and the principle of equality before the law regardless of any particularity or personal feature, in accordance with Articles 8.1 and 17.2 of the Constitution, Article 2.2 and 2.3 of the Law on Prohibition of Discrimination, Article 14 ECHR and Article 1 Protocol 12 ECHR.

The principle of non-discrimination and the principle of equality are contained in all core international and regional human rights instruments, in particular Article 14 ECHR and Article 1 Protocol 12 ECHR. In these particular proceedings, the Constitutional Court took into account the relevant practice of the European Court of Human Rights which has expressed its position several times regarding the meaning of family and marital relations guaranteed in the provision of Article 8 ECHR and in connection therewith, non-discrimination referred to in the provisions of Article 14 ECHR and Article 1 Protocol 12 ECHR in relation to this Law.

The Court was accordingly of the view that Article 15.2 of the Rules was of a discriminatory character. The provisions of Articles 71, 72.1 and 72.2 of the Constitution and Article 12.1 of the Family Law stipulate that a family enjoys special protection, that parents are obliged to take care of their children, to bring them up and educate them and that children born out of wedlock have the same rights and obligations as those born in marriage. Moreover, common-law community is equalled with marital community in terms of the right to mutual support and other property and legal relationships. It appeared from Article 15.2 of the Rules that the household members of an employee that a distinction was drawn between children born in wedlock and those born outside it; one of the

parents of those children was not considered a member of the household if they were not married to the employee.

The Constitutional Court held that the difference that had been established between married persons and those living in common-law community has no objective and reasonable justification in terms of the process of addressing the residential needs of employees. There were no constitutional or legal objectives which could justify this sort of discrimination on the grounds of marital status (inequality in exercising the right to settlement of residential issues) on the basis of citizens' personal characteristics.

The question the applicant had raised regarding the compliance of the challenged provision of Article 15.2 of the Rules with the provisions of Articles 8.1 and 17.2 of the Constitution, Article 2.2 and 2.3 of the Law on Prohibition of Discrimination, Article 14 ECHR and Article 1 Protocol 12 ECHR, was well founded.

Cross-references:

European Court of Human Rights:

- *Marckx v. Belgium*, no. 6833/74, 13.06.1979;
- *Abdulaziz, Cabales and Balkandali v. United Kingdom*, nos. 9214/80, 9473/81 and 9474/81, 28.05.1985;
- *Johnston and others v. Ireland*, no. 9697/82, 18.12.1986;
- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010.

Languages:

Montenegrin, English.



Norway Supreme Court

Important decisions

Identification: NOR-2015-1-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 24.06.2014 / **e)** HR 2014-1323-A / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2014, 645 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

2.1.1.4.5 Sources – Categories – Written rules – International instruments – **Geneva Convention on the Status of Refugees of 1951**.

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Treaties and legislative acts**.

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.

5.1.4.3 Fundamental Rights – General questions – Limits and restrictions – **Subsequent review of limitation**.

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

Keywords of the alphabetical index:

Criminal law, interpretation / Identity, verification / International law, national law, relationship / International law, priority.

Headnotes:

The right to seek asylum, as protected by Article 31.1 of the Geneva Convention on the Status of Refugees of 1951, limits the scope of national criminal law regarding the use of false identification.

Summary:

I. A citizen of Cameroon was convicted in the District Court and the Court of Appeal for violation of Section 182 of the Penal Code. Upon arrival at Oslo International Airport, he had presented a false Portuguese residence card. After being taken aside for an immigration check, he informed the immigration authorities that he was seeking protection in Norway.

II. The Supreme Court concluded that he was protected by Article 31.1 of the Geneva Convention on the Status of Refugees of 1951, which prohibits Contracting States from imposing penalties on any refugee for illegally entering the State, if that refugee presents himself or herself without delay to the authorities and shows good cause for his or her illegal entry or presence. The Convention's requirement that a refugee shall seek protection "without delay" was met, as he had sought protection before the immigration check was completed. The Court of Appeal's judgment in the appeal hearing was therefore overturned.

Languages:

Norwegian, English (translation by the Court).



Identification: NOR-2015-1-002

a) Norway / b) Supreme Court / c) Plenary / d) 29.01.2015 / e) HR 2015-206-A / f) / g) *Norsk retstidende* (Official Gazette), 2015, 93 / h) CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Immigrant, expulsion / Child, custody / Citizenship / Child, best interest / Family reunification.

Headnotes:

An expulsion order made by the Immigration Appeals Board against a mother violated her daughter's right to family life under Article 8 ECHR.

Summary:

I. A Kenyan woman, who remained in Norway illegally after her application for asylum had been rejected, had an expulsion order imposed on her by the Immigration Appeals Board. At the same time, her application for a residence permit on the basis of family reunification with her five-year-old daughter, who is a Norwegian citizen, was also rejected.

II. In a lawsuit brought by the mother and daughter, the Supreme Court found both decisions to be null and void and rendered a declaratory judgment establishing that the administrative decisions contravened the right to family life guaranteed by Article 8 ECHR. Initially, it was established that the daughter had legal standing, both in the validity suit and in the declaratory suit, pursuant to Section 1-3 of the Dispute Act. The fact that a potential violation of the European Convention on Human Rights might constitute a legal controversy, without prejudice for subsequent litigation in a parallel validity suit, did not reduce the daughter's legal interest in obtaining judgment for violations of the European Convention on Human Rights.

In the validity suit, the Supreme Court concluded that a procedural error had failed to establish the daughter as a party to the immigration authority's hearing of the case, and that the actual situation the forced expulsion of her mother would create for the daughter, could not be equated to a decision to expel Norwegian nationals. The Supreme Court, furthermore, made reference to Sections 102 and 104 of the Constitution, which, pursuant to an amendment of the Constitution of 6 May 2014 to incorporate human rights protection, relate to the right of family life and children's rights respectively. The Court concluded that the child's interests weigh heavily in any consideration of interests pursuant to Section 102 of the Constitution.

In the assessment of this specific case, it was found that there were no alternatives to the mother's role as her daughter's care-giver. The fact that the daughter is a Norwegian citizen, with the rights this status entails, is a key factor. Her care situation would be difficult if her mother were to move to Kenya with the child. The daughter's interests carried considerable weight in favour of allowing the mother to remain in Norway, and against the expulsion of her mother, who is her only care-giver. The circumstances on which the expulsion order was based, i.e. illegal residence in the realm and providing a false identity in her asylum application, could not outweigh these factors. Finally, the Supreme Court concluded that the immigration authorities' decision violated the daughter's rights under Article 8 ECHR.

Languages:

Norwegian, English (translation by the Court).

*Identification:* NOR-2015-1-003

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 06.02.2015 / **e)** HR-2015-289-A / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2015, 155 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

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

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**

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

Keywords of the alphabetical index:

Extradition / War crime.

Headnotes:

The extradition of a foreigner charged with war crimes is not in contravention of Article 8 ECHR or Article 3 of the UN Convention on the Rights of the Child of 1989.

Summary:

I. The case concerned an extradition request to the Norwegian authorities regarding a man from Rwanda, who in that country had been charged with participating in genocide and crimes against humanity in 1994. He has been resident in Norway as a refugee since 1999, is married and has three children in Norway.

II. The Supreme Court based its assessment on the fact that basic human rights, as incorporated in Sections 102 and 104 of the Constitution, Article 8 ECHR and Article 3 of the UN Convention on the Rights of the Child, are central to the

interpretation of what constitutes “basic humanitarian considerations” pursuant to Section 7 of the Extradition Act. Accordingly, it was necessary to weigh society’s interest in extraditing criminals, on the one hand, against the effect of such interventions on individuals’ constitutional rights on the other. The Court pointed out that the crux of this assessment is the fact that it is in the interest of involved states that serious crimes are prosecuted in the country where the crimes were committed and, in the case of genocide, this is an expectation and a condition of international agreements and conventions.

The Court stated that the right to respect for private and family life under Article 8 ECHR has limited validity in terms of preventing extradition in cases involving serious crimes and that the threshold for giving the best interests of children absolute priority similarly must be very high in such cases. Given a specific assessment of the circumstances in this case, the court found no grounds on which to give the interests of the children absolute priority. Consequently, there were also no grounds on which to refuse extradition on the grounds of basic humanitarian considerations.

Languages:

Norwegian, English (translation by the Court).



Poland

Constitutional Tribunal

Important decisions

Identification: POL-2015-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.01.2015 / **e)** K 39/12 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2015, text 142; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2015, no. 1A, text 2 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.12 General Principles – **Clarity and precision of legal provisions**.
 3.16 General Principles – **Proportionality**.
 4.10.6 Institutions – Public finances – **Auditing bodies**.
 5.1.4.3 Fundamental Rights – General questions – Limits and restrictions – **Subsequent review of limitation**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Sensitive data, processing / Usefulness / Necessity / Appropriate legislation, principle.

Headnotes:

The processing, by the Supreme Chamber of Control, of sensitive personal data revealing individuals' political opinions, religious or philosophical beliefs and data concerning their genetic code, addictions or sex life is contrary to the Constitution.

All restrictions on the exercise of constitutional freedoms and rights, including the right to the protection of privacy expressed in Article 47 of the Constitution, must comply with the principles of usefulness, necessity and proportionality *stricto sensu*.

Summary:

I. The Supreme Chamber of Control is responsible for monitoring, in accordance with the criteria set out in Article 203 of the Constitution, the activities of

government authorities, the National Bank of Poland, State legal entities and other organisational units of the State. The Constitution also authorises the Chamber to monitor the activities of local and regional authorities, municipal legal entities and other municipal organisational units and other economic entities insofar as they use state or municipal assets or resources and discharge their financial commitments vis-à-vis the State.

The first provision contested by the Principal State Prosecutor authorises the representatives of the Supreme Chamber of Control, with a view to establishing the facts, to collect reliable evidence and to assess the activity being monitored in accordance with the criteria of lawfulness, good management, appropriateness and integrity, to process personal data, including data concerning the racial or ethnic origin of individuals, their political opinions, religious or philosophical beliefs, Church, political party or trade union membership as well as data concerning their health, genetic code, addictions or sex life, and information concerning any prison sentences, decisions in criminal matters, fines or other judicial and administrative decisions, if such processing proves necessary in the context of the monitoring (Article 29.1.2.i of the law on the Supreme Chamber of Control, which refers to Articles 5 and 28 of this law and to Article 27.1 of the law on the protection of personal data). The complaint of unconstitutionality was based on Article 51.2 of the Constitution, which stipulates that public authorities cannot collect, assemble and make accessible information concerning citizens other than that which is necessary in a democratic state of law, in connection with Article 31.3 of the Constitution, which stipulates that the exercise of constitutional freedoms and rights cannot be subject to restrictions other than those provided for by law on the grounds that they are necessary in a democratic state to ensure security, law and order, for the protection of the environment, public health and morality or the freedoms and rights of others. Such restrictions may not infringe the essence of rights and freedoms.

The second legal provision contested authorised the processing of the aforementioned "sensitive" data on the basis of a specific legal provision authorising its processing without the consent of the person concerned and guaranteeing its full protection (Article 27.2.2 of the law on the protection of personal data). The Principal State Prosecutor challenged this by invoking the principle of appropriate legislation (inferred from Article 2 of the Constitution), on the grounds that it did not clearly identify the circumstances and the entities authorised to process "sensitive" data.

II. Regarding the constitutional values deriving from relevant higher-ranking legislation, the Tribunal considered the usefulness, necessity and proportionality *stricto sensu* of the first impugned provision.

Firstly, pursuant to the Tribunal's case-law, a restriction of constitutional rights and freedoms is useful if it is justified by a reasonable need and directly serves to achieve the objective based on the Constitution. The Tribunal decided that the processing of personal data concerning political opinions, religious or philosophical beliefs and data concerning genetic code, addictions or sex life was not useful in carrying out the constitutional and legal tasks attributed to the Supreme Chamber of Control and that the impugned provision was, from this standpoint, unconstitutional. On the other hand, the Tribunal upheld the constitutionality of processing data relating to the racial or ethnic origin of individuals, church, political party or trade union membership as well as data concerning their health, and information on any prison sentences, decisions in criminal matters, fines or other judicial and administrative decisions, considering such information useful, in particular in the context of the monitoring of health or social security establishments and of entities providing the funds for these services, and in the context of the monitoring of prison, customs, and police services and of tax offices.

Secondly, the Tribunal decided that the contested provision was necessary to protect law and order, the rights of religious and ethnic minorities, public health and freedom of association.

Thirdly, the Tribunal found that the impugned provision did not constitute an excessive restriction on the autonomy of individuals with regard to the disclosure of information concerning them. It is, for example, not sufficient to have access to anonymous and aggregated data, since such a restriction does not make it possible to carry out formal, indirect and planned monitoring and would be contrary to the principle of substantive truth.

The Tribunal pointed out that the auditors of the Supreme Chamber of Control, whose special status guarantees impartiality, are bound by a professional duty of confidentiality, which continues to apply after they have completed their term of office. Any infringement of the duty of confidentiality is subject to penal and disciplinary sanctions.

Moreover, the Tribunal decided that the second impugned provision, when interpreted in relation to all the provisions governing the activities of the Supreme Chamber of Control, was sufficiently precise and

comprehensible and thus in conformity with the principle of appropriate legislation. The Tribunal pointed out that the level of precision of provisions depends on the circumstances of the case, which is a natural consequence of the specific nature of legal language and of the wide range of matters dealt with. A legal provision could only be made null and void on grounds of imprecise drafting as a last resort when it was absolutely impossible to remove all doubt by applying rules of interpretation.

Cross-references:

Constitutional Tribunal:

- K 7/01 of 05.03.2003, *Bulletin* 2003/2 [POL-2003-2-017];
- K 18/02 of 28.04.2003, *Bulletin* 2003/2 [POL-2003-2-020];
- SK 56/04 of 28.06.2005;
- K 17/05 of 20.03.2006, *Bulletin* 2007/1 [POL-2007-1-001];
- K 45/07 of 15.01.2009;
- U 10/07 of 02.12.2009, *Bulletin* 2010/1 [POL-2010-1-003];
- K 8/08 of 18.03.2010;
- K 20/09 of 19.05.2011, *Bulletin* 2012/3 [POL-2012-3-005];
- K 16/10 of 11.10.2011, *Bulletin* 2012/3 [POL-2012-3-006];
- K 23/11 of 30.07.2014.

Languages:

Polish.



Identification: POL-2015-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.02.2015 / **e)** SK 70/13 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2015, text 234; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2015, no. 2A, text 14 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.16 General Principles – **Proportionality.**
- 3.18 General Principles – **General interest.**

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

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

Keywords of the alphabetical index:

Insulting behaviour towards a public official / Insult / Official / Risk exposure, high level, enhanced protection.

Headnotes:

A provision which makes insulting behaviour towards a public official a criminal offence, when not committed in public, is in conformity with the Constitution.

The values protected such as the proper functioning and authority of government justify the restriction of freedom of expression as enshrined in the Constitution.

Freedom of expression in the public sphere, although strengthened by the case-law of the European Court of Human Rights, is not absolute and may be restricted in accordance with the principle of proportionality.

Summary:

I. The Tribunal received a constitutional complaint (Article 79.1 of the Constitution), a procedure under which anyone whose freedoms or rights have been infringed may appeal to the Constitutional Tribunal concerning the conformity with the Constitution of a statute or other normative act on the basis of which a court or organ of public administration has made a final decision on his or her freedoms or rights or on his or her obligations as specified in the Constitution. The applicant, an individual, contested the provision of the Criminal Code which punishes with a fine, a penalty of restriction of liberty or imprisonment of up to one year anyone who insults a public official or a person called upon to assist such official in the course of and in connection with the performance of official duties (Article 226.1 of the Criminal Code). The claim that the provision was unconstitutional was restricted to circumstances where the insulting of a public official or of a person assisting the official did not take place in public.

The applicant, supported by the Human Rights Defender, maintained that insulting behaviour not committed in public does not breach public order, does not humiliate the public official and does not undermine the authority of government and that, consequently, the restriction of freedom of expression

does not pass the proportionality test, especially since the individual insulted may sue for damages in the civil courts.

The Principal State Prosecutor took the opposite stance and requested that the impugned provision be ruled constitutional, stating in particular that the right to criticise could not take the form of aggression and turn into a right to insult public officials.

II. The applicant cited several higher-order norms, of which the Tribunal only admitted freedom of expression as set out in Article 54.1 of the Constitution in connection with the principle of proportionality as set out in Article 31.3 of the Constitution. Under the latter, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons, it being specified that such limitations must not violate the essence of freedoms and rights. The Tribunal also confined itself to considering insulting behaviour towards a public official, not towards a person assisting the latter, as the constitutional complaint procedure is a concrete review procedure and cannot be dissociated from the case and the circumstances on which the complaint is based.

The Tribunal developed the judgment of the Supreme Court concerning Article 226.1 of the Criminal Code, refusing to confine the provision's scope to acts committed in public. The Tribunal thus reduced the constitutional problem to two fundamental questions: are insults covered by the protection resulting from freedom of expression and, if so, is Parliament entitled to restrict such protection in the manner provided for in the impugned provision? In answering these questions, the Tribunal held that even though strictly offensive comments did not deserve protection, it had to be acknowledged that, given that there was no unambiguous definition of insulting language, it generally fell within the scope of the protection of freedom of expression under Article 54.1 of the Constitution. With regard to the second question, the Tribunal underlined that the cumulative conditions "in the course of and in connection with the performance of official duties" clearly refer to the values protected on a priority basis by the impugned provision, i.e. to public order and, in particular, the proper and effective functioning of institutions and to the respect due to government authorities. Action taken by a person exercising public authority must not be paralysed or at least prevented by the behaviour of the persons against whom such action is taken. An utterance may not take the form of an insult which

actually undermines the possibility of the effective performance of official duties in the general interest. That is the *ratio legis* of the impugned provision. It is obvious that the latter also protects the rights of other persons, specifically individual dignity, but the justification for exceptional protection lies in the need to ensure the respect due to public officials performing their official duties. This is all the truer since the latter are more exposed to aggressive behaviour or infringements of their personal rights than other persons, as they often perform their duties in situations involving conflict. The enhanced protection stemming from the high level of risk exposure is clearly justified, with regard both to public and to non-public infringement of those rights. An official performing his or her duties in a non-public setting, for instance when a residence is being searched, deserves the same protection as one performing them in public. The Tribunal also held that the impugned provision does not constitute an excessive restriction on freedom of expression in a democratic state ruled by law and found it to be in conformity with the Constitution. The Tribunal did, however, state that the application of the provision examined, in a manner in line with the Constitution, made it necessary to ask the question whether the insulting behaviour towards a public official, in the specific circumstances, actually infringed the values protected by the provision. In this context, the Tribunal cited the following criteria, drawn from the case-law of the European Court of Human Rights: status of the person making the utterance, that of the person it is directed towards, nature of the insult, its form and the reasons for it. Assessment of the degree of social harm of the act committed and the criminal penalties imposed must relate not only to the values protected by the impugned provision, i.e. to public order (proper functioning and authority of government) and the rights and freedoms of other persons (dignity of public officials), but also to the freedom of expression and public discussion enshrined in the Constitution.

Cross-references:

European Court of Human Rights:

- Decisions 25716/94, 43425/98, 43587/09.

Supreme Court:

- Decision V KK 195/03 of 10.12.2003;
- Decision II KK 84/11 of 25.10.2011;
- Decision I KZP 8/12 of 20.06.2012.

Constitutional Tribunal:

- Decision P 3/06 of 11.10.2006;
- Decision P 12/09 of 06.07.2011.

Languages:

Polish.



Portugal

Constitutional Court

Important decisions

Identification: POR-2015-1-001

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 14.01.2015 / **e)** 16/15 / **f)** / **g)** *Diário da República* (Official Gazette), 132 (Series II), 09.07.2015, 18412 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Administration of justice, proper functioning / Expert, costs / Compensation, right / Remuneration, fair, principle / Pay.

Headnotes:

Legislation setting an excessively restrictive limit on the maximum remuneration payable to court experts is unconstitutional. If the expert's right to fair compensation for services provided and the right of access to the courts are to be kept in balance with one another, it is necessary for there to be a degree of restraint when the standards for the amount of experts' fees are set. It is understandable for the decision to fix the prices of services to the courts not to be subject to market rules, because this is the only way to ensure that the effect those prices have on the final amount of court costs is compatible with the guarantee of access to justice. However, the maximum limit imposed by the challenged norm, by precluding any discretion for courts to award a higher amount in certain cases, excessively limited the right to fair compensation and was therefore unconstitutional.

Summary:

I. In this concrete review case, the Public Prosecutors' Office brought a mandatory appeal against the refusal by a lower court to apply a norm on the grounds that it was unconstitutional. The question before the Court was whether the norm, contained in the Regulations governing Procedural Costs (RCP), which placed a maximum, unbreakable ceiling on the remuneration payable to court experts, was constitutional. The norm set a fixed maximum pay, even if the type, amount and complexity of the work involved and market practices suggested that the remuneration should be higher.

The work experts do for the courts entails understanding or gauging facts and is based on special knowledge which the judges do not possess. Ordinary legislation provides that performance of the role of expert presupposes a duty to collaborate with the court and is compulsory, and experts can be removed from their functions or fined if they fail to fulfil their duties.

Apart from cases, in which people exercising particular functions are legally excused from the obligation to serve as court experts, the only valid grounds on which someone can ask to be excused from serving as an expert are certain types of personal reasons. The obligation to serve as a court-appointed expert is one aspect of the legal duty to collaborate in the administration of justice, which pertains to every citizen.

In previous cases, the Constitutional Court had already recognised a general right to reparation or compensation for damages caused by actions and/or omissions, founded on the key structural principle that the state must be democratic and based on the rule of law. The legislator is under a duty to legislate in such a way as to ensure "compensation for sacrifices" that are legitimately imposed in the public interest, although it does enjoy a broad scope regarding the way in which it concretely shapes the implementation of that guarantee, and, therefore, the possibility of differentiated legal solutions cannot be excluded. However, the legislator's solutions cannot contradict the fundamental teleological content of 'compensation', namely, the obligation to satisfy the demands imposed by the concept of distributive justice. In particular, the compensation must be proportional to the sacrifice.

The lower court in the instant case had followed a different line of reasoning from that adopted by the Constitutional Court. It considered that the expert's compulsory collaboration with the courts was a restriction of the freedom of labour that was constitutionally legitimate, but only if the compensation was both appropriate and proportionately remunerated.

II. The Constitutional Court rejected this argument, because expert work done as part of legal proceedings does not give rise to or configure a subordinate labour relationship. An expert is an evidentiary agent who performs a public service. Experts continue to pursue their professional occupations, but when they are called on to provide their services in court, their remuneration (and only that, because even as experts they freely exercise their professional charge without interference from anyone else) is set out in specific legislation.

Under the terms of its Organic Law, the Constitutional Court can confirm the unconstitutionality of a norm which has been disapplied in a lower court on the grounds of its unconstitutionality, but on the grounds that it is in breach of constitutional norms or principles other than those relied on by the lower court.

The Court noted, as regards the obligation to serve as a court expert, that not every expert is required to make the same degree of sacrifice. The concrete case before the Court did not involve experts serving in an official establishment, laboratory or department, or persons on official lists of people who can be called to serve as experts. The Court said that it was therefore possible to talk about the imposition of a true legal requirement to collaborate with the court, and the legal regime that bound the expert concerned imposed a personal cost on him that demanded proper compensation.

When there is a conflict between the public interest – which must prevail – and a private interest, and assuming that it is legitimate to impose the sacrifice in question (failing which the agent would be liable for an unlawful fact), the legally acceptable solution within the framework of a state based on the rule of law is to compensate the possessor of the sacrificed interest, thereby restoring that possessor to parity with the other possessors of similar private interests.

The Court found that the issue in the present case was the right to be compensated for one's 'sacrifice'. If the expert's right to fair compensation for services provided and the right of access to the courts are to be kept in balance with one another, it is necessary for there to be a degree of restraint when the standards for the amount of experts' fees are set. It is understandable for the decision to fix the prices of services to the courts not to be subject to market rules, because this is the only way to ensure that the effect those prices have on the final amount of court costs is compatible with the guarantee of access to justice.

The Court observed that there is no constitutional requirement which states that the remuneratory value of expert opinions must be unlimited. However, the imposition of a maximum, unbreakable ceiling is so absolute an imposition of the amount of the pay due in return for expert work that it could, in abstract terms, lead to situations in which the sacrifice required of the expert is not properly compensated. The absence of a general clause that would have allowed the courts to take account of exceptional circumstances when determining the price of an expert opinion meant that judges were unable to consider concrete cases in which fair compensation would exceed the figure set in the norm. To put it another way, by imposing a maximum limit, the norm disproportionately limited the right to fair compensation.

For these reasons, the Constitutional Court found that the maximum limit imposed by the norm before it was unconstitutional.

Cross-references:

Constitutional Court:

- nos. 352/91, 14.07.1991; 467/91, 18.12.1991; 1182/96, 20.11.1996; 380/06, 27.06.2006; 421/07, 16.10.2007; 444/08, 23.09.2008; 301/09, 22.06.2009; 525/11, 09.11.2011 and 656/14, 14.10.2014.

Languages:

Portuguese.



Identification: POR-2015-1-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 03.02.2015 / **e)** 96/15 / **f)** / **g)** *Diário da República* (Official Gazette), 43 (Series I), 03.03.2015, 1269 / **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.**

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

Keywords of the alphabetical index:

Criminal liability / Criminal liability, elements, precision / Constitutional Court, decision, binding effect.

Headnotes:

The requirements imposed by the need for legal certainty in the criminal law and to preserve the principle of equality are only met when a concrete, individualised decision concerning criminal liability can be founded on a normative provision that clearly and accurately defines both the preconditions for a crime to exist, and the type and degree of punishment. In addition, the Constitutional Court is empowered to find a challenged norm to be unconstitutional on grounds other than those put forward by the applicant challenging the norm's constitutionality.

Summary:

I. Under the combined terms of the Constitution and the Organic Law governing the Constitutional Court, whenever the Court has held the same norm unconstitutional in at least three concrete cases, both it and the Public Prosecutors' Office possess the power to initiate abstract review proceedings in which the Court must decide whether or not the norm should be declared unconstitutional with generally binding force.

In the present case the Public Prosecutors' Office requested the Court to conduct abstract review of a Notarial Code norm that had already been found unconstitutional more than three times. This norm provided that signatories of notarised acts must be warned in advance that they were subject to the penalties applicable to the crime of making false declarations before a public official if they culpably, and to the detriment of someone else, made or confirmed false declarations, and that that warning should be included in the notarised document.

II. The Court noted that the type of crime to which the Notarial Code article referred did not match either the descriptive title or the content of any provision in the Criminal Code or of any other legislation known to the Court.

The Executive Law that approved the current Notarial Code was issued under the government's own

competence and not under a parliamentary law authorising the government to legislate. It is a primary requirement of the principle that criminal penalties must be provided for by law that both the criminalisation of a fact and the penalty for it must be set out in either a formal law passed by the Assembly of the Republic, or an executive law which the government was authorised to issue by the Assembly. This is because the definition of crimes, criminal penalties, security measures and the preconditions for their applicability falls within the Assembly of the Republic's partially exclusive legislative competence.

In past cases, the Constitutional Court had consistently held that the Assembly of the Republic's partially exclusive legislative competence is not infringed if the norms in a legislative act issued by the government on a subject encompassed by that partial exclusivity do not create a regime which materially differs from that which had thus far been in force as a result of legal acts issued by competent organs. In the present case, the two norms did differ in the ways in which they determined the penalty applicable to the conduct they typified as criminal. Although both employed a technique whereby they referred to another sanction-imposing norm, the original text referred to the "penalties applicable to the crime of falsehood", whereas the latest version said that agents were liable to the "penalties applicable to the crime of making false declarations before a public official". The Court held that this change inevitably caused a substantial alteration in the norm's scope compared to that of the previous version. In the absence of the appropriate legislative authorisation, this fact meant that the norm infringed the formal dimension of the principle that criminal penalties must be provided for by law and was therefore unconstitutional.

The task of establishing a match between the term 'crime of making false declarations before a public official' and a specific legal type of crime is an interpretative one and faces difficulties and uncertainties that are incompatible with the *nulla poena sine lege certa* aspect of the principle of legality. The requirements imposed by the need for certainty in the criminal law and to preserve the principle of equality are only met when a concrete, individualised decision as to criminal liability can be founded on a normative provision that clearly and accurately defines both the preconditions for a crime to exist, and the type and degree of punishment.

The Court emphasised that it had found the challenged norm unconstitutional in three previous concrete cases and that the condition for the issue of a general declaration of unconstitutionality under the

ex post facto abstract rules was thus fulfilled. However, some of the decisions on which the Public Prosecutors' Office had founded its review request were based on the finding that the norm was materially unconstitutional because it was in breach of the principle that a crime must be provided for by law and that that criminalising law must clearly determine the applicable penalty.

The Court therefore asked itself whether the type of procedure which the Organic Law governing the Constitutional Court lays down for the generalisation of findings in which the same norm has been held unconstitutional on multiple occasions, allows a declaration of unconstitutionality with generally binding force to be based on grounds other than those that motivated the rulings or decisions on which the request for that declaration was itself founded. Specifically, in the present case, the question was whether a declaration of organic unconstitutionality was permissible when the justifying decisions resulted from the norm's material unconstitutionality.

Looking at its previous jurisprudence, the Court answered its own question in the affirmative. The Organic Law governing the Constitutional Court states that the Court can declare the unconstitutionality of norms that are brought to it for review, on the grounds that they are in violation of constitutional norms or principles other than those referred to by the petitioner. This is the same as saying that the Court can declare such norms unconstitutional in the light of constitutional norms or principles other than those referred to in the reasoning underlying the earlier rulings that served as the basis for the review request.

As such, and in the light of its past decisions, the Court declared the norm unconstitutional with generally binding force.

III. The Ruling was the object of one concurring and three dissenting opinions.

Cross-references:

Constitutional Court:

- nos. 266/87, 08.07.1987; 340/05, 22.06.2005; 114/08, 20.02.2008 and 379/12, 12.07.2012.

Languages:

Portuguese.



Identification: POR-2015-1-003

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.02.2015 / **e)** 101/15 / **f)** / **g)** *Diário da República* (Official Gazette), 60 (Series II), 26.03.2015, 7506 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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 / Forfeiture / Prostitution / Presumption, legal, rebuttable.

Headnotes:

A norm that establishes a presumption that the difference between the value of the accused person's assets and the amount that would be compatible with his or her lawful income constitutes a gain derived from criminal activity is not unconstitutional. The presumption does not offend the presumption of innocence, as this special regime governing the forfeiture of assets to the State operates solely after conviction. It also remains possible for the accused person to prove that the presumption that the differential between the two sets of asset values is a gain derived from criminal activity is inaccurate.

Summary:

I. This concrete review case involved an appeal on constitutional grounds by a private individual against a decision of the Lisbon Court of Appeal, in which the appellant challenged the constitutionality of a legal provision that establishes measures designed to fight organised and economic/financial crime.

This norm defines a special regime covering evidence gathering, setting aside the duty of professional secrecy and the forfeiture of assets to the state in the case of certain crimes that are listed in the law, one of which is the crime of causing or inciting prostitution for gain. Where the special regime governing the forfeiture of assets to the State is concerned, the norm provides that where a person is convicted of any of the crimes on the list, it is presumed that the

difference between the value of his or her assets and the amount that would be compatible with his or her lawful income is a gain derived from criminal activity.

The decision centred on the appellant's argument that this norm is unconstitutional, because it establishes a presumption that implies a reversal of the burden of proof and is in breach of the principle of the presumption of innocence, thereby injuring the guarantees which the Constitution affords to accused persons in criminal proceedings.

II. The Court took the view that when it established this presumption, the legislator assumed that in principle such cases entail illicit gains made from criminal activities. The Court considered it understandable for the legislator to attribute any income over and above the accused person's lawful income to such activities and also noted that the appellant could always have demonstrated that the amount in question was not in fact acquired unlawfully.

The Constitutional Court noted that the special regime governing the forfeiture of assets to the State operates after conviction and thus does not contradict the constitutional presumption of innocence. What is more, the accused person always has the opportunity to prove that the presumption that the differential between the two sets of asset values is a gain derived from criminal activity is inaccurate – a possibility that applies to all legal presumptions unless the legislator provides otherwise.

Accordingly, the Court found no unconstitutionality in the norm before it.

III. The Ruling was the object of a partial dissenting opinion, whose author believed that the formal requirements for hearing the appellant's first question of constitutionality, which had been rejected by the Court, had been met.

Languages:

Portuguese.



Identification: POR-2015-1-004

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 12.02.2015 / **e)** 123/15 / **f)** / **g)** *Diário da República* (Official Gazette), 130 (Series II), 07.07.2015, 18125 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

4.7.14 Institutions – Judicial bodies – **Arbitration.**

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

Keywords of the alphabetical index:

Arbitration, access to courts, exclusion / Access to courts, scope / Civil procedure / Proportionality.

Headnotes:

A norm requiring disputes regarding industrial property rights to be settled by compulsory arbitration, and expressly precluding direct access to a court, is not unconstitutional. The Constitution expressly permits the existence of arbitration tribunals and allows the ordinary legislator to institutionalise non-judicial conflict-resolution instruments and formats. However, the limitation of the ability to resort to the compulsory arbitration procedure to the thirty days of the initial phase of the administrative procedure involved in issuing a Market Introduction Authorisation (hereinafter, "MIA"), or at most to the period before that procedure is concluded, is a disproportionate limitation on the right of access to justice as it placed especially serious burdens on patent holders.

Summary:

I. In this concrete review case two pharmaceutical companies (Bayer Portugal and Lusal) appealed against a decision of the Lisbon Court of Appeal. That decision was handed down in injunction proceedings, which are characterised by the fact that they are summary and provisional in nature and serve as a mere instrument in relation to the main action, are intended to protect a right that will then be determined in the main proceedings and are dependent on the latter.

Given these specific characteristics, in its previous jurisprudence, the Constitutional Court has questioned whether many of the questions of constitutionality raised in relation to injunctions can in fact be appealed to the Court. However, this issue

of the admissibility of appeals concerning questions of constitutionality is not posed when the norms in question apply to the object of the main dispute and are relevant to the main proceedings. Nor is it relevant if the norms are only applicable to injunction proceedings themselves, given that any finding of unconstitutionality would be restricted to them and would not affect anything else. As such, the fact that the norms before the Court in the present case referred to the ability to bring injunction proceedings meant that there was no prior question that would have prevented the constitutional appeal from being heard.

Two questions of constitutionality were raised by the appellant. The first concerned a norm which provides that in the case of a dispute, industrial property right-holders may only resort to compulsory arbitration and definitively cannot bring an action before a court of law, even in order to seek an injunction. The second concerned a norm that prevented such right-holders from bringing legal action against the holder of, or applicant for, a Market Introduction Authorisation more than thirty days after publication by the National Authority of Medicines and Health Products (Infarmed, in the Portuguese acronym) of the details of medicines which, at that moment in time, had not yet received at least one of the following: a market introduction authorisation; a retail sale price authorisation; or an authorisation including it on the list of medicines whose price is partly or wholly paid by the state when they are prescribed by a doctor.

The Law containing these norms was designed to combat factors that were blocking the entry of generic medicines into the Portuguese market, or at least making that introduction difficult, some of which were derived from uncertainties about possible violations of industrial property law.

II. The Constitutional Court took the stance that the right derived from a patent on a reference medicine combines the protection afforded by the right to private property with that conferred by the right of cultural creation. Intellectual property is private property and falls within the essential core of the fundamental right to property and ownership. However, the protection of copyright is not limited to the protection the state provides to property. The Constitution provides that the right of cultural creation includes the right to see one's copyright protected by law. Intellectual property is encompassed by the scope of the specific regime governing constitutional rights, freedoms and guarantees, and thus enjoys a more intense protection than that which the Constitution provides to economic, social and cultural rights.

Even though the rights at stake here do not formally take the shape of 'copyright', patents are exclusive rights obtained with regard to inventions, and, basically speaking, represent the protection of those inventions.

The constitutional norm that protects both the freedom of cultural creation, including the right to invent, and copyright simultaneously qualifies intellectual (including industrial) property rights as both fundamental personality rights and fundamental incorporeal property rights to intangible items. This is a *sui generis* fundamental right that encompasses elements from both personal law and property law.

The questions of constitutionality raised in the concrete case before the Court focused on ensuring respect for both the right of access to the law and the courts in order to defend rights and interests that are protected by law, and the right to an effective jurisdictional protection.

The sole purpose of the administrative procedure under which Infarmed can authorise or register the introduction into the Portuguese market of a medicine intended for human use is to evaluate that medicine's quality, safety and efficacy, and the procedure expressly excludes the consideration of any possible industrial property rights.

The Industrial Property Code (CPI) reserves jurisdiction over the validity of patents to the courts. Only a court decision can annul a patent or declare its nullity. The Constitutional Court stated that, if arbitration proceedings consider the possibility that the respondent (in cases like the present one, the party seeking to bring a generic medicine to the market) may be undermining the validity of the applicable patent, they are addressing a subject which the law reserves to the jurisdiction of the State. What is more, the rights at stake here are fundamental constitutional rights that also raise questions involving important public and private interests.

Promoting research and innovation with regard to pharmaceutical products is vital to public health and implies protecting both trust (legal certainty) and the investments made by private initiative.

The Court was of the view that, contrary to the position taken by European Union (EU) Law, from the perspective of Portuguese constitutional law the 'free use' of an invention must be seen as a restriction on a fundamental right pertaining to the inventor which is only admissible to the extent that it is justified in order to safeguard interests of the community and even

then is subject to the limits of appropriateness, need and proportionality which the Constitution imposes on norms that restrict fundamental rights.

The Court stressed that the overall legal regime involved in the present case expressly provides for a court to intervene in an appeal against an arbitration tribunal's decision on the merit of the case. However, it does not provide for any form of articulation between the arbitration process and the applicable administrative procedure. On the contrary, neither any invocation of industrial property rights, nor the respective arbitration process and decision have any influence whatsoever on the administrative procedure that leads to the grant or refusal of an MIA. In other words, the competent administrative entities can issue MIAs without considering the possible existence of relevant industrial property rights.

The Court said that it was not questioning *a priori* the legislator's freedom to shape legislation regarding time limits on access to justice, on condition that those limits do not make that access impossible or excessively difficult.

The way the legislator determined the beginning of the time limit placed especially serious burdens on the patent holder in terms of how it first becomes aware of a situation which it may then want to challenge. The countdown began with the publication of MIA applications for generic medicines on a website, including a simple mention of the name of the reference medicine. This procedure did not adequately ensure that the holder of the industrial property rights to the latter was effectively aware of the beginning of the time-limit within which it would be able to go to arbitration if it chose to do so and there was no provision for any means of notification or information other than the application's appearance on the website.

If arbitration proceedings – the only form of jurisdictional protection available to the industrial property right-holders in question – could only be initiated within thirty days of the publication of the application for an MIA, then the patent holders could only initiate them during the MIA procedural phase. In other words, this could only happen before the issue of an administrative act authorising an activity which could hypothetically challenge the exclusive rights afforded by the patent, and the fact is that little information was made available to the patent holder during that phase.

The Court recalled that in this particular case this form of resolving disputes (compulsory arbitration) involves claims based on industrial property rights regarding reference medicines. It said it was plausible that a thirty-day deadline – with no regard for the type of

patent which could be in question and which might involve a high degree of technical and scientific complexity, particularly in terms of the substances and active principles and the manufacturing processes concerned – would not prove sufficient for the patent holder to be able to assess the real risk and the extent to which its right could be affected, and thus to be in a position to weigh up whether it should turn to the justice system in the form of the conflict-resolution process laid down in the law.

The norm completely precluded any jurisdictional protection the right-holder might want to seek later on. Even though the patent (and the exclusive right it provides) remained, its effects from the point of view of protection against generic medicines would be "paralysed" by the impossibility of exercising the right to jurisdictional protection at any time after the deadline set by the norm. This impossibility for industrial property rights linked to reference medicines to be jurisdictionally protected against generic medicines conflicted with the right of access to the courts and to an effective jurisdictional defence of the right to exclusivity provided by a patent.

The legislator chose to dissociate the administrative procedure leading to the issue of an MIA from the jurisdictional arbitration procedure designed to protect industrial property rights regarding reference medicines. This meant that the act authorising introduction into the market did not in its own right ensure the absence of possible violations of the industrial property right in question.

Notwithstanding the interests invoked by the legislator – the need for speed in order to make it possible to bring generic medicines to the market quickly, and the need to reduce health costs and thus make medicines both more accessible to citizens and cheaper for the state – the norm left other constitutionally important interests unprotected.

The norm also represented the prevalence of the right to free private economic initiative over both a right anchored in the freedom of cultural creation (which is one of the constitutional rights, freedoms and guarantees), and the right to property, in ways which the normative framework applicable to the protection of fundamental rights enshrined in the Constitution does not permit.

The Court's decision to find the second norm before it unconstitutional was thus based on the finding that the time-limit – a mere thirty days – was insufficient given both the lack of information available to the patent holder at the moment when the law required it to decide whether to go to compulsory arbitration, and the complexity of the subject matter involved.

Supplementary information:

As part of its reasoning, the Court reviewed the comparative law question of whether requests for an injunction can be subjected to arbitration.

Cross-references:

Constitutional Court:

- nos. 230/86; 08.07.1986; 289/86, 05.02.1986; 33/88, 02.02.1988; 52/92, 05.02.1992; 757/95, 20.12.1995; 259/97, 18.03.1997; 400/97, 21.05.1997; 262/98, 05.03.1998; 254/99, 04.05.1999; 442/00, 25.10.2000; 235/01, 23.05.2001; 247/02, 04.06.2002; 491/02, 26.11.2002; 310/05, 08.06.2005; 178/07, 08.03.2007; 311/08, 30.05.2008; 577/11, 29.11.2011; 350/12, 05.07.2012; 2/13, 09.01.2013; 230/13, 24.04.2013 and 781/13, 20.11.2013.

Languages:

Portuguese.

*Identification:* POR-2015-1-005

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 25.02.2015 / **e)** 141/15 / **f)** / **g)** *Diário da República* (Official Gazette), 52 (Series I), 16.03.2015, 1569 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – **Nationals living abroad.**

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

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Citizenship, European / Citizenship, link, real and effective / Equality / European Community law, preliminary ruling / European Union / Freedom of movement / Right to emigrate / Social assistance, entitlement, condition.

Headnotes:

Two norms seeking to restrict eligibility for social assistance are unconstitutional on the grounds that they are in violation of the principle of equality. The first provision required Portuguese citizens to legally reside in Portugal for at least one year before they were entitled to a social assistance benefit. Portuguese citizens possess a fundamental right to live in the territory that forms the physical and geographic basis for the Portuguese community and it is thus impossible for a Portuguese person to reside in Portugal illegally. When a person emigrates or simply leaves Portuguese territory, his or her effective state of belonging to the Portuguese community remains intact. Treating such citizens differently from other Portuguese citizens in this way is not justified. The second provision introduced a further requirement that members of the household of any applicant for the social assistance benefit to have legally resided in this country before the benefit could be granted.

Summary:

I. This *ex post facto* review case was brought before the Constitutional Court by the Ombudsman. It addressed norms that together required both Portuguese citizens and the members of their household to legally reside in Portuguese territory for at least a year before they could apply for and receive the Social Insertion Income (hereinafter, “RSI”).

The Ombudsman questioned the constitutionality of requiring Portuguese citizens to have lived in Portugal for a minimum period of time before they could apply for this benefit. He argued that excluding certain Portuguese citizens from the right to the RSI was contrary to the principle of universality, was in breach of the principle of equality because it illegitimately discriminated against resident Portuguese citizens and denied the right to a minimally dignified standard of living.

In such cases the author of the challenged norm(s) is entitled to send the Court its comments on the challenge. Under this prerogative the Prime Minister argued that in the Government’s view the norms

were not unconstitutional, because the minimum residence requirement was justified by the nature of the benefit and was a reasonable condition for ensuring the existence of a certain prior link to the country. He argued, moreover, that under European Union (EU) law no distinction can be made in relation to any EU citizen with the right of residence – all must be treated equally throughout the Union, regardless of whether they are from the host country or another Member State. The Prime Minister therefore argued that the introduction of a minimum residence period in order to receive ongoing social benefits aimed at avoiding the payment of such benefits to persons who simply entered Portugal and would otherwise have been entitled to any form of support intended for members of the community for that reason alone.

II. The Constitutional Court observed that the RSI forms one part of a range of social security measures included in the overall social welfare protection system. The Law setting out the Bases of the Social Security System makes the award of solidarity subsystem benefits conditional on residence in Portuguese territory.

When deciding who should be awarded the RSI, the legislator employed a unitary concept of “legal residence in Portugal”, which was applied to three groups of people:

- i. Portuguese citizens;
- ii. nationals of other EU Member States (and of states that belong to the European Economic Area (hereinafter, “EEA”) or with which the EU has an agreement providing for the free movement of natural persons);
- iii. nationals of other states.

Inasmuch as the Constitution does not allow Portuguese citizens to be expelled from Portuguese territory and does give them the right to freely travel or settle anywhere in that territory, when the concept of legal residence is applied to any Portuguese person living in Portugal it tends to be confused with the mere identification for legal purposes of his or her domicile. The Court held that this must also apply to Portuguese emigrants returning to their country. Where citizens who are nationals of an EU (or EEA) Member State are concerned, the Treaty on the Functioning of the European Union (TFEU) provides that any person who holds the nationality of a Member State is also a citizen of the European Union and that the latter citizenship is additional to national citizenship and does not replace it.

EU citizens enjoy the right to move and remain freely within the territory of the various Member States, but this right is not unconditional and situations can therefore arise in which an EU citizen who is not also a Portuguese citizen resides in Portugal illegally.

The situation of persons who are neither Portuguese nor citizens of another EU Member State is very different. In their case the fact that the legislator has adopted a unitary concept of legal residence means that residing in Portugal is no longer a sufficient reason for access to the RSI benefit.

Regarding the Prime Minister’s arguments, the Constitutional Court agreed that if the minimum residence requirement was derived from EU law, it would be binding on the Portuguese legislative authorities under both EU law itself (in accordance with the principle of the primacy of EU Law) and Portuguese constitutional law. However, if this were not the case then the legislative decision to exclude Portuguese persons who had been “legally resident” in Portuguese territory for less than a year from the RSI payment would constitute a free choice by the ordinary legislator and thus one whose conformity with the Constitution the Court would need to consider.

The Court recalled that EU law does not always impose the uniform treatment of national citizens and citizens of other EU Member States. The fundamental principle of equal treatment for these two groups of citizens is subject to limitations and derogations established by EU law itself, including with regard to aspects of the freedom of movement and residence. The principle must thus be acknowledged to be a relative one. All “social assistance” benefits are also excluded from this equal treatment requirement and the fact that the RSI is non-contributory means that it is covered by this exclusion.

EU law also enshrines a principle that the social security regime of host Member States cannot be unreasonably overburdened. In its case-law the Court of Justice of the European Union (CJEU) has accepted conditions Member States have placed on the principle of equal treatment with regard to social benefits of a strictly ‘assistentialist’ nature. Union Law does not oblige the Member States to treat their own nationals and those of other Member States equally.

The Court noted that the entity which issued the challenged norms had effectively accepted an “obligation”, to treat other European citizens in the same way as their Portuguese counterparts and *vice versa*, that was not imposed on Portugal by EU law.

The Court considered that the question of constitutionality posed here was whether the legislator could formulate the legal regime governing the RSI in such a way as to impose the requirement that Portuguese citizens must have legally resided in Portuguese territory for a minimum period of time before being entitled to this social benefit. The legislator's view was that within a framework in which the state is being forced to redistribute scarce resources, it was necessary to ensure that a benefit like the RSI would only be granted to people with effective ties to the Portuguese community, whether they are Portuguese or from other countries.

However, the Court considered that inasmuch as the terms 'nationality' and 'citizenship' signify the bond that links an individual to a given state, it was hard to understand how the ordinary legislator could subject Portuguese citizens to ulterior requirements intended to prove or disprove the existence of effective bonds uniting them with the community in Portugal. The Constitution bases itself on the principle that being Portuguese is a personal status which adequately fulfils the condition of proof of the existence of that effective bond.

The fact that a Portuguese person lives abroad can imply that Portuguese law only grants him or her rights that are not incompatible with his or her absence from the country. However, when it required Portuguese citizens to demonstrate that they had been "legally residing" in Portugal for at least a year, the ordinary legislator instituted a regime governing access to the RSI that was more burdensome for one specific group of Portuguese citizens than for others. The question was thus whether the legislator was entitled to create differences in a legal regime whose only grounds (for less favourable treatment of some such citizens) were factual circumstances that represented the exercise of constitutionally protected individual freedoms.

The Constitutional Court held that the legislator was not so entitled and therefore declared both norms to be unconstitutional.

III. The Ruling was the object of three concurring (two concurring with the decision, but not the grounds for it; and one whose author concurred with both the decision and the grounds, but would have preferred to refer the question to the CJEU for a preliminary ruling) and two dissenting opinions. In all the opinions, both concurring and dissenting, the main issue was whether in this particular case the question of constitutionality before the court should have been preceded by the possible question of the legislative solution's compatibility with EU Law. The views of the five Justices varied, ranging from the opinion that the

latter question was irrelevant (because the decision to extend requirements imposed on nationals of other Member States to Portuguese citizens was not an issue on the level of the constitutional-law validity of the norm as applicable to such citizens) to a preference for its reference to the CJEU for a preliminary ruling.

Cross-references:

Constitutional Court:

- nos. 232/03, 13.05.2003; 412/02, 10.10.2002 and 191/88, 20.09.1988.

European Court of Justice:

- C-333/13, 11.11.2014, *Dano v. Jobcenter Leipzig*, not yet published, para. 78;
- C-408/03, 23.03.2006, *Commission v. Belgium*, paras. 37 and 41;
- C-140/12, 19.09.2013, *Pensionsversicherungsanstalt v. Brey*, not yet published, para. 55;
- C-424/10 and C-425/10, 21.12.2011, *Joined Cases Ziolkowski and Szeja and others v. Land Berlin*, *European Court Reports* I-14035, para. 40;
- C-158/07, 18.11.2008, *Förster v. Hoofddirectie van de Informatie Beheer Groep*, *European Court Reports* I-08507, paras. 49-60;
- C-413/99, 17.09.2002, *Baumbast and R v. Secretary of State for the Home Department (United Kingdom)*, *European Court Reports* I-07091, para. 90;
- C-200/02, 19.10.2004, *Zhu and Chen v. Secretary of State for the Home Department (United Kingdom)*, *European Court Reports* I-9925, para. 32;
- C-209/03, 15.03.2005, *Bidar v. London Borough of Ealing and Secretary of State for Education and Skills (United Kingdom)*, *European Court Reports* I-02119, paras. 56-57 and 59-61.

Languages:

Portuguese.



Identification: POR-2015-1-006

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.03.2015 / **e)** 178/15 / **f)** / **g)** *Diário da República* (Official Gazette), 130 (Series II), 07.07.2015, 18166 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

Keywords of the alphabetical index:

Election, democracy, participatory / Election, law / Fundamental rights, limitation / Fundamental rights, limitation, proportionality / Election, political party, right to participate in elections.

Headnotes:

All democratic systems, including consolidated democracies, impose a variety of formal conditions on electoral processes. The electoral process is a sequence of stages that are delimited in time and the setting of time-limits is inevitable. The norms challenged here do not contain restrictions on a fundamental right in the strict sense of the term ‘restriction’, but rather acceptable limits on such rights.

Summary:

I. Besides its specific powers to review the constitutionality of norms and hold them to be unconstitutional (in both abstract and concrete review) as the constitutional review organ *per se*, the Constitutional Court is also competent with regard to other matters, particularly electoral processes. In the instant case, the Court analysed a political party’s appeal against a decision in which the Funchal Court denied its application to submit a list of candidates for election to the Legislative Assembly of the Madeira Autonomous Region (RAM, in the Portuguese acronym).

At issue here was the constitutionality of an article in the RAM Legislative Assembly Electoral Law, under which candidacies can only be submitted by political parties and only by parties which have been registered by the beginning of the time-window for that submission.

The Funchal Court applied this norm and thus refused to admit the list of candidates of a party whose registration with the Constitutional Court was only completed after the window had already opened (albeit before it ended). The appellant political party argued that the norm was unconstitutional because it was in opposition to the right of citizens, acting via lawfully-constituted political parties, to compete democratically in order to influence the will of the people and to organise political power and because it prevented an indeterminate number of citizens who would have voted for the party from taking part in the Region’s political life via the Members of the Legislative Assembly they would otherwise have elected.

II. The Constitutional Court began by noting that in general, electoral laws, including those of countries where democracy is fully consolidated, impose a variety of formal conditions on electoral processes: deadlines; documentary requirements; certifications; and even the payment of deposits, as in countries like France and the United Kingdom. The electoral process is a sequence of stages that are delimited in time and the setting of time-limits is inevitable.

The Court noted that the exercise of the fundamental right to participate in democracy by taking part in elections is subject to formal constraints, whose dual purpose is to ensure that participation is serious and that elections are the object of healthy competition. It took the view that the norm in question does not constitute a ‘restriction’ on a fundamental right, but rather the lesser format ‘limitation’, and so cannot be invoked as grounds for the norm’s unconstitutionality. Moreover, even if one were to admit that some degree of review of the proportionality of limitations on the exercise of fundamental rights were possible, in the present case the Court considered the condition imposed by the law to be both appropriate and necessary. Appropriate, because it makes it possible to fix the moment in time at which everyone knows what parties and coalitions are capable of taking part in the elections and allows electoral strategies to be adjusted accordingly. Necessary, because it is indispensable to ensuring that the public is aware of all the competing political forces in each election and enabling voters to know exactly when candidacies can be submitted.

The constitutional norms the appellant considered to have been violated do not contain restrictions on a fundamental right in the strict sense of the term ‘restriction’, but rather limits on such rights. Unlike restrictions, limits do not concern the right itself, but the way in which it can be exercised. As the Universal Declaration of Human Rights (UDHR) states, when it comes to exercising rights and

freedoms everyone is subject and only subject to the limitations imposed by law, and the only goals of such limitations must be to guarantee that rights are recognised and respected and that the just demands made in the name of morality, public order and the well-being of a democratic society are fulfilled.

The Court was of the view that the challenged norm does not directly undermine the constitutional right of citizens to take part in political life and the management of the country's public affairs. Recognition of a political party's legal personality is dependent on that party being registered and registration is thus constitutive and not merely declarative in nature. Prior to its registration the political party does not exist and the Portuguese legal system does not admit the formal existence of unregistered political parties. If it is not registered with the Constitutional Court, there is no political party, but just an association with political ends to which the legal regime governing political parties and the rights pertaining to them does not apply.

III. The Ruling was the object of a dissenting opinion whose author pointed out that the right to compete democratically via political parties in order to help influence the will of the people is one of the constitutional rights, freedoms and guarantees that pertain to citizens. He argued that this means that limitations and conditions on the exercise of the right must be justified by constitutionally-important interests and must comply with the principle of proportionality. The members and supporters of the party in question were prevented from exercising this right, notwithstanding the fact that it submitted its list of candidates before the final legal deadline for doing so. The sole justification for this was the fact that only political parties are recognised to possess the power to submit candidacies and then only when the party is registered by the beginning of the submission window. In the present case, the party was not yet officially formed when the window opened, although the formal process of constituting it at the Constitutional Court had already begun nearly two months earlier. The resulting registration only occurred later on for reasons that had nothing to do with the appellant party.

The dissenting Justice contended that the interests the challenged limitation under review here was designed to protect ought to be concretely weighed against the appellant's constitutional-law position and that it would only be justified for those interests to prevail if they were manifestly and irremediably injured by not observing the limitation. In his view, the majority's reasons for not accepting the appellant's position were insufficient. Accepting that position would not have undermined the

seriousness of the electoral process, given that the party's intention to register itself and its formal request to do so were already public knowledge and the party was not responsible for the reasons that prevented the registration from happening in time to meet the first of the legal deadlines for submitting candidacies. On top of all this, the second and final deadline was actually met and the need for all the parties and coalitions running for election to enjoy equal opportunities was thus fulfilled. The dissenting Justice argued that the applicable legal and procedural norms were important, but were nonetheless accessory and merely instrumental when set against an applicable fundamental right.

Cross-references:

Constitutional Court:

- no. 253/99, 04.05.1999.

Languages:

Portuguese.



Identification: POR-2015-1-007

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 19.03.2015 / **e)** 194/15 / **f)** / **g)** *Diário da República* (Official Gazette), 132 (Series II), 09.07.2015, 18443 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.5 General Principles – **Social State**.
- 3.10 General Principles – **Certainty of the law**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 3.23 General Principles – **Equity**.
- 5.1 Fundamental Rights – **General questions**.
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
- 5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.
- 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Austerity measures, economic crisis / Legal certainty / Public interest / Public sector worker, pay cuts / State budget.

Headnotes:

Public workers do not have a constitutional right to an irreducible salary, but solely a basic right to be paid. This basic right, taken alongside the principle of “equal pay for equal work, in such a way as to ensure a minimally dignified standard of living”, does not preclude the imposition of pay cuts. There is no rule with constitutional value that directly prohibits pay cuts and no such guarantee can be inferred from the fundamental right to be paid. However, pay cuts can nevertheless be subjected to review for conformity to the Constitution, on the basis of constitutional principles, particularly those of legal certainty and equality. In exceptional circumstances related to management of the State’s financial affairs, pay-cutting measures intended to safeguard the public interest can be accorded overriding importance.

Summary:

I. Whenever a court refuses to apply a norm on the basis that it is unconstitutional, the Public Prosecutors’ Office must appeal against the decision to the Constitutional Court. In this case the Public Prosecutor applied for a concrete review of a decision in which the Porto Labour Court refused to apply norms contained in the State Budget Law for 2011 (LOE2011) because it considered them to be materially unconstitutional.

Workers employed under individual labour contracts by the state-owned company STCP requested the lower court to order their employer to recognise their right to a new seniority bonus to which they argued they were entitled under the applicable collective labour agreement. STCP argued that it could not pay the additional amount, because the 2011 and 2012 State Budget Laws had effectively frozen such bonuses by prohibiting acts that increased pay packages. The Porto Labour Court found in favour of the applicants, refusing to apply the Budget norms on the grounds that they were unconstitutional.

In the past the Constitutional Court had already held that instrumental measures of this type are only valid if their purpose is to reduce public spending and to correct an excessive budget deficit as part of an overall programme that is delimited in time. There is no rule in the Constitution that directly, autonomously and *per se* guarantees that salaries cannot be cut.

However, such a rule does form part of the country’s ordinary legislation and is included in both the Regime governing Public Sector Labour Contracts (RCTFP) and the Labour Code.

It was argued at first instance that although this guarantee is created by ordinary legislation, it also enjoys parallel constitutional force due to the constitutional provision which states that the fact that the Constitution enshrines certain fundamental rights does not preclude the existence of others included in applicable ordinary laws and rules.

II. The Constitutional Court pointed out that the ordinary-law rule in question is only valid as regards pay in the strict sense of the term and is not absolute. The only absolute prohibition in the rule is on the arbitrary reduction by employers (public and private) of the amount of an employee’s pay without sufficient normative grounds for doing so.

The Court rejected the argument that workers’ have a right to an irreducible salary, whose inclusion in labour legislation gives it the force of a fundamental right under the open constitutional clause on the existence of fundamental rights outside the Constitution. Given the basic protection provided by the existence of a minimum guaranteed wage, the Court also considered that it is not possible to argue that pay above that minimum cannot be reduced because this is required by the dignity of the human person, or because such an irreducibility is a primary or essential asset, which is in turn the material criterion for determining whether one is in the presence of a subjective right that can be deemed fundamental; even though it is not enshrined in the Constitution, but only in ordinary law.

The Court observed that the constitution-drafters took the trouble to create a dense network of provisions designed to protect the compensation payable for work done and therefore enshrined the guarantees deemed necessary to ensure the position of workers in this respect in the Constitution. In addition to recognising the basic right to be paid, the constitution-drafters also established the principle of “equal pay for equal work, in such a way as to ensure a minimally dignified standard of living”, charged the state with “creating and updating a minimum national wage”, and required the ordinary legislator to make provision for “special guarantees” for wages. However, none of this signifies the existence of a constitutional right to be protected from pay cuts.

Accordingly, the Court was of the view that there were insufficient material grounds for considering the right not to have one’s pay reduced to be a fundamental legal right.

That which is a fundamental right, i.e. a right whose nature is analogous to that of the various constitutional rights, freedoms and guarantees, is the “right to be paid or compensated” for one’s work. This is fully accepted in legal doctrine and has been recognised by the Court in the past. However, the right to compensation is one thing; a right to a concrete amount, which by law cannot be reduced whatever the circumstances and the economic/financial variables that concretely condition it, is something else entirely. The ordinary-law restriction on reducing or otherwise negatively affecting a wage is not a guarantee-style dimension of the protection afforded to the right to be paid for one’s work, nor does a reduction in the *quantum* of a worker’s pay affect or restrict the right to be paid itself.

Inasmuch as there is no rule with constitutional value that directly prohibits pay cuts and no such guarantee can be inferred from the fundamental right to be paid, the Court was only able to gauge the constitutional conformity of the norms before it using parameters derived from certain constitutional principles, particularly those of trust and equality.

Pay cuts are of a budgetary nature and are not definitive. Even so, one can ask whether they are in breach of the principle of the protection of trust (legal certainty).

The protection given to the value ‘trust’ reflects the subjective application of the requirement to protect legal certainty. The protection of trust and legal certainty form a necessary condition for the fulfilment of the principle of a democratic state based on the rule of law.

The application of the principle of trust (certainty) must begin with a rigorous definition of the cumulative requisites that a “trustworthy” situation must meet in order for it to deserve protection. Once these requisites have been verified, it is necessary to weigh up the private interests which are unfavourably affected by the change in the normative framework that regulates them on the one hand, against the public interest which justifies the amendment on the other.

Significant pay cuts that encompass the entire universe of people paid out of public funds do not fall within the range of behaviours on the part of the decision-making authorities that can be called predictable. However, the Court considered that the country is currently going through an absolutely exceptional conjunctural situation from the perspective of the financial management of public resources. The budget imbalance generated strong pressure on Portuguese sovereign debt, with a

progressive rise in interest rates, thus posing serious funding difficulties for the Portuguese State and the country’s economy.

No one could reasonably doubt that the pay-cutting measures were intended to safeguard a public interest, that could be considered to be of overriding importance, and the Court considered that this was the decisive reason for rejecting the allegation that it was in the presence of a failure to protect that could be criticised in constitutional terms.

Pay cuts form part of a range of measures that the political authorities, acting in concert with the international bodies of which Portugal is a member, decided to take in order to restore a balance in the country’s public finances – a balance that was seen as absolutely necessary in order to prevent and staunch disastrous consequences in the economic and social sphere. The public interest that needed to be safeguarded was clearly identified and of key importance. The Court said that that interest necessarily had to prevail over the others at stake, even though one could not ignore the intensity of the sacrifice caused to the private spheres affected by the reductions in pay.

One could indeed ask whether the need to impose asset-related sacrifices in order to protect a public interest pertaining to everyone meant that the spheres of every citizen with the same capacity to contribute should have been equally affected. This would be one logical outcome of the principle that there must be equality in the responsibility for public expenditure, under which the sacrifices inherent in fulfilling public needs must be fairly distributed between all the country’s citizens. The measures before the Court do not divide the sacrifices imposed by the exceptional financial crisis situation between every citizen with the same capacity to contribute in the same way, inasmuch as their scope is not universal and they only fall on persons with a public employment relationship. The legislator could alternatively have taken fiscal measures that would have brought in tax revenues equal to the amount saved by the pay cuts. In that case, everyone with the same taxable income would have been subjected to an equal sacrifice from the point of view of their contribution to public expenses.

However, no one has established grounds for holding that the principle of equality in the responsibility for public expenditure requires the taking of fiscal system measures, thus predetermining the possible type of solution and taking any scope for free choice away from the democratically elected political decision-maker.

Whether the government should fight the deficit on the revenue side (primarily fiscal) or the spending side of the public finance equation (or indeed by means of a suitable combination of the two types of measure and by choosing the most appropriate ones from among all the various possibilities) was and continues to be the object of intense political and economic debate. It is not the Constitutional Court's place to take part in this debate, weighing up whether this or that measure is "better" or "worse". The Court stated that its responsibility in the present case was to gauge whether the actual solutions before it were arbitrary, because they gratuitously and unjustifiably overburdened a certain category of citizens.

The Court held that this was not the case. The decision not to forego pay cuts, taken within an overall framework of an articulated range of different budgetary consolidation measures that also include tax rises and other public spending cuts, was based on a rationale that is coherent with an action strategy whose definition remains within the scope of the ordinary legislator's freedom to shape policies.

As such, the Court unanimously found no unconstitutionality in the norms before it.

Cross-references:

Constitutional Court:

- nos. 237/14, 06.03.2014; 396/11, 21.09.2011; 620/07, 20.12.2007; 304/01, 27.06.2001 and 94/92, 16.03.1992.

Languages:

Portuguese.



Romania Constitutional Court

Important decisions

Identification: ROM-2015-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 12.11.2014 / **e)** 669/2014 / **f)** Decision on the exception of unconstitutionality of the provisions of Article 9.1 and 9.2 of Education Law no. 84/1995, Article 18.1 and 18.2 of Law on National Education no. 1/2011, as well as the provisions of Article 61.3 of the Law no. 47/1992 on the organisation and operation of the Constitutional Court / **g)** *Monitorul Oficial al României* (Official Gazette), 59, 23.01.2015 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

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

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

Keywords of the alphabetical index:

Education, compulsory / Education, duty of the State / Religion, sensibility, protection / Religion, state.

Headnotes:

In adopting its regulations on education, the legislator must take into account that the Constitution guarantees the right to religious education and does not place any obligation on students to attend Religion classes. In this respect, it should be a person's free choice to attend Religion classes, and the person's tacit consent should not be presumed, nor should express refusal to attend be required. In no case shall a person be put *ab initio* in a position to defend or protect his or her freedom of conscience, as such an approach would be contrary to the negative obligation of the State, which precludes the State from requiring persons to study Religion. Thus, a positive obligation rests on the State to ensure the

necessary above-mentioned environment shall be applicable solely on foot of the expression of the student's willingness to study the specific precepts of a certain religion, if the student is an adult, or if the student is a minor, his or her parents or legal guardian.

Summary:

I. A challenge was brought to the Constitutional Court claiming the unconstitutionality of Article 9.1 and 9.2 of Education Law no. 84/1995, as subsequently amended and supplemented, until the entry into force of the new Law (i.e. Law no. 1/2011), and of provisions of Article 18.1 and 18.2 of the Law on National Education no. 1/2011. These impugned laws (hereinafter, the "1995 Law" and the "2011 Law") regulate, on the one hand, the inclusion of Religion in the curriculum frameworks of primary, secondary and vocational education, as a school subject, part of the core curriculum and, on the other hand, the student's choice not to attend Religion classes, provided he or she expresses this choice in writing, if the student is an adult, or by his or her parent or legal guardian, if the student is a minor.

As grounds for the exception of unconstitutionality, it was claimed that the provisions of the 1995 Law, superseded by the 2011 Law, are unconstitutional given that children are obliged to attend Religion classes, which violates their and their parents' right to freedom of thought, conscience and religion. Although it was acknowledged that the impugned legal provisions allow parents to request in writing that the student shall not attend these classes, this regulation does not cancel the binding requirement to study the subject of Religion, as the child must study this subject until a written request for his or her exclusion from Religion classes is made.

In support of the exception, the following constitutional provisions were invoked: Article 1.3 of the Constitution (the rule of law); Article 4.2 of the Constitution (the equality of citizens); Article 11 of the Constitution (international law and domestic law); Article 15.1 of the Constitution (the universality of rights and freedoms of citizens); Article 16.1 of the Constitution (equal rights); Article 20 of the Constitution (international human rights treaties); Article 21.3 of the Constitution (right to a fair trial); Article 23 of the Constitution (individual liberty); Article 29.1, 29.5 and 29.6 of the Constitution (freedom of conscience); as well as Article 6 ECHR (right to a fair trial); Article 9 ECHR (freedom of thought, conscience and religion); and Article 14 ECHR (prohibition of discrimination).

In addition, a number of international instruments were invoked: all of the European Convention on Human Rights; Article 2 Protocol 1 ECHR (right to education); Article 1 Protocol 12 ECHR (general prohibition of discrimination); Articles 18 and 26 of the International Covenant on Civil and Political Rights (ICCPR) (freedom of thought, conscience and religion, and the right to equality respectively); Article 13.3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (freedom of parents to choose their child's school); Article 2 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (prohibition of discrimination); and Articles 1, 3.d and 5.1.b of Section 2 of the Convention against Discrimination in Education, ratified by Decree no. 149 of 2 April 1964 (concerning discrimination and the liberty of parents to choose their child's school).

II. Having examined the exception of unconstitutionality, the Court held as follows.

First, as concerns the exception of unconstitutionality of the provisions of Article 9.1 and 9.2 of the 1995 Law and of Article 18.1 and 18.2 of the 2011 Law, the Court found that the inclusion of Religion as a school subject and part of the core curriculum does not represent in itself a problem likely to generate non-compliance with the freedom of conscience, as long as the impugned provisions do not give rise to obligations to attend courses covering a particular religion, contrary to one's beliefs.

Thus, the Court found that the provisions of Article 9.1 of the 1995 Law and of Article 18.1 of the 2011 Law reflect the constitutional provisions of Article 32.7, which states: "The State shall ensure freedom of religious education, subject to the specific requirements for each religious cult. In public schools, religious education is organised and guaranteed by law." The mandatory nature of Religion is enforceable only against the State, which shall organise religious education by making provision for the teaching of Religion for the 18 religions recognised under Romanian law. Article 9.2 of the 1995 Law and Article 18.2 of the 2011 Law render Religion classes optional by giving the student the right to choose not to attend these classes, whether through the direct choice of the adult student, or for a minor student, through his or her parents or legal guardian. Consequently, the Court rejected as unfounded the exception of unconstitutionality of Article 9.1 and 9.2 second and third sentence of the 1995 Law, as well as the provisions of Article 18.1 and 18.2 second and third sentence of the 2011 Law.

Second, the Court nevertheless found that the way in which the legislator has regulated the educational provision of religious education (by Article 9.2 first sentence of the 1995 Law and by Article 18.2 first sentence of the 2011 Law) is likely to affect the freedom of conscience. Under Article 29.1 of the Constitution, the individual enjoys unrestricted freedom of thought, conscience and religious belief, a situation that gives consistency to the free development of human personality as a supreme value guaranteed by Article 1.3 of the Basic Law. Likewise, according to Article 32.5 of the Constitution, "Education at all levels is conducted in public, private or confessional schools, according to the law."

This means that religious education aims at both educational institutions organised by religious bodies for training their own staff according to the law, and religious education conducted in public schools so as to be in compliance with the freedom of conscience, as well as with the right of parents or legal guardians to ensure education to their minor students according to their own convictions. This entire framework is established to protect each person's convictions. Furthermore, in accordance with the last sentence of Article 29.1 of the Constitution, "No one may be compelled to embrace an opinion or religion contrary to his own convictions". In addition, Article 29.6 of the Constitution states: "Parents or legal tutors are entitled to ensure for children under their responsibility the upbringing which accords with their own convictions." The Court found that the Constitution guarantees parents the right to the care and education of their children and includes the right to religious education.

Therefore, the right of parents to pass on to their children their own convictions related to religious issues is essential. Likewise, parents are entitled to keep their children away from religious belief. It results that, on the one hand, there is a negative obligation of the State not to interfere in forming or joining a religious conviction or belief and, on the other hand, there is a positive obligation to create the necessary legal and institutional environment to exercise the rights provided for in Articles 29 and 32 of the Constitution, to the extent that a person shows willingness to study or receive the teachings of a particular religion or religious belief. In no case shall a person be put *ab initio* in a position to defend or protect his or her freedom of conscience, as such an approach would be contrary to the negative obligation of the State, which, under this obligation, cannot require any person to study Religion.

Thus, the positive obligation of the State to ensure the necessary above-mentioned environment shall intervene only after the expression of the adult student's willingness, or in the case of a minor

student, expression of willingness by his or her parents or legal guardian, to study the specific precepts of a certain religion. In adopting its regulations on education, the legislator must take into account that Article 29.6 of the Constitution guarantees the right to religious education and not the obligation to attend Religion classes. In this respect, it should be the individual's free choice to attend the subject of Religion and their tacit consent should not be presumed, nor should express refusal to attend Religion classes be required.

To be fully observed, the freedom of conscience and religion, which includes the freedom to belong or not to any religion, enshrined in Article 29.1, 29.2 and 29.6 of the Constitution, requires that the legislator must remain neutral and impartial. This obligation is carried out when the State ensures compliance with these freedoms, giving the parents and legal guardians of minor students, as well as adult students, the possibility of attending religious classes if they choose to do so.

That being so, by majority vote, the Court allowed the exception of unconstitutionality and found that the provisions of Article 9.2 first sentence of Education Law no. 84/1995 and of Article 18.2 first sentence of Law on National Education no. 1/2011 are unconstitutional.

Languages:

Romanian.



Identification: ROM-2015-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 21.01.2015 / **e)** 17/2015 / **f)** Decision on the objection of unconstitutionality against the provisions of the Law on cybersecurity of Romania / **g)** *Monitorul Oficial al României* (Official Gazette), 79, 30.01.2015 / **h)** CODICES (Romanian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
3.10 General Principles – **Certainty of the law.**
3.12 General Principles – **Clarity and precision of legal provisions.**

3.13 General Principles – **Legality.**

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:

Law, precision, need / Legislative omission / Legislator, omission.

Headnotes:

A new Law on cybersecurity is unconstitutional in three aspects. First, the failure to comply with the legal obligation that requires approval from the Supreme Council for National Defence for drafts of regulatory acts initiated or issued by the Government on national security violates the principle of legality and the constitutional powers of the Supreme Council for National Defence. Second, in order to ensure a climate of order, governed by the principles of the rule of law and democracy, the establishment or identification of a body responsible for coordinating security issues of cyber systems and networks, as well as those related to information, acting as a contact point for relations with similar bodies abroad, must be a civilian body that functions entirely on the basis of democratic oversight and not an authority operating in the field of intelligence, law enforcement or defence or as a structure of anybody working in these fields (Romanian Intelligence Service). Third, the legislator must adopt rules that meet the requirements of clarity, precision and foreseeability.

Summary:

I. An application was brought to the Constitutional Court claiming the unconstitutionality of provisions of the draft Law on cybersecurity. It was argued that the legal provisions are contrary to Article 1.3 and 1.4 of the Constitution regarding the rule of law and the obligation to observe the Constitution and the laws. It was contended that the impugned law introduces confusion and conditionality for holders of cyber infrastructures, which are likely to restrict the fundamental rights and freedoms of citizens. It was also contended that the legal provisions do not comply with Article 6 of Law no. 24/2000 on the rules of legislative technique for drafting normative acts, and consequently, they infringe the principle of legality, which is essential for the proper functioning of the rule of law.

Furthermore, the applicants argued that the Law had fundamental conceptual problems, as it proposes a series of measures having a limiting effect on the right provided by Article 26.1 of the Constitution on personal, family and private life, and clearly infringes proposed European Union legislation concerning the security of information in the digital environment. The rights and freedoms of citizens are restricted by enabling access to a cyber infrastructure and to the data contained therein, based on a simple reasoned request from the institutions set forth in the Law, addressed to the infrastructure owners, without the prior approval of a judge. This results in a violation of the constitutional provisions contained in Article 23.1 on the inviolability of personal freedom and safety, as well as in Article 28 on the secrecy of correspondence.

Likewise, under the provisions of Article 10 of the Law, the Romanian Intelligence Service is appointed as national authority in the field of cybersecurity, in which capacity it ensures the technical coordination, organisation and execution of activities related to Romania's cybersecurity. The European Union (EU), in the draft NIS (Network and Information System) Directive (2013/0027 (COD), 7 February 2013), proposes that authorities dealing with cybersecurity be "civilian bodies, subject to full democratic oversight, that should not fulfil any tasks in the field of intelligence". However, in the challenged Law, the Parliament of Romania grants unlimited and unattended access to all computer data held by persons of public and private law to institutions not fulfilling any of the above conditions.

The applicants argued that the possibility to have access, without a court order, to electronic data originating from any computer, irrespective of its owner, is an unjustified interference with the right to the protection of correspondence, i.e. with the right to privacy, as guaranteed by Articles 26 and 28 of the Constitution. They also argued that Article 148.2 of the Constitution, concerning the primacy of EU law, is infringed, given the failure to transpose correctly the EU rules in this area.

II. By majority vote, the Court allowed the objection of unconstitutionality raised and found in essence, as follows.

First, as regards the procedure for adopting the Law, the Court found that during the legislative procedure, the initiator had not complied with the legal obligation requiring that the Supreme Council for National Defence endorse any draft legislative acts initiated or issued by the Government concerning national security. Consequently, the Court noted that the legislative act was adopted in breach of the relevant

provisions of Article 1.5 of the Constitution, which enshrine the principle of legality, and of Article 119 concerning the powers of the Supreme Council for National Defence.

Second, by examining the normative content of the Law, the Court noted that a novelty introduced by the impugned law, under Article 10.1, is the designation of the Romanian Intelligence Service as the national authority in the field of cybersecurity, in which capacity it ensures the organisation and implementation of activities related to the cybersecurity of Romania. To this end, the National Cybersecurity Centre (NCSC) has been set up, organised and already operates within the Romanian Intelligence Service, with specialised military staff, according to certain decisions of the Supreme Council for National Defence.

The Court turned to verifying whether or not the legislation in the field concerned is consistent with the right to personal, family and private life, with the inviolability of the secrecy of correspondence, and with the right to the protection of personal data, which should constitute fundamental guiding principles of cybersecurity policy at the national level. In doing so, the Court considered that, in order to encourage a climate of order, governed by the principles of the rule of law and democracy, the establishment or identification of a body responsible for coordinating security issues of cyber systems and networks, as well as those related to information, acting as a contact point for relations with similar bodies abroad, must be a civilian body that functions entirely on the basis of democratic oversight. It must not be an authority operating in the field of intelligence, law enforcement or defence or a structure operating within any of these fields.

The need to designate a civilian and not a military body acting in the field of intelligence as national authority in the field of cybersecurity is justified by the need to prevent the risk of deviation from the purpose of cybersecurity legislation, in the sense of the intelligence services using the powers conferred by this law in order to obtain information and data leading to the infringement of the constitutional rights to personal, family and private life and to the secrecy of correspondence.

For these reasons, the Court found that the provisions of Article 10.1 of the Law infringe Article 1.3 and 1.5 of the Constitution concerning the rule of law and the principle of legality, as well as Articles 26 and 28 of the Constitution concerning personal, family and private life, in particular the secrecy of correspondence, due to the lack of safeguards required to guarantee these rights.

Furthermore, the Court noted that the terms used by the Law do not clearly define the scope of the rules contained in the impugned Law. The Law therefore does not have a precise and foreseeable nature, and, consequently, the provisions of Article 2 are in breach of Article 1.5 of the Constitution.

In this connection, the definition of the term “holders of cyber infrastructures” is particularly important because inclusion in this category involves, for the persons concerned, the obligation to comply with the law, on the one hand, and the justification, for the authorities designated by law with powers in the area of cybersecurity to order specific measures in their regard.

Likewise, the provision under which access shall be made with regard to “the data held, relevant in the context of the request” allows the interpretation that the authorities designated by law must be allowed access to any data stored on these cyber infrastructures, if the authorities deem those data to be relevant. One can thus note the unforeseeable nature of the rule; both in terms of the type of data accessed and in terms of assessment of the relevance of the data requested, likely to allow a discretionary application by the authorities listed in the provision.

The Court also found that the impugned law merely specifies which authorities may request access to data held, relevant in the context of the request, without regulating the manner in which the effective access to such data is accomplished. As a result, people whose data have been retained do not benefit from sufficient safeguards in order to ensure their protection against abuses and against any unlawful access and use of such data. The Law does not provide for objective criteria to limit to a minimum the number of persons who have access, and who can subsequently use, the data retained and it does not establish that access by national authorities to the data stores is conditional upon prior review carried out by a court, thus limiting this access and their use to what is strictly necessary for achieving the objective pursued. The legal safeguards on the actual use of the data retained are not sufficient and appropriate to remove the fear that personal rights, of a personal nature, are infringed upon, so that the expression thereof can take place in an acceptable manner. Requests for access to the data retained for use thereof as provided by law, filed by State bodies designated as cybersecurity authorities for their fields of activity, are not subject to authorisation or approval by the court, thereby discarding the guarantee of effective protection of the data retained against the risk of abuse and against any unlawful access and use of such data. This situation is likely to constitute an interference with the fundamental rights to

personal, family and private life and to the secrecy of correspondence, and is thus contrary to the constitutional provisions guaranteeing and protecting these rights.

Further, in its analysis, the Court considers that the method for determining the criteria for conducting the selection of cyber infrastructures of national interest (hereinafter, "CINI") and, hence, of CINI holders does not comply with the requirements of transparency, certainty and foreseeability. Thus, the reference to infra-legal legislation (i.e. Government Decisions, or legislative acts characterised by a high degree of instability) for governing the criteria according to which obligations in matters of national security become applicable, violates the constitutional principle of legality enshrined in Article 1.5 of the Constitution. Criteria for the selection of CINI and the modality in which they are established must be provided for by law and the primary regulatory legislative act should contain a list as exhaustive as possible of areas in which the legal provisions are deemed applicable.

Furthermore, the Court considered that the obligations arising from the Law on the cybersecurity of Romania must be applicable solely to legal persons of public or private law, holding or having in their responsibility a CINI (also including, under the law, public administrations), as only situations of risk to an infrastructure of national interest may have implications for the security of Romania. However, the legal provisions in the wording subject to constitutional review are very general, the obligations being aimed at all holders of cyber infrastructures, consisting of computer systems, related applications, networks and electronic communications services regardless of their importance, which may concern the national interest or merely the interest of a group or of an individual. For the above reasons, the Court considered that the provisions of Articles 19.1 and 18.3 of the Law on the cybersecurity of Romania infringe the provisions of Article 1.5 of the Constitution, since they do not meet the requirements of foreseeability, stability and certainty.

Next, the Court noted that the provisions of Articles 20 and 21.2 of the impugned law establish the obligations incumbent on legal persons of public or private law, those in ownership of or responsible for a CINI. These include the obligation to carry out annual cybersecurity audits or to allow such audits upon reasoned request by the competent authorities in accordance with this Law, to set up structures or appoint persons responsible for the prevention, detection and response to cyber incidents, to immediately notify, where appropriate, the National Cybersecurity Centre (NCSC), the Centre for Response to Security Incidents

(CERT-RO), National Authority for Management and Regulation in Communications (ANCOM) or the authorities designated, in accordance with the law, in the field of cybersecurity on cyber incidents and risks, which, by their effect, can be detrimental in any way to users or beneficiaries of their services.

In accordance with Article 20.1.c of the Law, legal persons of public or private law, holding or being responsible for a CINI, must allow cybersecurity audits upon receipt of a reasoned request by the competent authorities. Audits are conducted by the Romanian Intelligence Service or by cybersecurity service providers. In other words, as the Romanian Intelligence Service is the national authority in the field of cybersecurity, and therefore the competent authority under the law to request legal persons of public or private law who own or are responsible for CINIs, to conduct cybersecurity audits, there is a real possibility that this institution could be concomitantly in the position of the authority requesting the audit, the authority performing the audit, and the authority to which the result of the audit is communicated and, finally, in the position of the authority that ascertains a possible offence, according to Article 28.e of the Law, and applies a penalty regarding an offence, according to Article 30.c of the Law.

Such a situation is unacceptable in a society governed by the rule of law. The legal provisions are likely to generate a discretionary, even abusive application of the law, as it is impermissible to have all the tasks in this field concentrated within a single institution. The Court considered that the audit must be carried out by internal auditors or by a qualified independent body that would verify the compliance of cybersecurity policy implementation at the level of cyber infrastructures and send the result of the assessment to the competent authority or to the single point of contact.

From its analysis of the Law, the Court held that the Law does not regulate the right of subjects of the Law, on whom obligations and responsibilities have been imposed, to challenge in court the administrative acts concluded with respect to the fulfilment of such obligations, and which are likely to adversely affect a right or a legitimate interest. The lack of any provision in the Law that would ensure the possibility, for a person whose rights, freedoms or legitimate interests have been affected by acts or facts that are based on the provisions of the Law on the cybersecurity of Romania, to address themselves to an independent and impartial court is contrary to Articles 1.3, 1.5 and 21 of the Constitution (concerning the democratic nature of the State, rule of law and free access to the courts) and Article 6 ECHR concerning the right to a fair trial.

In the same way, the choice of the legislator to confer jurisdiction for monitoring and controlling the implementation of legal provisions on the Chamber of Deputies, the Senate, the Presidential Administration, the General Secretariat of the Government and the Supreme Council for National Defence, whereas Article 10.1 and 10.2 of the impugned law lays down the competent authorities in the field of cybersecurity concerning their own cyber infrastructures or of those under their responsibility, without including in this category the authorities listed above, which are mentioned throughout the entire legislative act as legal persons of public law, and which must comply with the obligations set by law, indicates inconsistency and generates confusion as to the legal regime applicable to these institutions. Thus, by virtue of the impugned law, the legislative authority, the Presidential Administration, the Government or the Supreme Council for National Defence, authorities of constitutional status, whose powers are specifically provided for in the Constitution, are subrogated to the tasks that, according to Government Ordinance no. 2/2001 on the legal regime of infringements (which is, moreover, referred to in the impugned law), lie with central or local government bodies.

Beyond the above reasons for finding provisions of the Law to be unconstitutional, the Court noted that the entire legislative act is marked by flaws in terms of compliance with the rules of legislative technique, clarity, coherence, foreseeability, in a manner likely to entail a breach of the principle of legality enshrined in Article 1.5 of the Constitution. The Law makes references, in several cases, to the regulation of aspects which are essential in the field governed by secondary legislation, such as Government decisions, methodological standards, orders or decisions or "mutually agreed procedures".

For all of the foregoing considerations, by majority vote, the Court held that the Law on the cybersecurity of Romania is vitiated in its entirety, so that the objection of unconstitutionality is to be accepted and the legislative act is to be declared unconstitutional in its entirety. In accordance with its case-law, the Court noted that once the Law is declared unconstitutional in its entirety, such a decision has a final effect on the legislative act, i.e. the legislative process in respect of that provision ceases as of right.

Cross-references:

Court of Justice of the European Union:

- C-293/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others*;

- C-594/12, *Kärntner Landesregierung and Others*, 08.04.2014.

European Court of Human Rights:

- *Golder v. United Kingdom*, no. 4451/70, paragraph 36, 21.02.1975;
- *Dokic v. Serbia*, no. 16702/08, paragraph 35, 20.12.2011;
- *Lungoci v. Romania*, no. 62710/00, paragraph 36, 26.01.2006;
- *Rotaru v. Romania*, no. 28341/95, paragraph 52, 04.05.2000, *Reports of Judgments and Decisions 2000-V*;
- *Sissanis v. Romania*, no. 23468/02, paragraph 66, 25.01.2007;
- *Anghel v. Romania*, no. 28183/01, paragraph 68, 04.10.2007.

Languages:

Romanian.



Identification: ROM-2015-1-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 26.02.2015 / **e)** 75/2015 / **f)** Decision on the exception of unconstitutionality of the provisions of Article 19.1 and 19.3 of Law no. 14/2003 on political parties / **g)** *Monitorul Oficial al României* (Official Gazette), 265, 21.04.2015 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Political party, freedom to create / Political party, registration / Privacy, protection.

Headnotes:

The requirement of a minimum of 25,000 founding members, residing in at least 18 state counties and in the capital city, Bucharest, but no less than 700 persons for each of those counties and Bucharest, as a legal requirement for the registration of a political party, is excessive and disproportionate in the current social and political context of the country and in relation to the legal measures in force concerning the public funding of political parties and election campaigns, as well as the parliamentary representation of the electorate. In relation to the current state of evolution of the Romanian society, the legislation enshrining such a requirement no longer meets the requirements of necessity and, by its excessive nature, leads to the inability to exercise the right of association, to the extent of affecting the right in its very substance.

Summary:

I. An application was brought to the Constitutional Court claiming the unconstitutionality of Article 19.1 and 19.3 of Law no. 14/2003 on political parties, on the requirements for the registration of a political party, as follows:

“1. The list of supporting signatures must specify the purpose, the drafting date and place, and for supporters it must contain: the first and last name, date and birth, type of ID, series and number, personal identification code, as well as signature. The persons supporting the registration of a political party may be only citizen with the right to vote.

...

3. The list must contain at least 25.000 founding members, residing in at least 18 state counties and in Bucharest, but no less than 700 persons for each of those counties and Bucharest.”

As grounds for the claim of unconstitutionality, the applicants essentially claimed that the provisions of Article 19.1 of Law no. 14/2003 on political parties are contrary to the provisions of Article 26.1 of the Constitution on the right to personal, family and private life, as well as of Article 8.2 of the Charter of Fundamental Rights of the European Union, which place limits on the extent to which interference with a political party is allowed. Thus, as it imposes an obligation on parties to draw up lists containing the founding members' personal data for the incorporation and registration of a political party, the Law does not provide safeguards for the protection of such data and does not justify the need for their collection and storage. Moreover, the Law does not require that the persons who shall collect such data must also be personal data operators.

As for the provisions of Article 19.3 of Law no. 14/2003, it was argued that it leads to an interference with the exercise of the right of association, as guaranteed by Article 40 of the Constitution and Article 11 ECHR. The establishment of a representation limit both at national and regional level cannot be justified by invoking Article 8.2 of the Constitution regarding the constitutional role of a political party (parties “contribute to the definition and expression of the political will of the citizens, while observing national sovereignty, territorial integrity, the legal order and the principles of democracy”), as it may also be accomplished without imposing a certain limit on representation.

II. Having examined the exception of unconstitutionality, the Court held as follows.

First, as concerns the challenge against the constitutionality of Article 19.1 of Law no. 14/2003, the Court held that the arguments of the applicants are unfounded. The collection of signatories' personal data is conducted by one or more persons specifically designated through the articles of incorporation of the political party under registration and who is/are its member(s). The veracity of such data is assumed by the voluntary signature of the founding member and confirmed by the affidavit of that/those who collect them. The obligation to draw up these lists of signatures rests on the political party, which is charged with carrying it out and also with ensuring, by its own means, the good faith of the designated person/persons and, therefore, compliance with the confidentiality of the content of the collected data. Consequently, the provisions of Article 19.1 of Law no. 14/2003 cannot be unconstitutional, given the way in which the person designated for this purpose understands the task of dealing with information received from the executive body of the political party under registration. The Court also held that such lists must be submitted as it is strictly necessary for the courts to verify that the legal requirements for the registration of political parties have been met, without any reasonable argument that such data could be also used for other purposes or that they will not be stored in compliance with the law.

Second, as concerns the legislative solution enshrined in Article 19.3 of Law no. 14/2003 setting the minimum number of 25,000 founding members as a required condition for the registration of a political party, the Court held that the applicant's arguments are unfounded. Considering that the impugned regulation is an interference by the State authorities with the right of association, the Constitutional Court analysed, by applying the proportionality test, whether it is justified under the rigorous requirements of the European Court of Human Rights and of the Venice

Commission. This test considers whether the interference is provided by law (including the quality criteria of the law), whether there is a legitimate aim and whether the measure is adequate, necessary in a democratic society and whether it maintains the right balance between collective and individual interests.

As regards the first requirement, concerning the legality of the challenged law, the Court found that it was originally provided by Decree-Law no. 8/1989 on the registration and operation of political parties and public organisations in Romania, setting a minimum number of 251 founding members. Law no. 27/1996 on political parties increased the number to 10,000; while the new law in 2003 (Law no. 14/2003 on political parties) increased this number to 25,000. According to the explanatory memorandum, expressed during the adoption of the latter bill, through the significant increase from the minimum 10,000 to 25,000 founding members, the legislator wished to avoid “the incorporation of certain political parties with reduced representation or of certain regional parties”, aiming at the occurrence of “some persons who have the ability to submit lists of candidates in most state counties”. Thus, this measure is obviously provided for by law, being at the same time accessible, clear and foreseeable and having a legitimate aim, which is to ensure the representation of the political party within the electorate.

However, the Court found that although, in the abstract, this measure is adequate in the sense that it can lead to the fulfilment of its purpose, it is not necessary in a democratic society. The requirement of a minimum of 25,000 founding members, residing in at least 18 state counties and in Bucharest, but no less than 700 persons for each of those countries and Bucharest, as a legal requirement for the registration of a political party, is excessive and disproportionate in the current social and political context of the country and in relation to the legal measures in force concerning the public funding of political parties and election campaigns, as well as the parliamentary representation of the electorate.

Having examined the reasons provided by the legislator at the moment of the adoption of Law no. 14/2003, the Constitutional Court found that they no longer reflect the current state of Romanian society marked by the natural historic and political evolution of the democratic system installed in late 1989. Thus, if the risk of creating a large number of political parties, of the “devaluation” of the idea of political party, of the fragmentation of their parliamentary representation and of an excessive burden of the State budget on account of their public funding represented an acceptable justification in the

social and political context of the 1990s, the Court notes that, precisely at that time, the minimum number of founding members required for the registration of a political party was the lowest in the entire evolutionary history of the legislation, i.e. 251 members (during 1989-1996), which increased then to 10,000 (during 1996- 2003). Then, 14 years after the events in December 1989, which marked the change of the communist regime and the transition to a democratic form of government, the legislator, in 2003, significantly increased again this number, citing the same reasons.

However, the circumstances considered at one time by the legislator are no longer present today, meaning that there is no risk of “devaluation” of the idea of a political party or a proliferation of political parties, with all the consequences envisaged at the time of adopting the law. On the other hand, the Court found that a significant part of the challenges envisaged by the legislator in order to limit the number of political parties, namely the parliamentary fragmentation or their funding from the state budget, finds solutions in the very regulations in force adopted in legislation. The possible negative effects that would occur in the absence of adopting the legal measure examined are thus counteracted by the existence of appropriate legal instruments, so that such requirement can no longer be considered necessary.

Thus, the Court found that there is no fair balance between collective and individual interests, since, by the requirement of high representation, the subjective right of the persons concerned to incorporate a political party meets a drastic restriction, which exceeds the possible benefits created by the adoption of the bill (see, in this respect, Decision no. 266 of 7 May 2014, published in the Official Gazette of Romania, Part I, no. 464 of 25 June 2014, paragraph 23). Likewise, in order to establish and maintain the right balance, the legislator must use means which entail the lowest possible interference with the right of association. However, in this case, the requirement of the minimum number of founding members and their territorial dispersion exceeded what is fair and equitable in relation to the protected fundamental right; namely, the right of association.

For these reasons, the Court held that the challenged provisions of Article 19.3 of Law no. 14/2003 on political parties, in relation to the current state of evolution of Romanian society, no longer meet the requirements of necessity and, by their excessive nature, impede the exercise of the right of association guaranteed by Article 40 of the Constitution, which is tantamount to affecting the right in its very substance.

As a result, by majority vote, the Court allowed the exception of unconstitutionality and held these provisions to be unconstitutional.

The Court also held that Article 61 of the Constitution accords the sovereign power of law-making on Parliament, which is “the supreme representative body of the Romanian people and the sole legislative authority of the country”. Consequently, in order to remove the flaw of unconstitutionality, within its limited margin of appreciation, the legislator must re-examine the provisions of Article 19.3 of Law no. 14/2003 in order to decrease the minimum number of founding members in the lists of supporting signatures for the registration of a political party and for reconfiguration of the requirement of territorial dispersion, ensuring that all requirements justifying such interferences by the State with the right of association are met.

Supplementary information:

Venice Commission – “Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific issues” (adopted at the 58th Plenary Session of the Venice Commission, 12-13 March 2004); “Report on the participation of political parties. In elections”, adopted at the 67th Plenary Session of the Venice Commission, 9-10 June 2006); Opinion no. 431/2007, entitled “Comments on the legislative draft on political parties in Moldova” (adopted at the 71st Plenary Session of the Venice Commission, 1-2 June 2007).

Cross-references:

European Court of Human Rights:

- *Gorzelik and Others v. Poland*, no. 44158/98, paragraphs 94 and 95, 17.02.2004, *Reports of Judgments and Decisions* 2004-I;
- *Sidiropoulos and Others v. Greece*, no. 26695/95, paragraph 40, 10.07.1998, *Reports* 1998-V;
- *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, paragraph 84, 02.10.2001, *Reports of Judgments and Decisions* 2001-IX;
- *Tănase v. Moldova* [GC], no. 7/08, paragraph 175, 27.04.2010, *Reports of Judgments and Decisions* 2010;
- *Ādamsons v. Latvia*, no. 3669/03, paragraph 123, 24.06.2008;
- *Republican Party of Russia v. Russia*, no. 12976/07, 15.09.2011;

- *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, no. 46626/99, 03.02.2005, *Reports of Judgments and Decisions* 2005-I (extracts).

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-2015-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 12.03.2015 / **e)** 4 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 65, 30.03.2015 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Expulsion / HIV-positive foreigners / HIV.

Headnotes:

Legislation providing for the expulsion of foreign citizens who are HIV-positive and prohibiting them from entering Russia, even to join their families, is unconstitutional and should be revised.

Summary:

I. In June 2012, the competent Russian authorities decided to expel a foreign citizen married to a Russian from the country on the ground that she was HIV-positive. At the time the decision was made, the woman was seven months pregnant. The couple appealed against the judgment, but all the judicial institutions held that the wife represented a threat to Russian citizens. Since the birth of the child, the mother, who is prohibited from entering Russia, has been living abroad. The child and the father are living in Russia.

Under the law, the presence of foreign citizens in Russia becomes undesirable if they “represent a real threat to the health of the population”, which means that foreigners who test positive for HIV are expelled.

The applicant appealed to the Russian Constitutional Court, alleging that the Russian authorities had ordered the expulsion of HIV-positive foreigners without possessing any evidence that they could represent a threat to society.

II. In 2006, the Russian Constitutional Court held that decisions to expel HIV-positive foreign citizens should take account of the factual and humanitarian circumstances. However, in most cases, the courts failed to take account of this ruling.

The Constitutional Court based its decision on the UNAIDS/IOM statement on HIV/AIDS-related travel restrictions (2004) and the decisions of the European Court of Human Rights.

The Court ruled that if an HIV-positive foreigner does not breach the measures intended to prevent the spread of the disease and if he or she has a family in Russia, his or her HIV status cannot constitute a ground for expelling him or her from Russian territory, or prohibiting him or her from entering Russia. The Court acknowledged that the legislation in question providing for the expulsion of HIV-positive foreigners was unconstitutional and should be revised.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2015-1-001

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 22.12.2014 / **e)** UŽ-5793/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 15/2015 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Legal capacity, restricted / Proceedings *in absentia* / Right to be heard.

Headnotes:

Proceedings concerning the deprivation of a person's legal capacity represent the most significant proceedings for an individual. Accordingly, in these proceedings the emphasis should not only be placed on the conduct of the legal proceedings as a matter of procedure, but also on their essential fairness.

Summary:

I. The applicant, N.Ć. filed a constitutional appeal against a ruling of the Basic Court and a ruling of the High Court, claiming, in particular, a violation of the right to a fair trial, guaranteed by Article 32.1 of the Constitution. The applicant sought to challenge these rulings, which had been adopted in non-contentious proceedings in which the appellant was defending herself against an action by her brother to deprive her of her legal capacity, and by which she was fully deprived of her legal capacity.

II. The Constitutional Court established the following facts and circumstances:

- The appellant's brother filed a motion with the Basic Court, proposing that the appellant be deprived of her legal capacity;
- The Social Care Centre appointed a temporary guardian to the appellant;
- The Basic Court ordered a medical examination of the appellant by a neuropsychiatrist and a psychologist, who were to examine the appellant and produce a finding and opinion on her mental and emotional state and her ability to reason; the appellant's examination was to be conducted at the hearing, and the finding and opinion of the expert witnesses were to be given at the hearing;
- The Basic Court later made an official note that the expert witnesses suggested not summoning the appellant to the hearing, due to the possible detrimental effect this might have on her health and that the examination of the appellant shall be conducted in early morning hours, prior to the commencement of the hearing;
- At the hearing, held in the absence of the appellant, the expert witnesses presented their findings, based on their expert opinion, and after the hearing, a decision was made to deprive the appellant of legal capacity;
- The Basic Court in its ruling fully incapacitated the appellant and pointed out that the Court waived the hearing of the appellant due to the fact that it would have a detrimental effect on her mental state;
- The High Court rejected the appellant's appeal and confirmed the first instance ruling.

The Constitutional Court pointed out that the right to legal capacity is a fundamental human right and in the proceedings concerning deprivation of legal capacity this right may be limited by the issuance of a measure of full or limited deprivation of legal capacity. In order to ensure that mentally ill and elderly persons are adequately taken care of, the State has other means at its disposal. A deprivation of legal capacity is a measure which is to be applied as a last resort (restrictive) measure.

The Court first considered whether the constitutional appeal was admissible considering that the Social Care Centre, as a competent guardianship body, had denied its consent in respect to the constitutional appeal and that no motion for revision had been filed against the final decision concerning deprivation of legal capacity within the meaning of the Law on Non-Contentious Proceedings (hereinafter, the "LNCP").

The Court noted that in relevant cases before the European Court of Human Rights, *Salontaji-Drobnjak v. Serbia* and *X and Y v. Croatia*, the applicants, who had been deprived of their legal capacity, had petitioned the European Court directly and that Court had not asked the competent guardianship bodies to give their consent.

The appellant had been fully deprived of her legal capacity, and hence she was unable to undertake any legal action, including filing a motion for revision of the decision depriving her of legal capacity. The Court held that, considering that revision was not directly accessible to the appellant and that it was left exclusively to the discretion of the temporary guardian, the fact that this extraordinary legal remedy had not been used before the filing of the constitutional appeal did not represent an insurmountable procedural obstacle for filing this legal remedy.

The Court pointed out that when the proceedings for deprivation of legal capacity are in question, the application of procedural rules should not affect the very essence of the appellant's right to a fair trial. The Court emphasised that, compared to a regular court, it has a stricter approach when assessing the application of procedural rules which may impact the participants' private life to a greater extent.

The Basic Court decision not to summon the appellant to the hearing and to waive hearing her was based in law pursuant to the LNCP and could therefore be considered to be legal. However, the Constitutional Court stressed that proceedings concerning the deprivation of a person's legal capacity represent the most significant proceedings for an individual, hence in these proceedings the emphasis should be, not only on how the legal proceedings are conducted, but also on their essential fairness. Namely, in the proceedings concerning deprivation of legal capacity, the appellant had a double-role, being at the same time a party to the proceedings and the main subject of consideration of the non-contentious court. Therefore, her active participation in the proceedings was necessary, not only in order to allow her to defend herself against her brother's motion seeking to remove her legal capacity, but also in order to allow the acting judge to form his own opinion on the appellant's mental state.

The Court pointed out that the Basic Court first ordered that the appellant be examined at the hearing. This ruling was not cancelled. The Court held that by this legal act the Basic Court was formally obliged to summon the appellant to the hearing and to subject her to an examination at the hearing, which has not been done.

From the content of the LNCP it follows that hearing an individual who is the subject of a case in person by the court represents a general rule, while the reasons for making exceptions from this general principle represent a restrictive interpretation and in any given case have to be provided in concrete, clear and detailed terms. In the instant case, when waiving the general rule to hear the appellant in person, the court relied on a general legal formulation and general phrasing, rather than any specific terms.

The Court held that the provision of the LNCP commands a procedural requirement that the person in relation to whom the proceedings are conducted is to be examined by at least two medical doctors specialising in the relevant fields. In the instant case, the regular court ordered a medical examination by an expert witness neuropsychiatrist, and a second expert witness, a psychologist. However, a psychologist is not a medical doctor.

Based on the aforementioned, the Court found in favour of the appellant and established that the ruling of the Basic Court and the ruling of the High Court had violated the right to a fair trial. The detrimental consequences of the violation could be removed only by a cancellation of the disputed ruling of second instance and by ordering the competent court to re-decide the appellant's appeal filed against the disputed ruling at first instance.

Cross-references:

European Court of Human Rights:

- *Salontaji-Drobnjak v. Serbia*, no. 36500/05, 13.10.2009;
- *X and Y v. Croatia*, no. 5193/09, 03.11.2011.

Languages:

English, Serbian.



Slovenia

Constitutional Court

Statistical data

1 January 2015 – 30 April 2015

In this period, the Constitutional Court held 22 sessions – 13 plenary and 9 in panels: 5 in the civil, 3 in the administrative and 3 in the criminal panel. It received 61 new requests and petitions for the review of constitutionality/legality (U-I cases) and 297 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 70 cases in the field of the protection of constitutionality and legality, as well as 285 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-2015-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 18.10.2012 / **e)** U-I-17/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 87/12 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

4.5.1 Institutions – Legislative bodies – **Structure.**

Keywords of the alphabetical index:

Parliament, chamber / Parliament, powers, nature / Responsibility, international relations.

Headnotes:

A law concerning co-operation between one house of the legislature (the National Assembly) and the government in matters concerning the European Union is not unconstitutional for failing to regulate such co-operation between the other government and the other house (the National Council). The Constitution does not determine the direct participation of the National Council in matters concerning the European Union, nor does such participation follow from other provisions of the Constitution.

Summary:

I. The National Council (one of the two chambers of parliament), the applicant in the instant case, challenged the Act concerning Co-operation between the National Assembly (the other chamber of parliament) and the Government in Matters Concerning the European Union. The applicant claimed that the Act is inconsistent with the Constitution given that it fails to determine the role of the National Council in matters concerning the European Union (EU). The applicant argued that in the Republic of Slovenia, the Parliament is composed of two chambers, i.e. the National Assembly and the National Council, and that therefore the role of both chambers in matters concerning the European Union should have been regulated by law.

II. The Constitutional Court held that Article 3a.4 of the Constitution does not determine the direct participation of the National Council in matters concerning the European Union, nor does such participation follow

from other provisions of the Constitution. While this does not entail that the National Council cannot participate in the formulation of the positions of the Republic of Slovenia on legal acts and decisions of the EU, its involvement in procedures under national law occurs within the framework of its general constitutional powers determined by Article 97 of the Constitution. The treaties on which the EU is founded do not determine how Member States should formulate and adopt their positions in matters concerning the EU under national law or what role the national parliaments and their individual chambers should have in such procedures. The Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and Protocol no. 2 on the application of the principles of subsidiarity and proportionality (annexed to the TEU and the TFEU by the Treaty of Lisbon of 13 December 2007) are not relevant to the question of what the constitutional relation between the National Assembly, the National Council and the Government should be within national procedures in matters concerning the European Union.

Furthermore, the Constitutional Court held that the legal order of the European Union does not grant individual chambers of national parliaments active standing to directly file actions before the Court of Justice of the European Union in cases of a violation of the principle of subsidiarity. The legal position of such bodies, as well as the position of the individual chambers of a parliament regarding the initiation of proceedings before the Court of Justice of the European Union, remains an issue for the domestic legal order.

III. The decision was adopted by eight votes against one. Judge Sovdat voted against and submitted a dissenting opinion.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2015-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 03.07.2014 / **e)** Up-624/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 55/14 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Constitutional Court, authority / Constitutional Court, decision, force, binding / Constitutional Court, decision, execution / Unconstitutionality, declaration.

Headnotes:

As a general rule, regular courts are obliged to observe declaratory decisions of the Constitutional Court, which includes extraordinary legal remedy proceedings. Regular courts are further bound by the manner of implementation of such decisions determined by a judgment of the Constitutional Court, which has the power of law. The failure to observe the manner of implementation may entail a violation of the Constitution.

Summary:

I. The applicant, in an action brought before the Constitutional Court, argued that the Supreme Court had not acted in accordance with an earlier declaratory decision of the Constitutional Court, nor with the manner of implementation determined by that declaratory decision.

II. The Constitutional Court observed that the Constitution contains no provisions on declaratory decisions of the Constitutional Court. Declaratory decisions were only introduced by the Constitutional Court Act, Article 48 of which determines that if an unconstitutional or unlawful regulation does not regulate a certain issue which it should regulate, or if it regulates that matter in a manner that does not enable its annulment or invalidation, the Constitutional Court shall adopt a declaratory decision concerning the regulation.

The Constitutional Court recalled that it follows from Article 125 of the Constitution and, *mutatis mutandis*, application of Article 44 of the Constitutional Court Act, that a declaratory decision of the Constitutional Court applies to all relations that had been established before the day such declaratory decision took effect if by that day such relations had not been finally decided. In all proceedings that have not hitherto been finally decided, the courts must observe

the declaratory decision of the Constitutional Court. This means that they must apply the unconstitutional statutory provision in such a manner that in concrete proceedings its application is not contrary to the reasons that led the Constitutional Court to establish its unconstitutionality.

The established position of the Constitutional Court with regard to the legal effects of decisions to invalidate a law, adopted in proceedings for the review of the constitutionality and legality of regulations, is that the invalidation of a statutory provision must also be observed in constitutional complaint proceedings. Consequently, due to the fact that in order to file a constitutional complaint also the formal and substantive exhaustion of all (including extraordinary) legal remedies is required, this also applies to extraordinary legal remedy proceedings. Extraordinary legal remedies filed in conformity with the conditions determined by procedural laws and a constitutional complaint filed in conformity with the conditions determined by the Constitutional Court Act ensure that the effects of the invalidation of laws also extend to final cases.

The Constitutional Court clarified that the same must also apply to declaratory decisions of the Constitutional Court. In constitutional complaint proceedings, the Constitutional Court can penalise a failure to observe its declaratory decisions – especially if the unconstitutionality was established due to an inadmissible interference with human rights and fundamental freedoms. Due to the fact that in a state governed by the rule of law it is necessary to ensure the effectiveness of legal remedies, including the remedy of a constitutional complaint, it is clear that declaratory decisions apply to constitutional complaint proceedings, and consequently they also must be observed appropriately in legal remedy proceedings before regular courts. In assessing legality, courts must also observe the Constitution, i.e. they must interpret laws in conformity with the Constitution and must continuously question themselves as to whether the legislation in conformity with which they adjudicate is consistent with the Constitution. Therefore, what is at issue with regard to the effects of the decisions of the Constitutional Court (both those to invalidate laws and declaratory decisions) is also the question of the effectiveness of legal remedies (regular and extraordinary legal remedies, as well as constitutional complaints) regarding constitutional issues.

The Constitutional Court may, on the basis of Article 40.2 of the Constitutional Court Act, also determine the manner of the implementation of its decision. In conformity with the established constitutional case-law, it also may adopt a temporary

legal regulation in conformity with which its addressees (individuals or state authorities) must act until the legislator regulates such question by law in a constitutionally consistent manner. The Constitutional Court has already adopted the position that the part of the operative provisions by which the manner of the implementation of its decision is determined has the binding power of a statutory norm. Therefore, the Constitutional Court can temporarily regulate a certain question by the same legal power as if it were regulated by the legislator, and a regulation determined by the manner of implementation has the same legal power as law. Such entails that the interpretation and the implementation of such regulation are subject to established methods of legal interpretation that otherwise apply to the interpretation and implementation of laws, and also to certain fundamental constitutional principles that represent constitutional limitations with regard to the interpretation of laws (e.g. the prohibition of retroactive effects determined by Article 155 of the Constitution).

Failure to observe a determined manner of implementation can thus primarily entail a violation of 'statutory' law. However, ignoring the manner of implementation may also amount to a violation of the Constitution. A court's refusal to apply the manner of implementation determined by a decision of the Constitutional Court must, above all, be substantiated, especially if the party to proceedings expressly refers thereto. The absence of reasons can entail that the court acted arbitrarily or that the disregard of a decision of the Constitutional Court was manifestly erroneous, which in itself entails a violation of Article 22 of the Constitution. However, it is admissible to disregard the manner of implementation determined by the Constitutional Court if such does not entail a violation of human rights and fundamental freedoms or if the court can adopt, by taking into consideration the constitutional reasons from the decision of the Constitutional Court, a decision consistent with the Constitution. Otherwise, a decision adopted contrary to the manner of implementation may be challenged before the Constitutional Court by a constitutional complaint.

In the case at issue the Constitutional Court did not find the alleged violations of human rights to have occurred and thus dismissed the constitutional complaint.

III. The Decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).

*Identification:* SLO-2015-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 16.10.2014 / **e)** Up-679/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 81/14 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Burden of proof / Liability, state / Liability, state, pecuniary / State, duty to protect life.

Headnotes:

The constitutional right to life is an absolute right that cannot be limited, even on the basis of the general rights limitation clause of the Constitution, which states that rights may be restricted solely by the rights of others and in such cases as are provided by the Constitution. In proceedings for damages arising from the state's failure to fulfil its obligation to protect the right to life stemming from the Constitution and the European Convention of Human Rights, the state must prove that its authorities acted lawfully in order to avoid an award of compensation.

Summary:

I. The applicants, family members of a deceased person, demanded payment of compensation from the State for non-pecuniary damage that occurred due to the death of their relative during a police action. The applicants alleged that their relative had died of an acute asthma attack triggered by physical

and emotional strain during the arrest. While the lower courts had found that the applicants did not prove that the police had acted in an unlawful manner, the applicants opposed these conclusions by claiming that the police officers had been violent, and that their reaction to the asthmatic attack entailed negligent conduct.

II. The Constitutional Court recalled that Article 17 of the Constitution determines that human life is inviolable. It stressed that in a free and democratic society, the right to life protects one of the supreme constitutional goods, i.e. human life. The Constitution guarantees it as an absolute right, therefore it cannot be limited even on the basis of Article 15.3 of the Constitution, which is the general limitation clause concerning rights protection. With regard to the protection of the right to life, the state is bound by negative and positive obligations.

When the State does not act in conformity with its obligations to protect the right to life, which stem from the Constitution and the European Convention of Human Rights, the question of its liability for damages determined by Article 26 of the Constitution inevitably arises. In such instances, in proceedings for damages the burden of proof as regards the lawfulness of the actions of State authorities lies with the State. The State must thus dispel any doubt with regard to the question of whether the conduct of its authorities was in conformity with the fundamental constitutional requirements and the requirements of the European Convention of Human Rights. If the State fails to plausibly substantiate that the conduct of its authorities was lawful and sufficiently diligent in the circumstances of an individual case, this suffices to demonstrate the existence of unlawfulness as one of the conditions for the liability of the state for damages.

In the case at issue, the Constitutional Court found that the reasoning of the challenged judgments did not contain concrete findings or an assessment of the circumstances in which the police action during which the deceased person suffered the fatal asthma attack had been conducted, which would allow the conclusion that the police officers acted in conformity with the principle of applying the least force necessary. There was also no indication that the police prepared and supervised the ordered investigative act diligently enough in order to exclude any foreseeable risk to the life and health of individuals. Consequently, the position of the courts in accordance with which the applicants failed to prove the unlawfulness of the conduct of police officers was unacceptable from the viewpoint of the right to compensation for damages (Article 26 of the Constitution).

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2015-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 19.01.2015 / **e)** CCT 76/14 / **f)** Democratic Alliance v. African National Congress and Another / **g)** www.constitutionalcourt.org.za/Archimages/22538.pdf / **h)** [2015] ZACC 1; CODICES (English).

Keywords of the systematic thesaurus:

4.5.10 Institutions – Legislative bodies – **Political parties.**

4.9 Institutions – **Elections and instruments of direct democracy.**

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

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

Keywords of the alphabetical index:

Election, campaign, information, veracity / Election, statement, influence outcome / Electoral law, infringement / Freedom of expression, election, regulated / Statement, opinion / Statement, factual.

Headnotes:

A statement by a political party during an election campaign does not breach a prohibition on publishing false information to influence outcome of election, where it amounts to an expression of opinion rather than a statement of fact.

Provisions whose breach carries penal sanctions must in case of ambiguity be interpreted restrictively.

Summary:

I. The dispute involved an SMS (text message) sent by an opposition party, the Democratic Alliance

(hereinafter, "DA"), to more than 1.5 million voters shortly before the 2014 general elections. It read:

"The Nkandla report shows how Zuma stole your money to build his R246m home. Vote DA on 7 May to beat corruption. Together for change".

It was sent after the Public Protector released a report into security upgrades at President Zuma's private residence (hereinafter, the "Nkandla Report"). The governing African National Congress (hereinafter, the "ANC") brought an application in the South Gauteng High Court, Johannesburg (hereinafter, the "High Court") for an interdict against the DA and an order compelling it to retract the SMS and to apologise. It contended that the SMS constituted false information, published with the intention of influencing the outcome of the election, in violation of Section 89.2 of the Electoral Act and item 9.1 of the Electoral Code of Conduct (hereinafter, the "Code").

Relying on its right to freedom of expression, the DA opposed the application, arguing that the SMS was fair comment, and expressed a genuinely and honestly held view based on the facts contained in the Nkandla Report. It also contended that the content of the SMS was not false.

The High Court held that the message amounted to fair comment. It therefore found in favour of the DA and dismissed the ANC's application. The ANC appealed to the Electoral Court, which reversed the High Court's decision. It held that the SMS was false, and that its publication thus constituted a violation of the Electoral Act and Code.

II. The Court unanimously granted the DA leave to appeal, but produced three separate judgments on the merits. A joint judgment, written by Cameron J, Froneman J and Khampepe J, with Moseneke DCJ and Nkabinde J concurring, highlighted the inter-connection between the right to freedom of expression and the right to vote, as well as the long-standing rule that penal provisions must be interpreted restrictively. It also observed that comments and opinions may be criticised for being unfair or unreasonable, but rarely for being "false". Therefore, and because Section 89.2.c of the Electoral Act and item 9.1.b of the Electoral Code refer to "false information" and "false allegations" respectively, the provisions apply only to factual statements and not comments or opinions. The judgment found the SMS to be an expression of a comment or opinion, as it was an interpretation of the Nkandla Report. The SMS was not intended to be, and did not hold itself out as being, authoritative. Therefore, the SMS fell entirely outside of the ambit of the provisions and it was unnecessary to rule on

whether it was false. As a result, it upheld the DA's appeal and ordered that the judgment of the Electoral Court be set aside.

III. In a separate concurring judgment, Van der Westhuizen J, with Madlanga J concurring, agreed with this outcome and order, but for different reasons. He agreed that the Electoral Act and Code must be interpreted narrowly and in light of the rights to freedom of expression and free and fair elections. However, he disagreed with the finding that an opinion cannot be "false information" and, therefore, disagreed with the conclusion that the Electoral Act and Code prohibit only false statements of a factual nature. He thus declined to determine whether the SMS was strictly fact or opinion, finding that the statements fall somewhere on a spectrum between the two. He held that a statement's veracity must be evaluated more generously the closer it is on the spectrum to an opinion and more strictly the closer it gets to a pure statement of fact. The SMS had components that suggested that it was factual, but could also be interpreted as a comment. He therefore interpreted the word "stole" generously and held that the conduct of the President, as described in the Nkandla Report, could fit into one of the possible meanings of the word. Accordingly, this judgment found that the SMS was not "false information". Hence its publication was not prohibited.

In a dissenting judgment, Zondo J, with Jafta J and Leeuw AJ concurring, found that the SMS constituted a statement of fact that was false and, accordingly, was in violation of the Electoral Act and Code. He found that an ordinary, reasonable reader of the SMS would have understood it to mean that the Nkandla Report explicitly concluded that President Zuma stole taxpayers' money to build his R246 million home, which the Report did not do. To understand the SMS otherwise would have required the reader to review the Nkandla Report in its entirety, which a reader would not normally do. Accordingly, he would have dismissed the appeal.

Supplementary information:

Legal norms referred to:

- Sections 16 and 19 of the Constitution of the Republic of South Africa, 1996;
- Sections 89.2.c of the Electoral Act 73 of 1998;
- Item 91.b of the Electoral Code of Conduct.

Cross-references:

- *The Citizen 1978 (Pty) Ltd and Others v. McBride*, 08.03.2011, *Bulletin* 2011/1 [RSA-2011-1-003];
- *S v. Coetzee*, 06.03.1997, *Bulletin* 1997/1 [RSA-1997-1-002].

Languages:

English.

*Identification:* RSA-2015-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 24.03.2015 / **e)** CCT 61/14 / **f)** Paulsen and Another v. Slip Knot Investments 777 (Pty) Limited / **g)** www.constitutionalcourt.org.za/Archimages/22802.pdf / **h)** [2015] ZACC 5; CODICES (English).

Keywords of the systematic thesaurus:

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension**.
 2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law**.
 3.18 General Principles – **General interest**.

Keywords of the alphabetical index:

Common law, development / Common law, principle, constitutionality / Constitutional Court, interference in other state bodies activities, minimum, principle / Constitutional Court, jurisdiction, limits / Creditor, rights / Debt, enforcement / Debtor, right to access courts.

Headnotes:

In order to fall within the Constitutional Court's extended jurisdiction, a matter must raise "an arguable point of law of general public importance which ought to be considered" by the Court, meaning that the point must have some degree of merit, be one of law and not of fact, and must have an impact not only on the litigants but on a significant part of the general public.

Where a credit provider enters into only credit agreements exempted from the operation of the National Credit Act, it does not need to register under the Act.

Once litigation has commenced, a debtor cannot be held liable for accumulated interest greater than the capital amount of the loan. In other words, the *in duplum* rule continues to apply.

Summary:

I. Winskor 139 (Pty) Ltd (hereinafter, "Winskor"), a company of which Mr and Mrs Paulsen (hereinafter, "Paulsens") were shareholders entered into a finance agreement to borrow R12 million from Slip Knot Investments 777 (Pty) Ltd (hereinafter, "Slip Knot"). The Paulsens bound themselves as sureties in respect of Winskor's liability to Slip Knot. In 2007, Winskor defaulted on its obligation to repay the loan to Slip Knot, together with a large amount of accrued interest.

Slip Knot sued the Paulsens in the Western Cape Division of the High Court, Cape Town, seeking the capital amount; accrued interest, which had been capped at R12 million by the *in duplum* rule; additional interest that would commence from the date of institution of the proceedings; and interest on the judgment debt. The *in duplum* rule caps accrued arrear interest at an amount equal to the outstanding capital debt. The Paulsens advanced three defences. The first was that the loan agreement was invalid because Slip Knot was not registered under the National Credit Act (hereinafter, the "NCA"). The second was that even if the loan agreement was valid, the amount of interest payable under it was limited to an overall total of R12 million by the *in duplum* rule. The third was that, even if the institution of proceedings had the effect in law of suspending the operation of the *in duplum* rule, interest in this matter could not exceed R12 million as no proceedings had been instituted against Winskor, the principal debtor.

In 2010 Slip Knot was successful in the High Court in all that it had claimed. The Paulsens appealed to the Full Court of the High Court. The Full Court confirmed that the Paulsens owed the capital amount, but upheld their defence that, because their liability was accessory to that of Winskor (which had not been sued), interest could not resume accruing against them upon institution of legal proceedings. Interest thus had to be capped at R12 million by virtue of the *in duplum* rule. The Paulsens appealed the finding of liability to the Supreme Court of Appeal. Slip Knot cross-appealed in respect of the disallowed interest. The Supreme Court of Appeal agreed that the

Paulsens owed the capital sum and upheld the cross-appeal, thus finding that the *in duplum* rule ceases to operate once litigation commences. Accordingly, interest resumed accruing between the start of the litigation and the judgment of the High Court, resulting in the award of interest far greater than R12 million.

II. In the portion of the main judgment unanimously agreed upon, Madlanga J addressed this Court's extended jurisdiction as introduced by the Constitution Seventeenth Amendment Act, which extended the Court's jurisdiction to include an "arguable point of law of general public importance which ought to be considered" by the Court. Relying on foreign courts with similar jurisdiction, the Court found that the point must have some degree of merit, be one of law and not of fact, and must have an impact not only on the litigants but on a significant part of the general public. The Court granted leave to appeal on this basis. Madlanga J (again with all the justices concurring) also found that where a credit provider enters into only credit agreements exempted from the operation of the NCA, then it does not need to register under the NCA.

Madlanga J (with Jafta J and Nkabinde J concurring in the whole judgment, and Moseneke DCJ (with Mogoeng CJ, Leeuw AJ, Khampepe J and van der Westhuizen J) concurring in the result but not the reasoning) held that the longstanding common law *in duplum* rule should apply during the litigation process. In doing so, the Court reversed the contrary decision of the Supreme Court of Appeal in *Standard Bank Ltd v. Oeanate Investments* [1997] ZASCA 94 (*Oeanate*) because it ignored debtors' right of access to courts and other valid policy considerations and, accordingly, failed to conduct a proper balancing exercise. This resulted in a failure to see that there were valid competing public policy considerations, rendering it inappropriate for a court to make a choice one way or the other.

In the result, leave to appeal was granted and the appeal upheld only to the extent that accrued interest may not exceed the outstanding capital debt. There was no order as to costs.

III. In his concurring judgment, Moseneke DCJ supported the outcome and reasoning of the main judgment, except where the main judgment disavowed that it developed the common law by overturning *Oeanate*. Moseneke DCJ held that the main judgment made a mistake in reasoning that the separation of powers precluded it from adapting the common law in this case. He found that the *in duplum* rule is a common law norm that has always been under the oversight of the courts, and thus developing

the rule would not encroach on any exclusive terrain of the legislature. He concluded by reiterating that the overall purpose of Section 39.2 of the Constitution is to ensure that the common law is infused with the values of the Constitution and that the normative influence of the Constitution must be felt throughout the common law. He agreed that the Supreme Court of Appeal's decision in *Oeanate* should be overruled.

In a dissenting judgment on the operation of the *in duplum* rule only, Cameron J affirmed the Supreme Court of Appeal's interpretation of the common law in *Oeanate*. The purpose of the *in duplum* rule is to protect debtors from creditors who allow interest to run without taking steps to recover the debt. However, where a creditor institutes litigation, a debtor will be vindicated by a valid defence, or by paying the debt. The Paulsens freely entered into the agreement, therefore, there was no reason to interfere with it once litigation had commenced.

Supplementary information:

Legal norms referred to:

- Sections 392 and 167.3.b.2 of the Constitution of the Republic of South Africa, 1996;
- Constitution Seventeenth Amendment Act 72 of 2012;
- Sections 4, 40.1, 40.4 and 89 of the National Credit Act 34 of 2005.

Cross-references:

- *Barkhuizen v. Napier*, 04.04.2007, *Bulletin* 2007/1 [RSA-2007-1-005];
- *Brisley v. Drotzky*, [2002] ZASCA 35;
- *Carmichele v. Minister of Safety and Security*, 16.08.2001, *Bulletin* 2001/2 [RSA-2001-2-010];
- *Dengetenge Holdings (Pty) Ltd v. Southern Sphere Mining And Development Company Ltd and Others* [2013] ZACC 48;
- *Du Plessis and Others v. De Klerk and Another*, 15.05.1996, *Bulletin* 1996/1 [RSA-1996-1-008];
- *Kubyana v. Standard Bank of South Africa Ltd*, [2014] ZACC 1;
- *Masiya v. Director of Public Prosecutions Pretoria (The State) and Another*, 10.05.2007, *Bulletin* 2007/2 [RSA-2007-2-006];
- *Paulsen v. Slip Knot Investments* [2014] ZASCA 16;
- *Standard Bank Ltd v. Oeanate Investments (Pty) Ltd* [1997] ZASCA 94.

Languages:

English.



Identification: RSA-2015-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 20.04.2015 / **e)** CCT 133/14 / **f)** City Power (Pty) Ltd v. Grinpal Energy Management Services (Pty) Ltd and Others / **g)** www.constitutionalcourt.org.za/Archimages/22881.pdf / **h)** [2015] ZACC 8; CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Employment, labour law / Employment, contract, transfer from a private company to a municipality / Labour relation, municipality / Labour law, transfer of a business as a going concern / Municipal entity, labour law applicable.

Headnotes:

Municipal entities are obliged to comply with labour law, including the provisions regulating the transfer of a business as a going concern, unless expressly excluded by the legislation in issue.

Labour law provisions obliging municipal entities to take transfer of employees where there is a transfer of a business as a going concern do not conflict with the obligations the Constitution places on those entities.

Summary:

I. The applicant, City Power (Pty) Ltd (hereinafter, “City Power”), awarded a tender to the first respondent, Grinpal Energy Management Services (Pty) Ltd (hereinafter, “Grinpal”), for the supply of prepaid electricity metering systems in Johannesburg. The second respondent was the National Union of Mineworkers (NUM), a registered trade union, and the further respondents 41 former Grinpal employees.

When the original tender contracts between City Power and Grinpal lapsed in 2010, the two companies entered into additional service delivery agreements for the installation of more prepaid meters and for the maintenance of meters previously installed. This stood until 2012, when City Power informed Grinpal that it was terminating the contracts with immediate effect for alleged fraud. Despite Grinpal disputing this, the parties eventually decided to terminate the contracts and agreed that City Power would render the electricity services, using Grinpal’s infrastructure, until a new service provider was appointed. However, while City Power took over the operation, it refused to take transfer of the employees of Grinpal, in terms of Section 197 of the Labour Relations Act (hereinafter, the “LRA”).

Grinpal referred the matter to the Labour Court, arguing that – in terms of the LRA – because its business had been transferred as a going concern, City Power automatically took over its employees upon termination of the service delivery agreement. The Labour Court upheld Grinpal’s application, finding that the business had been transferred, as contemplated in the LRA, because the infrastructure for conducting the business did not remain in the hands of Grinpal but rather in the hands of City Power, albeit temporarily. Thus the employees had been automatically transferred to City Power. On appeal, the Labour Appeal Court agreed that transfer of the business, and the consequent automatic transfer of the employees, did take place, but expressed concern about the implications for organs of state who enter into outsourcing agreements for a limited period.

In the Constitutional Court, City Power argued that since it was a municipal entity, which operated like a municipality, it was exempt from the application of the LRA in respect of transfers. It further argued that if the LRA were applicable to it, this would be contrary to the employment and financial procedures it was obliged to follow in terms of the Municipal Systems Act and would impose constitutionally invalid budgetary constraints. Grinpal, on the other hand, argued that City Power is not a municipality, but a private company and is not exempt from the operation of the relevant provisions of the LRA.

II. In a unanimous judgment, penned by Tshiqi AJ, the Court held that City Power is a municipal entity governed by the Municipal Systems Act, but that this did not exempt it from the transfer provisions of the LRA. The Court found that the Municipal Systems Act is subservient to the LRA in all employment matters, which should prevail. Employers, including organs of state, should make arrangements for legal eventualities like the transfer provisions of the LRA.

There are adequate safeguards available to municipalities in the LRA to allay the concerns the Labour Appeal Court expressed. The Court concluded that there had been a transfer of a business as a going concern and, consequently, City Power automatically took over the employees. City Power's appeal was dismissed with costs.

Supplementary information:

Legal norms referred to:

- Section 23 of the Constitution of the Republic of South Africa, 1996;
- Section 197 of the Labour Relations Act 66 of 1995;
- Sections 66, 76, 86 and 93.A.i of the Local Government: Municipal Systems Act 32 of 2000;
- Section 66 of the Municipal Finance Management Act 56 of 2003.

Cross-references:

- *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer of the South African Social Security Agency and Others* (no. 2), 06.05.2014, *Bulletin* 2014/1 [RSA-2014-1-006];
- *Aviation Union of South Africa and Another v. South African Airways (Pty) Ltd and Others*, 24.11.2011, *Bulletin* 2011/3 [RSA-2011-3-017];
- *Joseph and Others v. City of Johannesburg and Others*, 09.10.2009, *Bulletin* 2009/3 [RSA-2009-3-017];
- *National Education Health and Allied Workers Union v. University of Cape Town and Others*, 06.12.2002, *Bulletin* 2002/3 [RSA-2002-3-019].

Languages:

English.



Identification: RSA-2015-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 20.04.2015 / **e)** CCT 160/14 / **f)** Wayne Coughlan N.O. v. The Road Accident Fund / **g)** www.constitutionalcourt.org.za/Archimages/22883.pdf / **h)** [2015] ZACC 9; CODICES (English).

Keywords of the systematic thesaurus:

- 5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Accident, road, fatal / Child, best interest / Child, care, cost / Child, foster parent, support grant / Compensation, damages, double / Compensation, loss of support / Damages, award / Foster family, support.

Headnotes:

Payment of foster child grants is not dependent on the death of a parent. Their nature and purpose is thus different to third party compensation claims. Foster child grants are, therefore, not deductible from compensation for loss of support payable to foster children under motor accident compensation legislation.

Summary:

I. The applicant, Mr Wayne Saleem Coughlan N.O. (Mr Coughlan), brought this application as the court-appointed representative of three orphaned children. The children were orphaned after their mother, at the time a pedestrian, was fatally struck by a motor vehicle in June 2002. After the death of the children's mother, the maternal grandmother applied to the Children's Court to be appointed as a foster parent to the three children. As a result of the appointment, the grandmother became eligible to receive foster grants in terms of the Social Assistance Act. Immediately before the death of their mother, two of the children primarily lived with their grandparents, while their mother made financial contributions towards their care.

Mr Coughlan lodged a claim with the Road Accident Fund (hereinafter, "RAF") for loss of support on behalf of the children. The RAF admitted liability and the parties agreed that the amount of damages was R112 942. However, the RAF contended that the amount the foster parents had received for foster child grants should be deducted and that a failure to do so would amount to double compensation.

Mr Coughlan successfully approached the High Court seeking an order declaring that the foster child grants were not deductible. The RAF appealed against this decision to the Supreme Court of Appeal, which upheld the appeal and set aside the High Court

judgment. The Supreme Court of Appeal reasoned that there was no evidence to show that, before the death of their daughter, the grandparents needed additional funds to take care of the children. It was as a result of the death of their mother that the grandparents applied for the foster child grants. Hence the foster care grants were to be taken into account in assessing the damages to be awarded for loss of support. Since the amount of the foster care grants exceeded the damages payable, no compensation was payable.

Before the Constitutional Court, Mr Coughlan argued that the provision of the foster child grants by the state is in fulfilment of its constitutional obligations in respect of the children and it cannot be said that payment of damages for loss of support creates double compensation. The RAF maintained that the grant should be deducted.

II. In an unanimous judgment by Tshiqi AJ, the Court held that the nature and purpose of the foster child grants is unrelated to compensation for loss of support; the grant is not predicated on the death of a parent and there is no causal link between the payment of the grant and damages for loss of support; and that the grant is paid to the foster parent, who may use it for the welfare of the child. Further, at the request of the Centre for Child Law (as friend of the court in these proceedings) and with the agreement of the compensation fund and the curator, this Court extended its reasoning to child support grants, finding that they, too, should not be deducted from damages claims for loss of parental support. The appeal was upheld and the order of the Supreme Court of Appeal set aside.

Supplementary information:

Legal norms referred to:

- Sections 27 and 28 of the Constitution of the Republic of South Africa, 1996;
- Sections 1, 156.1.e and 181 of the Children's Act 38 of 2005;
- Section 18.2 and 18.3 of the Road Accident Fund Act 56 of 1996;
- Sections 5 and 8 of the Social Assistance Act 13 of 2004.

Cross-references:

- *Engelbrecht v. RAF*, 06.03.2007, *Bulletin* 2007/1 [RSA-2007-1-001];
- *Government of the Republic of South Africa and Others v. Grootboom and Others*, 04.10.2000, *Bulletin* 2000/3 [RSA-2000-3-015];

- *Makhuvela v. Road Accident Fund*, [2009] ZAGPJHC 18;
- *Mvumvu v. Minister for Transport*, 17.02.2011, *Bulletin* 2011/1 [RSA-2011-1-001];
- *Road Accident Fund v. Timis* [2010] ZASCA 30.

Languages:

English.



Spain

Constitutional Court

Important decisions

Identification: ESP-2015-1-001

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 06.11.2012 / **e)** 198/2012 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 286, 28.11.2012; www.boe.es/diario_boe/txt.php?id=BOE-A-2012-14602 / **h)** <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106>; CODICES (Spanish).

Keywords of the systematic thesaurus:

2.3 Sources – **Techniques of review.**

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

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

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

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

Keywords of the alphabetical index:

Adoption, child, best interest / Homosexuality, same-sex couple, right to marriage / Adoption, homosexual couple / Family, constitutional protection / Marriage, definition / Marriage, evolutionary interpretation.

Headnotes:

The Spanish Constitution does not incorporate a constitutional prohibition for the marriage of homosexual couples. The recognition of the right to marriage, regardless of the sexual orientation, involves the possibility that couples of different or same-sex have the right to marry. This interpretation does not affect the essential contents of the right, nor changes the nature or creates other rights. The judgment also recognises the right to same-sex couples of adoption.

Summary:

I. Seventy-one Deputies of the conservative party (“*Partido Popular*”) filed an appeal for the review of constitutionality of the Law which modifies the Civil

Code in relation to the right to marriage. The challenged regulation changes and recognises to same sex-couples the right of adoption.

II. The Constitutional Court states that the law that opens marriage to same-sex couples does not infringe the principle of equality and does not discriminate. The judgment considers that the new regulation does not breach the prohibition of arbitrariness principle. There is enough rational motivation for the measure and there has not been legislative discrimination.

Starting from an evolutionary interpretation of the concept of marriage, the judgment establishes that the amendment perfectly maintains the evolved image of marriage that the Spanish society has nowadays. The law also recognises the right to marriage of each one in regardless of their sexual orientation. The option contained in the contested law is consistent with the constitutional mandate to promote the conditions for freedom and equality of individuals and the groups to which they belong, to be real and effective. The contested law is also compatible with the Court’s case-law on the anti-discrimination constitutional clause. The legislator acting within the constitutionally granted powers does not compromise the freedom of heterosexual couples to get married. Consequently, the law does not introduce any material change in the norms governing the requirements and effects of civil marriage between persons of different sex, nor restricts or denies the constitutional right of any person to marry.

In relation to joint-adoption of children by same-sex couples, the judgment considers that the interest of the adopted child is protected. This protection in each case depends on the exam of the eventual circumstances of the adopters, without regarding the sexual orientation. Furthermore, allowing or banning the adoption by same-sex couples (individually or jointly) does not affect the duty to full protection of children established on the Constitution. The Civil Code establishes that the judicial resolution that permits adoption will always need to consider the interest of the adopted and also the suitability of the adopters to exercise parental authority, regardless of their sexual orientation.

In conclusion, marriage is considered as an institutional guarantee thus it must be construed according to the institutional notion of marriage widespread in the Spanish society and the international community.

III. The judgment has one concurring opinion and three dissenting opinions.

Cross-references:

- Law 13/2005, 1 July (Modification of the Civil Code about the right to marry);
- Article 32 of the Constitution;
- Article 44 of the Civil Code.

European Court of Human Rights:

- *Dudgeon v. United Kingdom*, no. 7525/76, 22.10.1981, Series A, no. 45;
- *Rees v. United Kingdom*, no. 9532/81, 17.10.1986, Series A, no. 106;
- *Manoussakis and others v. Greece*, no. 18748/91, 26.09.1996, *Reports* 1996-IV;
- *X, Y and Z v. United Kingdom*, no. 21830/93, 22.04.1997, *Reports* 1997-II;
- *Parry v. United Kingdom*, no. 42971/05, 28.11.2006, *Reports of Judgments and Decisions* 2006-XV;
- *R. and F. v. United Kingdom*, no. 35748/05, 28.11.2006;
- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010, *Reports of Judgments and Decisions* 2010;
- *P.V. v. Spain*, no. 35159/09, 30.11.2010.

Languages:

Spanish.

*Identification:* ESP-2015-1-002

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 05.03.2013 / **e)** 199/2013 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 7, 08.01.2013 / **h)** <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106>; CODICES (Spanish).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.16 General Principles – **Proportionality**.
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

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

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

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

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**.

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

Keywords of the alphabetical index:

Evidence, unlawfully obtained / Evidence, for the charge, examination / Evidence, obtained legally, admissibility / Data, personal, collection / Data, personal, processing / Terrorist attack / Access to court, limitations / Right to informational self-determination.

Headnotes:

In an urgent performance, the police does not infringe rights by analysing non-encoding DNA sequences that identify the condemned, even when there is no court warrant ordering the DNA analysis. Such an analysis does not reveal biological information and the report of the expert witnesses complies with international and national standards.

This judgment initiated a new case-law line.

Summary:

I. The appellant was sentenced to six years of imprisonment, as author of a terrorist crime, after placing an explosive-incendiary artefact in a Bank branch causing several structural damages. The incriminating evidence consisted in a DNA analysis, conducted by the police of the Autonomous Community of the Basque Country (“*Ertzaintza*”), without permission of the arrested or judicial intervention. The analysis was carried out from the surreptitious collection of thrown sputum in prison cell, which was compared with a genetic profile obtained from the biological remains existing in clothing found in the crime scene. The Supreme Court had previously acquitted another appellant based on similar facts, considering that the DNA analysis had been practiced without judicial authorisation. Nevertheless, the Supreme Court set aside these criteria, ruling out the necessity of a judicial intervention.

II. The appeal is rejected. At the time the facts took place there was no legal provision stipulating a statutory reserve to the judge injunction to practice the DNA analysis; consequently, in compliance with their attributions to investigate crimes, the police was empowered to issue expert witness reports without any court authorisation. Moreover, in the present case, there was no need of judicial authorisation due to the following exceptional circumstances:

1. the small impact on the personal privacy of the appellant, taking into account that the analysis was done over the non-encoding DNA sequence that merely identifies the condemned and provides no other personal information;
2. the urgency in the police intervention to ensure the chain of custody of the biological sample;
3. the subsequent input to the process of the analysis result as soon as it was available.

As concurs the way the spit sample of the appellant was obtained, he was not forced to spit, therefore the invoked breaches of the right not to incriminate oneself and the presumption of innocence are rejected. The subject did not display any activity or any active manifestation that could be considered as the exercise of his defence rights and neither any physical or moral force was used over him.

About performing the DNA test, following the established case-law of the European Court of Human Rights, it is admitted that it constitutes an interference with the right to privacy by virtue of the potential risks to private life that those analyses may cause (such as the genetic bond between individuals, ethnic origin, etc.). However, this interference is justified by the achievement of a constitutionally legitimate aim as is the investigation of a crime. Likewise, from the perspective of the proportionality principle, the measure appears as an adequate way to reveal the identity of the author of the crime, since there is no other alternative and the way it was practiced, it was the least invasive in the privacy as it did not reveal coded DNA sequences.

A breach of the right to informational self-determination is ruled out, as the DNA profile was obtained to respond to mere identifying purposes and was not incorporated into a shared database to set up a racial, sexual, economical or any other kind of profile. A violation of the criminal legality principle by the punishment is also ruled out. The Court ruling fulfils the constitutional requirements of reasoning, prohibition on acting arbitrarily and the patent error.

Finally, with reference to the disparity of criteria found in the rulings of the Supreme Court, there appears to be no breach of the right to equality in the application of the law, then for that the ruling should refer to different subjects. The contested decision is respectful of the right to judicial protection since, although using different criteria from a former ruling, it expresses the reasons for that change of orientation.

III. Three judges have expressed their dissenting opinions to the judgment.

Cross-references:

- Articles 18, 24 and 25 of the Spanish Constitution.

Constitutional Court:

- no. 292/2000, 30.11.2000, *Bulletin* 2000/3 [ESP-2000-3-035].

European Court of Human Rights:

- *Van der Velden v. the Netherlands*, no. 29514/05, 07.12.2006, *Reports of Judgments and Decisions* 2006-XV;
- *S. and Marper v. the United Kingdom*, no. 30562/04, 04.12.2008, *Reports of Judgments and Decisions* 2008.

Languages:

Spanish.



Sweden

Supreme Administrative Court

Important decisions

Identification: SWE-2015-1-001

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 11.12.2014 / **e)** 1833-14 / **f)** / **g)** RÅ 2014 ref. 80 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Driving license, suspension, double jeopardy / Drink driving.

Headnotes:

The Swedish procedure of suspending a person's driving license following a conviction for a traffic-related offence is compatible with the European Convention on Human Rights, even in view of the new jurisprudence regarding tax surcharges and punishment for tax offences relating to the right not to be tried or punished twice for the same offence (HFD 2013 ref. 71).

Summary:

I. According to the Driving License Act, the Swedish Transport Agency must take action regarding the driving license of a person convicted for a traffic offence. One of the actions can be suspending the driving license for a certain period of time.

The person concerned in the case was sentenced for aggravated drunk driving. The Transport Agency suspended his driving license for twenty-four months. In his appeal, the person pleaded that the procedure violated the right not to be tried or punished twice for the same offence.

II. The Supreme Administrative Court observed that the Swedish procedure had been tried both by the European Court of Human Rights (*Nilsson v. Sweden*, no. 73661/01) and by the Supreme Administrative Court in a previous case (RÅ 2000

ref. 65). The Court determined that the suspension of the driving license of a person convicted for a traffic offence does not give rise to a new criminal procedure. The procedure differs from the case of tax surcharges and punishment for tax offences and does not violate Article 4 Protocol 7 ECHR.

Cross-references:

Supreme Administrative Court:

- RÅ 2000 ref. 65.

European Court of Human Rights:

- *Nilsson v. Sweden*, no. 73661/01, 13.12.2005.

Languages:

Swedish.



Identification: SWE-2015-1-002

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 17.03.2015 / **e)** 4160-14 / **f)** / **g)** HFD 2015 ref. 6 / **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**.

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:

Board of Appeal for Student Grants, judicial character.

Headnotes:

The Swedish Board of Appeal for Student Grants constitutes a court in the meaning of Article 6.1 ECHR.

Summary:

I. The Central Student Grants Committee denied a person financial aid for studies since he did not fulfil the requirements. He appealed to the Board of Appeal for Student Grants. The Board of Appeal has its own administration, which is formally an administrative authority under the Government.

In this case, the Board of Appeal delegated the power of decision-making to one of its members, who was the head of the administration of the Board. Because the appeal was rejected and the decision was final, the appellant questioned if the Board of Appeal had met the requirements of a court as stated in Article 6.1 ECHR.

II. The Supreme Administrative Court found that the Board of Appeal is a part of a Swedish administrative authority and has the same constitutional protection against external influences as the courts in their judicial operations. Regarding the case-law of the European Court of Human Rights, the Court held that the Board of Appeal fulfilled the requirements of a court in Article 6.1 ECHR.

The role of the head of the administration of the Board does not include any other executive functions than those concerning the practical work of the Board. The fact that the Government appoints the head of the administration of the Board is not in itself a reason to doubt the independence of the Board of Appeal.

Languages:

Swedish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2015-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Civil Law Chamber / **d)** 22.01.2015 / **e)** 5D_141/2014 / **f)** A. v. Canton of Zurich and First Civil Division of the Zurich Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 141 I 97 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Debt, enforcement / Higher education, financing, repayment / Prosecution / Loan.

Headnotes:

Article 6.1 ECHR; scope and right to a public hearing in proceedings for final dismissal of a debtor's objection to enforcement (Articles 80 *et seq.* of the Federal Law on Prosecution for Debts and Bankruptcy).

Consideration of whether Article 6.1 ECHR applies in enforcement proceedings, and more specifically in proceedings for final dismissal of a debtor's objection to enforcement, and whether there is a convention-based right to a public hearing (paras. 5-7).

Summary:

I. Based on a decision by the office for youth and vocational guidance, the public education directorate of the Canton of Zurich brought proceedings against A. for repayment of a student loan. The Canton of Zurich applied for final dismissal of the debtor's objection to enforcement.

This procedure requires the court to rule on the dismissal of the defendant's objection to the order to pay, as served on him by the debt recovery office at the creditor's request. Having been called on by the court to state his case, A. said that he wished to explain his position orally. The district court insisted on a written statement and gave A. ten days in which to file it. The case file does not indicate whether A. submitted written observations on the final dismissal of his objection. The district court of Bülach subsequently granted the Canton of Zurich's application in summary proceedings.

A. lodged an appeal against this decision with the Zurich cantonal court, which dismissed it. A. then lodged a subsidiary constitutional appeal with the Federal Tribunal, asking it to set aside the lower court's judgment and to refer the case back to the district court of Bülach so that he could be given a fair hearing in ordinary proceedings.

II. In this case, the Federal Tribunal was required to determine whether there is a right to a public hearing in proceedings for dismissal of a debtor's objection to enforcement. It notes that, according to the case-law of the European Court of Human Rights on Article 6.1 ECHR, enforcement proceedings subsequent to judicial proceedings do not, in principle, fall within the scope of this provision because such proceedings do not concern the determination of civil rights and obligations.

On the contrary, enforcement proceedings presuppose prior consideration by a competent court regarding the claim that is sought to be enforced. The Federal Tribunal held that, according to the case-law of the European Court of Human Rights, enforcement proceedings preceded by ordinary judicial proceedings when the merits of the claim are no longer under consideration do not involve determining a civil right. Hence, Article 6.1 ECHR does not, in principle, apply to such proceedings.

A. also argued that the decision by the office for youth and vocational guidance to demand repayment had not been served on him in the proper way and that there was therefore no enforceable document constituting a basis for the dismissal of his objection. The Federal Tribunal conceded that, in principle, a decision, which has not been served in the proper way on the person concerned, has no legal effect, does not enter into force and cannot therefore be executed.

It concluded, however, that a party who does not receive the original judgment but who later receives a summons referring to it is obliged, in accordance with the principle of good faith, to seek information and, where appropriate, appeal. He must not wait to be

prosecuted. His failure to act may be interpreted as acceptance, so that the judgment that was not formally served in the proper way nevertheless enters into force and becomes enforceable.

Languages:

German.



Identification: SUI-2015-1-002

a) Switzerland / **b)** Federal Court / **c)** Court of Criminal Law / **d)** 28.01.2015 / **e)** 6B_648/2014 / **f)** Y. v. Public Prosecutor's Department of the Canton of Solothurn / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 141 IV 34 / **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:

Expert, opinion, criminal law / Expert, opinion, scope / Disqualification, expert.

Headnotes:

Bias on the part of an expert. Articles 56.f and 183.3 of the Swiss Code of Criminal Procedure (disqualification of an expert).

An expert is not disqualified by the mere fact of giving an opinion on three co-defendants provided the assessment he makes of one of them in his report does not compromise his free judgment in assessing the others (para. 5).

Summary:

I. On 5 June 2009, after meeting up with Z., X. and Y. decided to go to the home of Mrs A., use chloroform to subdue her and any other persons present, and kill her.

X. and Y. then went to the home of Mrs. A. on the pretext of handing over a sum of money to her. In reality, their intention was to recover money from a gifting circle that they believed to be in the house. Mrs A. took them to her office in the basement of the house, following which X. seized hold of her and placed a plastic bag over her head. X. and Y. then tied up and gagged the struggling victim, placed a second plastic bag over her head and put adhesive tape over her mouth and around her neck, which led to her death from suffocation. The assailants then went to the first floor of the house, where X., after attempting unsuccessfully to force Mrs A.'s husband to hand over valuables to him, shot and killed him. He also suffocated the victims' daughter with a plastic bag after tying her up and gagging her. The murderers then searched the house and stole 600 euros, 5 000 Swiss francs, watches and jewellery.

X., Y. and Z. had already made arrangements, between 10 and 14 May 2009, to rob and possibly murder Mrs A. In a judgment of 25 May 2012, the district court of Solothurn-Lebern found Y. guilty of murder, aggravated robbery with violence, offences preparatory to committing murder and aggravated robbery with violence, and other offences, and sentenced him to life imprisonment, as well as ordering the confiscation of the stolen goods. The judgment was upheld by the cantonal court in 2014. Evidence submitted by Y. was dismissed.

Y. lodged a criminal-law appeal with the Federal Tribunal, asking for the cantonal judgment to be set aside and for the case to be referred back to the lower court so that fresh evidence could be brought. He requested in particular a fresh psychiatric assessment, the hearing of witnesses, a hair analysis and a report by the institute of forensic medicine.

On 2 September 2009, the Public Prosecutor's Department of the Canton of Solothurn appointed Dr E. to make an expert psychiatric assessment of the appellant. The expert delivered his opinion on 4 January 2011.

The appellant argued that the fact that the same expert had assessed all three defendants implied a bias on his part within the meaning of the Swiss Code of Criminal Procedure. He further submitted that the expert report did not satisfy the relevant requirements.

II. Legal writers acknowledge that the fact that two defendants were assessed by the same expert may be problematic in some cases: the expert cannot be impartial when he has assessed one of the participants in a crime and his findings do not leave him the necessary latitude to be able to assess another participant independently and impartially.

In the case in point, there is nothing in the expert's written and oral statements to suggest that his assessment of X. and Z. might have influenced his assessment of the appellant. His expert opinion was based both on a personal assessment of the appellant and on the documents in the case file. The interviews with the co-defendants revealed nothing more than the documents already on file. The Public Prosecutor's Department sent the assessments to the appellant and the other defendants for information and comment. Furthermore, the expert fully documented and substantiated his findings. It should also be remembered that it is not for an expert to investigate facts and draw legal inferences from them, but only to express an opinion on questions of psychiatric diagnosis and the responsibility, if any, of the accused. Lastly, in the instant case there was no breach of the expert's duty to remain silent on facts coming to his attention. Moreover, this duty exists only towards persons not participating in the proceedings.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2015-1-001

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 11.02.2015 / e) U.br.93/2014 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 31/2015, 03.03.2015 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

4.9.9.3 Institutions – Elections and instruments of direct democracy – Voting procedures – **Voting**.

4.9.9.4 Institutions – Elections and instruments of direct democracy – Voting procedures – **Identity checks on voters**.

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

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

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

5.3.41.4 Fundamental Rights – Civil and political rights – Electoral rights – **Secret ballot**.

Keywords of the alphabetical index:

Election, voting, secrecy / Election, electoral ink, marking / Election, electoral process, confidentiality.

Headnotes:

The practice of marking voters’ hands with visible ink to signify they had voted is unconstitutional, violating the principles of equality, secrecy of voting as well as their dignity, reputation and privacy.

Summary:

I. In this case, the applicant requested the Constitutional Court to consider the constitutionality of provisions of the Electoral Code (hereinafter, the “EC”) concerning the use of election ink to visibly mark the voters’ thumb to identify they voted. The applicant argued that the challenged provisions not

only violate the principle of equality and the right to vote but also unlawfully distinguishes between voters and non-voters. The applicant also pointed out that the practice gives political parties inadmissible and unconstitutional opportunity to control whether their members had acted according to the party line, which further violate their right to vote.

The applicant underscored that the right to vote should be exercised in secrecy. Confidential voting is not only an integral part of free and fair elections but it also manifests the freedom of belief, conscience, thought and public expression guaranteed by the Constitution. Hence, the applicant believes that marking voters with visible ink directly contradicts the principle of secrecy of voting, an internationally recognised right under Article 21.3 of the Universal Declaration of Human Rights and Article 25.b of the International Covenant on Civil and Political Rights.

II. The Court noted that the contested EC provisions fail to maintain voters’ confidentiality and guarantee their anonymity, because the marking on the voters’ thumb is visible to others, who can identify whether his or her fellow citizen has exercised his or her right to vote or not, which violates the principle of secrecy of voting. This right is recognised also by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which are part of the internal legal order as that they have been ratified (Article 118 of the Constitution). According to the acts, general principles of the European constitutional heritage (basis of any genuinely democratic society) determine the right to vote in terms of the possibility of casting a vote in general, direct, equal, free and secret elections held at regular intervals. The presumption of a democratic state must favour inclusion, because the universal right to vote in such society becomes a “basic principle”.

Furthermore, according to the Court, the visible marking of the voter’s thumb violates Article 22.2 of the Constitution, specifically the passive dimension of the secrecy of the voting right. That is, it violates the secrecy of the right of the citizen to decide to participate in or abstain from elections, a right which is guaranteed by the Constitution. The Court emphasised that freedom of choice includes protection against various types and forms of pressures that citizens confronted, whether they voted or not. Hence, the visible marking of voters, in contrast to citizens without markings because they chose not to vote, is not in accordance with the Constitution and its basic principles.

Also, the Court found that the visible marking violates the voter's dignity and reputation and his or her privacy, which is contrary to Article 25 of the Constitution. The Court pointed out that civil liberties are freedoms and rights granted to citizens, which are confirmed and guaranteed by the Constitution. Essential to civil liberties and rights is the respect for the physical and legal integrity of the personality and the individual and upholding his or her honour and dignity.

Based on the aforementioned considerations, the Court repealed contested parts of Article 108.2, 108.6 and 108-a.9 of the EC and ruled them as unconstitutional.

Languages:

Macedonian, English (translation by the Court).



Turkey Constitutional Court

Important decisions

Identification: TUR-2015-1-001

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 06.01.2015 / **e)** 2013/3924 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 13.05.2015, 29354 / **h)** CODICES (English, Turkish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Assembly, function, democratic / Police, powers / Ill-treatment.

Headnotes:

Disproportionate use of force by the police when intervening in unarmed and peaceful meetings and demonstration marches infringes the freedom of assembly and association guaranteed under Article 34 of the Constitution. Under Article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution, without impinging on their essence. Any such restrictions must not contravene the letter and spirit of the Constitution, the requirements of the democratic order of society, the secular republic, and the principle of proportionality.

Use of disproportionate and excessive force by the police when intervening in a public demonstration may amount to violation of the prohibition of torture, inhuman or degrading treatment or punishment under Article 17 of the Constitution and Article 3 ECHR.

Summary:

I. The applicants Özcan Çetin, Orhan Bayram, Veli İmrak, Tunay Özyayın, Deniz Doğan (teachers) and Ali Rıza Özer (an education inspector) are members of the Education and Science Labourers' Union Izmir Branch, an association of public servants working in the education sector. When the debate began in the Grand National Assembly on the "Bill Amending the Elementary School and Education Law and Various Other Laws", which proposes amendments in educational system and is known to the public as "4+4+4 bill", the applicants wished to join the demonstration set to take place in Ankara on 28-29 March 2012, to express their objections to the bill.

They were prevented by force from doing so by police intervention. To protest against this intervention and the above bill, a group including the applicants made a second press release and held a demonstration in Izmir on 27-28 March 2012. The applicants were injured during police intervention against the demonstration. The Chief Public Prosecutor's Office of Izmir considered the intervention of the security forces to be within the limits of the legal use of force and found no grounds for prosecuting any police officer. Some of the applicants were, however, prosecuted for violating the Assemblies and Marches Act no. 2911 and resisting or obstructing public officers. They were acquitted on both charges.

The applicants lodged individual applications with the Constitutional Court, alleging breaches of their rights to freedom of expression, peaceful assembly and demonstration, and the ban on ill treatment. They alleged that these breaches took place when they were prevented from joining the press release and demonstration in Ankara and due to disproportionate use of force by police during the demonstration in Izmir.

II. The Constitutional Court decided that the application should be examined from the standpoint of the right to hold meetings and demonstration marches under Article 34 of the Constitution and the ban on ill treatment under Article 17 of the Constitution. The application was not further examined under Articles 25 and 26 of the Constitution as "the right to hold meetings and demonstration marches" is a specific manifestation of the freedom of expression under these Articles.

Regarding the allegations of violation of substantive and procedural aspects of the ban on ill treatment, the Court emphasised that police may use force during non-peaceful public protests only when this is inevitable and provided the force used is not excessive. Where an individual's actions and

attitudes do not absolutely necessitate it, the use of force may violate the substantive aspect of the ban on ill treatment. The Court also noted that the use of pepper spray alone will not constitute a violation of the ban on ill treatment.

Regarding the procedural aspect of the ban on ill treatment, the Court stated that criminal investigations should be conducted in an efficient and sufficient manner to determine and punish those responsible. To achieve this, the responsible authorities should commence investigations of their own motion, and gather all evidence necessary to find out the facts and determine those who are responsible.

In this context, the Court held by majority that the ban on ill treatment which is guaranteed in Article 17.3 of the Constitution had been violated substantively and procedurally for the applicant A.R.Ö. It held unanimously that the ban on ill treatment had not been violated substantively or procedurally for applicants O.B, V.İ and Ö.Ç.

The Constitutional Court then assessed the right to hold meetings and demonstration marches under Article 34 of the Constitution. It noted that, in a democratic society based on the rule of law, the opportunity should be provided for the expression of political ideas which run counter to the present system and are based upon peaceful methods, through the freedom of assembly and other legal means. Article 34 of the Constitution guarantees the right to assembly and demonstration so that ideas can be manifested peacefully (without violence and hostility). The purpose of the freedom of assembly is to protect the rights of individuals who express their ideas peacefully and do not engage in violence. The Court also stressed the importance, in public protests where pepper spray is to be used, of giving individuals who are more susceptible to the spray due to age, pregnancy and chronic diseases, fair warning prior to its use.

The Constitutional Court held by majority that, concerning the first protest, the entirety of the applicants' right to assembly and demonstration guaranteed under Article 34 of the Constitution had been breached. With regard to the second protest, the court unanimously held that the right to assembly and demonstration had not been violated for applicant O.B. on the grounds that the interference against his violent actions was proportionate. It held by majority that the right had been violated for all other applicants.

III. One of the judges delivered a dissenting opinion, on the grounds that the application should have been declared inadmissible with regard to violation of the right to assembly and demonstration guaranteed

under Article 34 of the Constitution as the applicants submitted their allegations on this issue with an “additional petition” which, in the judge’s opinion, was inadmissible. The judge also disagreed with the majority decision on the violation of the ban on ill treatment under Article 17 of the Constitution.

Languages:

Turkish, English (non-official translation by the Court).



Identification: TUR-2015-1-002

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 27.05.2015 / **e)** 2015/51 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.06.2015, 29382 / **h)** CODICES (English, Turkish).

Keywords of the systematic thesaurus:

5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

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

Keywords of the alphabetical index:

Marriage, right, limitation criteria / Religion, religious neutrality of the state.

Headnotes:

Imprisonment of those who marry by arranging a religious ceremony without executing an official marriage and those who conduct a religious marriage ceremony without seeing the certificate of marriage is a violation of freedom of conscience and the right to family life. Under Article 13 of the Constitution, the right to demand respect for private and family life and the freedom of religion and conscience may be restricted only by law and to the extent that it is necessary in a democratic society. Such restrictions must not be contrary to the letter and spirit of the Constitution, the requirements of the democratic order of society, the secular republic, and the principle of proportionality.

Summary:

I. Pasinler District Chief Public Prosecutors Office filed a public case against a defendant, alleging that he had committed the crime of getting married with a religious ceremony without a civil marriage which is an offence under Article 230.5 of the Penal Code (hereinafter, “TCK”) and against another defendant alleging that he had committed the crime of conducting a religious ceremony of wedding without a civil marriage under Article 230.6 of TCK.

At a hearing on 24 January 2014, the Court of first instance found Article 230.5 and 230.6 of the TCK to be contradictory to the Constitution and referred the case file to the Constitutional Court for a review of constitutionality.

The above provisions criminalise the acts of arranging a religious marriage ceremony without executing official marriage transactions and conducting such religious ceremonies. The applicant court of first instance alleged that marrying by arranging a religious ceremony and conducting such a ceremony are issues of private life and freedom of religion and conscience. Living together without an official marriage contract does not constitute a crime under the Turkish legal system. The applicant claimed that criminalising these acts was in breach of the right to respect to private life and family life under Article 20 of the Constitution, freedom of religion and conscience under Article 24 of the Constitution, the principle of equality before the law under Article 10 of the Constitution and the right to protect and improve one’s corporeal and spiritual existence under Article 17 of the Constitution.

II. The Constitutional Court held that the application should be examined from the standpoint of the right to demand respect for private and family life under Article 20 of the Constitution and the freedom of religion and conscience guaranteed under Article 24 of the Constitution. The application was found to be irrelevant to Articles 5 and 17 of the Constitution. Also, given that Article 13 of the Constitution includes the criteria to be observed when fundamental rights and freedom are limited, it was also decided that an assessment under this Article was needed.

The Constitutional Court stressed that “the right to demand respect for private and family life” aims to protect the secrecy of private and family life and to prevent it from being publicly exposed. In effect, it protects the individual’s right to demand all issues and events in his or her private life to be known only to himself or herself or to those of his or her choice. Furthermore, it aims to prevent public authorities from

interfering in an individual's private life; it guarantees the individual's right to control and live his or her personal and family life according to his or her own sense and understanding. In this context, the Constitutional Court noted that Article 20 of the Constitution protects the private life and family life against the State, society and other people, subject to the exceptions under Constitution.

It also assessed the freedom of religion and conscience guaranteed under Article 24 of the Constitution and noted that this freedom is "one of the foundations of a democratic society" and a fundamental right "that goes to make up the identity of people and their conception of life". The Court also noted that, similarly to the right to demand respect for private and family life, freedom of religion and conscience constitutes a space that cannot be encroached on by the State and others.

However, the Constitutional Court noted that the right guaranteed under Articles 20 and 24 of the Constitution is not absolute; certain limitations may be imposed on it. Any such limitations must be in accordance with Article 13 of the Constitution, i.e. they must not strike at the essence of the right or contravene the requirements of the democratic order of society and the principle of proportionality.

The Constitutional Court noted that for a restriction to comply with the principle of proportionality, there must be a requirement of the democratic order of society in order to interfere in the right to demand respect for private and family life and the freedom of religion and conscience, and there must be no other means available to protect the rights of spouses arising from the establishment of conjugal community other than this limitation.

The Court noted that the legal order allows for legal arrangements for the protection of human rights arising from the establishment of conjugal community, that the relevant provisions of the Civil Code require spouses to have their official marriage transactions completed in order to claim their rights arising under matrimony, that they would be deprived of certain rights in the absence of official marriage transactions, that this deprivation of rights constitutes a civil sanction for those who do not execute official marriage transactions and this sanction is adequate to ensure that people execute these transactions. There is therefore no need to impose penal sanctions on the acts of marrying by arranging a religious ceremony or conducting a religious marriage ceremony in accordance with people's religious beliefs.

Consequently, the Constitutional Court concluded that there was no requirement of the democratic order of the society; the contested provisions were not

necessary for the protection of family order which is the purpose of the limitation they introduced. The Court also concluded that, as marrying by arranging a religious ceremony or conducting a religious marriage ceremony falls within the scope of the right to demand respect for private and family life and freedom of religion and conscience, criminalising such acts and introducing penal sanctions constitute a disproportionate interference to these rights, thereby breaching the principle of proportionality. The Constitutional Court ruled that the provisions in question should be annulled.

III. Four of the seventeen justices delivered two dissenting opinions. The three dissenting judges disagreed on the grounds that one of the reform laws protected under Article 174.4 of the Constitution prescribes the principle of civil marriage according to which the marriage acts are to be concluded in the presence of a competent official adopted under the Civil Code no. 743 of 17 February 1926 and the provisions of Article 110 of the Code. They also expressed that "freedom of religion and conscience" cannot be given precedence over this reform law as Article 174/4 of the Constitution must be interpreted together with the principles stated in the Preamble and Articles 2, 4, final paragraph of 24 and 41 of the Constitution.

The other dissenting judge expressed that this regulation imposes a sanction in the nature of "*coercive detention*" on the crime in question, which is different from effective repentance and extenuating circumstances. The purpose of the regulation is not to punish someone for conducting a religious ritual, but to ensure that a religious ceremony is conducted after official proceedings of civil marriage. It aims to prevent losses of rights on the part of women and children which might arise if the religious marriage remained ineffective due to deferral of the official civil marriage.

Languages:

Turkish, English (non-official translation by the Court).



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2015-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 31.03.2015 / **e)** 1rp/2015 / **f)** Official interpretation of the provisions of Article 469.2 of the Customs Code / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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.**

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

Keywords of the alphabetical index:

Customs, rules, violation / Liability, administrative / Offence, administrative.

Headnotes:

Article 469.2 of the Customs Code should be understood as meaning that the use or disposal without permission from the revenue and duties authorities of goods with pending customs clearance or goods placed for temporary warehousing under customs supervision or placed under the customs warehouse regime constitutes an administrative offence.

The use or disposal of personal vehicles that are placed under the customs regime of temporary importation into the customs territory of Ukraine is not an administrative offence under the Code.

Summary:

I. A citizen of Israel, Volodymyr Martynov, asked the Constitutional Court for an official interpretation of Article 469.2 of the Customs Code (hereinafter, the “Code”), which enshrined administrative responsibility for changes in the status of goods with

pending customs clearance or goods placed for temporary warehousing under customs supervision in a temporary warehouse, warehouse for the beneficiaries of humanitarian aid or customs warehouse, as well as their use and disposal without the authority of the revenue and duties authorities, as well as failure to take the measures set out in Article 204.4 of the Code in respect of goods when the period for temporary warehousing under customs supervision in a temporary warehouse, warehouse for beneficiaries of humanitarian aid or in a customs warehouse has expired.

Ukraine is a law-based state, where the principle of the rule of law is recognised and effective (Articles 1 and 8.1 of the Basic Law).

The principles of customs legislation relating to administrative offences and liability for them are determined exclusively by law (Article 92.1.9 and 92.1.22 of the Constitution).

Under Article 7.1 and 7.3 of the Code, state customs affairs shall include the established procedure and conditions for the movement of goods across the customs border of Ukraine, customs supervision and customs clearance, customs regimes and the conditions of their application and the imposition of prohibitions and/or restrictions on certain goods entering, leaving and transiting the territory of Ukraine.

Under the Code, the following types of customs regime are stipulated: import (release for free circulation), re-import, export, re-export, transit, temporary import, temporary export, customs warehousing, free customs zone, duty-free trade, inward processing, outward processing, destruction or elimination and abandonment to the state (Article 70).

The movement of goods across the customs border of Ukraine, their presentation to the revenue and duties authorities for customs control and customs clearance and the handling of goods that are placed under customs control are regulated by customs regulations (Article 4.1.28 of the Code).

Persons transporting goods into the national customs territory shall comply with the customs rules defined in the Code; the Code sets out administrative responsibility for failure to comply with these rules.

Under Article 458.1 of the Code, violation of customs rules means an administrative offence which is unlawful, wrongful (deliberate or inadvertent) acts or omissions that infringe the procedure laid down in this Code and other legislative acts for movement of

goods, means of transport for commercial use across the customs border, their presentation to the revenue and duties authorities for customs supervision and customs clearance, as well as handling goods that are placed under customs control or that of the revenue and duties authorities, and for which this Code provides for administrative liability. Types of violations of customs rules and liability for such offences are enshrined in Chapter 68 of the Code.

Administrative responsibility for the unlawful handling of goods with pending customs clearance or goods placed for temporary warehousing under customs supervision is set out in Article 469 of the Code. Article 469.2 determines responsibility for violations of customs rules such as changes in the state of goods with pending customs clearance or goods placed for temporary warehousing under customs supervision in a temporary warehouse, a warehouse for the beneficiaries of humanitarian aid or customs warehouses, their use and disposal without the authority of the revenue and duties authorities, and failure to take measures set out in Article 204.4 of the Code in respect of goods, when the period for temporary warehousing under customs supervision in a temporary warehouse, warehouse for the beneficiaries of humanitarian aid or customs warehouse has expired.

Under Article 4.1.57 of the Code “goods” are any moveable items, including those to which the regime of immovable item is applied by the law (except for means of transport for commercial use), currency valuables, cultural valuables and electric energy transmitted by power supply lines.

Analysis of Article 469.2 of the Code suggests that the conjunction “and” combines homogeneous subjects “use” and “disposal”, which together with the other phrases (“changes in the state of goods”, “failure to take measures”) constitute a list of individual actions (actions or inaction) forming the objective aspect of an administrative offence provided for in this legal norm.

From the content of Article 469.2, it appears that such offences may be committed through certain acts (change in state, use and disposal) or omission (failure to take certain measures) relating to goods with pending customs clearance or goods placed for temporary warehousing under customs supervision in a temporary warehouse or placed under the customs warehouse regime. Any other customs regime, including that of temporary admission, is not specified in the above provisions of the Code.

Languages:

Ukrainian.



Identification: UKR-2015-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 31.03.2015 / **e)** 2-rp/2015 / **f)** Official interpretation of the provisions of Article 294.2 of the Code on Administrative Offences in conjunction with the provisions of Article 129.3.8 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.2 Institutions – Judicial bodies – **Procedure**.
4.7.9 Institutions – Judicial bodies – **Administrative courts**.
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, administrative / Administrative Court, decision, challenge.

Headnotes:

Only certain resolutions by a judge in an administrative case matter (namely the imposition of an administrative penalty) on enforcement measures set out in the Code on Administrative Offences upon the dismissal of a case may be challenged on appeal.

Summary:

I. Citizen Andrii Tretiak, the applicant in this matter, sought an official interpretation from the Constitutional Court of the provisions of Article 294.2 of the Code on Administrative Offences (hereinafter, the “Code”), namely “a decision by a judge in an administrative offence matter may be challenged by a person who is the subject of such proceedings, his or her legal representative or lawyer, the injured party or his or her representative within ten days from the adoption of the resolution”, in conjunction with Article 129.3.8 of the Constitution, under which ensuring the possibility of challenges in the appeal and cassation of a court decision, except in cases prescribed by the law, is one of the basic principles of court proceedings.

The applicant was seeking clarification as to whether the word combination “a decision by a judge in administrative offence proceedings” contained in Article 294.2 of the Code in terms of whether it covered any decision by a judge in administrative offence cases, including those adopted at the stage of execution of a court decision, which could be challenged in appeal, or only those adopted on the merits (Article 284 of the Code).

To substantiate the need for such clarification, the applicant attached copies of court decisions, which indicated that in certain cases the appeal courts considered that the above provisions only concerned resolutions adopted on the merits, and refused to admit appeals against decisions not provided for in Article 284 of the Code. In other cases, the courts took the opposite stance, arguing that this provision did not limit the right to appeal against any resolution by a judge in cases of administrative offence. The applicant contended that inconsistent application of the provisions of Article 294.2 of the Code by the courts led to violation of his constitutional right to access to justice.

II. Ukraine is a law-based state (Article 1 of the Constitution). State power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power (Article 6.1 of the Constitution). According to Article 19.2 of the Fundamental Law, officials of bodies of state power are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and national legislation. One of the main principles of judicial proceedings are legality, equality of all parties to a hearing under the law and before the court and ensuring court decisions can be appealed against, except in cases established by law (Article 129.3.1, 129.3.2, 129.3.8 of the Constitution).

Article 294.2 of the Code allows for the resolution by a judge in cases on administrative offences to be appealed by the subject of such proceedings, his or her legal representative or advocate, the injured party or his or her representative within ten days of the date the resolution is adopted.

The Constitutional Court considered that determination of the types of resolutions of a judge referred to in Article 294.2 of the Code, in terms of the applicant's question regarding challenges to them, should be carried out in conjunction with Articles 284.1 and 287.2 of the Code.

The Code regulates the sequence of procedural actions to consider and resolve issues related to taking administrative proceedings against somebody; the order of challenge of a judge's resolution in administrative offence cases adopted on the merits;

the order of execution of the resolution on the imposition of administrative penalty.

The order of proceedings in administrative offence cases is regulated in Articles 284, 287 and 294, Section IV of the Code. Under Article 284.1 of the Code, in administrative offence cases an official body adopts one of the following resolutions: on imposition of administrative penalty; on enforcement measures provided in Article 24-1 of the Code and on dismissal of a case. The specified list of resolutions by which the examination of cases on administrative offences on the merits is terminated is, in fact, exhaustive.

Article 287.2 of the Code is crucial for establishing the type of resolution by a judge that may be appealed. A resolution by a district or city court judge on the imposition of an administrative penalty may be appealed in the order prescribed by the Code.

The procedure for review of a resolution of a judge in an administrative offence case on appeal is regulated by the provisions of Article 294 of Chapter 24 “The appeal of a resolution on a case on administrative offences” Section IV of the Code. The intended purpose of this chapter is to establish the order for appeal, including the resolution of a judge in an administrative offence matter.

However, the order of execution of a resolution on the imposition of administrative penalty is regulated by the provisions of another section of the Code, namely Section V “Execution of resolutions on imposition of administrative penalties”. These are not in direct conjunction with the provisions of Chapter 24 of Section IV of the Code, which regulates the order of appeal against the resolution of a judge in administrative offence proceedings adopted on the merits.

The Court therefore concluded that, following the results of consideration of administrative offence cases, other resolutions of a judge may not be appealed, except those referred to in Article 284 of the Code.

III. Judges V. Shyshkin and S. Sas expressed their dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2015-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.04.2015 / **e)** 3-rp/2015 / **f)** Constitutionality of the provisions of Article 171-2.2 of the Code of Administrative Proceedings / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**

4.7.8 Institutions – Judicial bodies – **Ordinary courts.**

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 proceedings, appeal / Cassation, administrative proceedings.

Headnotes:

Provisions may not set out that decisions by a local general court acting as an administrative court in cases concerning decisions, acts or omissions by the subjects of such cases are final and not subject to review.

Summary:

I. The applicant in this matter, the Ukrainian Parliamentary Commissioner for Human Rights, asked the Constitutional Court to recognise the provisions of Article 171-2.2 of the Code of Administrative Proceedings, according to which a decision by a local general court acting as an administrative court in cases concerning the decisions, acts or omissions by the subjects of such cases shall be final and are not subject to appeal, as unconstitutional in that they did not meet the requirements of Articles 8.1, 55.1, 55.2, 64 and 129.3.8 of the Constitution.

Ukraine is a democratic, law-based state where human rights and freedoms and their guarantees determine the essence and orientation of its activity; the State is answerable to the individual for its activity; the upholding and safeguarding of human rights and freedoms is the main duty of the State (Articles 1, 3.2 of the Constitution).

In Ukraine, the principle of the rule of law is recognised and effective; the Constitution has the

highest legal force; laws and other normative legal acts are adopted on the basis of the Constitution and in conformity with it (Article 8.1 and 8.2 of the Fundamental Law).

Bodies of state power and bodies of local self-government and their officials must act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and national legislation (Article 19.2 of the Constitution).

Under the Fundamental Law, human and citizens' rights and freedoms are protected by the court; there is a universal right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Article 55.1 and 55.2).

Under Article 92.1.14 of the Constitution, the judicial system, judicial proceedings and the status of judges are determined exclusively by the national legislation.

One of the main principles of judicial proceedings is ensuring that court decisions can be appealed against, except in cases established by law (Article 129.3.8 of the Fundamental Law).

II. The Constitutional Court noted that the right to judicial protection includes, in particular, the possibility of challenging court decisions in appeal and cassation, which is one of the constitutional guarantees of implementation of other rights and freedoms, their protection from violations and illegal encroachments, including false and unjust judgments.

Parliament must establish the scope of the right of parties to proceedings to instance appeal against local court decisions so as to ensure effective judicial protection. Restriction of access to appeal or cassation is possible only in exceptional cases with mandatory compliance with constitutional norms and principles. In establishing such restrictions on the right to appeal and cassation of court decisions, the legislator is to be guided by rule of law components such as proportionality.

Under the Constitution, restrictions may be placed on the right to challenge decisions by appeal and cassation (Article 129.3.8), but these must not be arbitrary or unfair. Such restrictions should be established by the Constitution and national legislation only. They must pursue a legitimate aim and be motivated by the public need to achieve this aim. They must be proportionate and reasonable. In cases of restriction of the right to challenge court decisions, the legislator must introduce a legal regulation that will allow the achievement of a legitimate aim optimally with minimum interference to the imple-

mentation of the right to judicial protection and will not violate the substantive content of such right.

Chapter 17 of the Code of Administrative Offences (hereinafter, the "Code") regulates the jurisdiction of administrative offence proceedings both in terms of courts (judges) (Article 221 and 221-1) and other subjects of authority: administrative commissions at executive committees of village, settlement and city councils; executive committees of the above councils; bodies of internal affairs, bodies of state inspections and other bodies (officials), authorised by the Code (Article 213).

The Code provides that district, district in city, city or city-district courts (judges) are exclusively authorised to impose such administrative penalties as administrative arrest, correctional labour, community service, seizure with compensation or confiscation of the goods which became an instrument of committing or a direct object of the administrative offence (Articles 28.1, 29.1, 30-1.2, 31 and 32.1).

Analysis of the legislation establishing administrative offences entailing administrative penalties such as fines allows the conclusion to be reached that such cases fall within the jurisdiction of both courts (judges) and other subjects of authority. For instance, the Code provides for a fine, imposed by the court in the amount of up to five thousand non-taxable minimum incomes for certain types of administrative offence (Article 162-1.3). According to the Customs Code, a fine for violation of customs regulations not imposed by the court, but by another subject of authority (body of income and charges) is set in the amount of one thousand non-taxable minimum incomes (Articles 469, 477) or 300 percent of the unpaid sum of customs duties (Article 485).

These types of administrative penalties are, in terms of the degree of their severity, proportionate to the penalties prescribed by the Criminal Code, including fines, community service, correctional labour, confiscation of property, arrest (Articles 51, 53, 56, 57, 59 and 60). Such administrative sanctions and penalties, envisaged by the Criminal Code, restrict the constitutional rights of citizens, namely to freedom and personal inviolability; to freely own, use and dispose of their property and to labour (Articles 29, 41 and 43 of the Constitution).

The Code establishes that rulings by a judge in administrative offence cases concerning liability may be appealed to a court of appeal; a ruling by a court of appeal shall come into force immediately after its delivery, shall be final and may not be appealed (Article 294.2 and 294.10).

At the same time pursuant to Article 288.1 of the Code, a ruling in administrative offence cases, delivered not by the court, but by the other subject of authority, may be appealed to a "higher authority (superior official)" as well as to a local general court as an administrative court in the order determined by the Code of Administrative Proceedings. For instance, under Article 18.1.2 of the Code of Administrative Proceedings, all administrative cases concerning decisions, actions or omissions by subjects of authority in cases on bringing to administrative liability fall under the jurisdiction of local general courts as administrative courts. The provisions of Article 171-2.2 of the Code of Administrative Procedure, the constitutionality of which are challenged, stipulate that such decisions are final and may not be appealed.

The Constitutional Court considers that the legislator's restriction of the right of an individual to challenge decisions of local general courts as administrative courts in appeal and cassation is only justified in terms of decisions in cases of minor administrative offences. In other cases of administrative liability, individuals must have the right to appeal decisions by local general courts as administrative courts.

By making it impossible to challenge in courts of appeal the decisions of local general courts as administrative courts in cases concerning rulings of the subjects of authority on imposing administrative penalties that are proportionate to the penalties established by Criminal Code in terms of severity, the legislator allowed disproportion between the purpose and measures taken for its achievement.

According to Article 70.2 of the Law on the Constitutional Court, the Constitutional Court may, where necessary, determine in its decision or opinion the procedure and terms of their execution and oblige the appropriate state bodies to ensure execution of the decision and adherence to the opinion.

It was recommended that Parliament take immediate action to resolve this issue.

III. Judge of the Constitutional Court V. Shyshkin attached his dissenting opinion.

Cross-references:

Constitutional Court:

- no. 26-rp/2009, 19.10.2009.

European Court of Human Rights:

- *Delcourt v. Belgium*, no. 2689/65, 17.01.1970;
- *Hoffmann v. Germany*, no. 34045/96, 11.10.2001;
- *Ashingdane v. the United Kingdom*, no. 8225/78, 28.05.1985;
- *Krombach v. France*, no. 29731/96, 13.02.2001;
- *Engel and Others v. the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 08.06.1976;
- *Gurepka v. Ukraine*, no. 61406/00, 06.09.2005;
- *Menarini Diagnostics v. Italy*, no. 43509/08, 27.09.2011.

Languages:

Ukrainian.



United States of America Supreme Court

Important decisions

Identification: USA-2015-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 30.03.2015 / **e)** 14-593 / **f)** Grady v. North Carolina / **g)** 135 *Supreme Court Reporter* 1368 (2015) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

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

Keywords of the alphabetical index:

Global Positioning System (GPS) / Monitoring device / Search, body.

Headnotes:

When government attaches a device to a person's body without consent for the purpose of obtaining information about that individual's movements, a search occurs that falls within the scope of the constitutional guarantee against unreasonable searches and seizures.

The constitutional guarantee against unreasonable searches and seizures is not limited to the sphere of criminal investigations; the government's purpose in collecting information does not control whether the method of collection constitutes a search that implicates the constitutional guarantee.

The Constitution prohibits only unreasonable searches: the reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search, and the extent to which the search intrudes upon reasonable privacy expectations.

Summary:

I. Torrey Dale Grady was convicted of sexual offenses in the courts of the State of North Carolina in 1997 and 2006. After he served his sentence for the second crime, a North Carolina court ruled that he should be subject to satellite-based monitoring as a recidivist sex offender. The court ordered him to wear a Global Positioning System (GPS) tracking device for twenty-four hours a day for the rest of his life.

In issuing this order, the court denied Grady's argument that the monitoring programme would violate his right under the Fourth Amendment to the U.S. Constitution to be free from unreasonable searches and seizures. The Fourth Amendment states in relevant part that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." It is applied to the States through the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution. The North Carolina Court of Appeals upheld the court's decision and the North Carolina Supreme Court dismissed Grady's appeal on the grounds that it had not raised a substantial constitutional question.

II. The Supreme Court of the United States reversed the decision of the North Carolina Supreme Court. In so doing, it cited precedents in which it ruled that Fourth Amendment searches had occurred when the government had physically occupied constitutionally-protected areas for the purpose of obtaining information, and concluded that government also conducts a search when it attaches a device to a person's body without consent for the purpose of tracking that individual's movements.

In rejecting Grady's Fourth Amendment argument, the North Carolina Court of Appeals had relied on the fact that the State's monitoring programme was civil in nature. The U.S. Supreme Court found this reasoning to be erroneous because the Fourth Amendment's protections extend beyond the sphere of criminal investigations. The government's purpose in collecting information does not control whether the method of collection constitutes a Fourth Amendment search.

The Court emphasised that its holding did not decide the ultimate question of the monitoring programme's constitutionality. The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search, and the extent to which the search intrudes upon reasonable privacy expectations. Because the North Carolina courts had not

determined whether the monitoring programme was reasonable under Fourth Amendment standards, the Court said it would not do so as a court of first instance. Therefore, the Court vacated the decision of the North Carolina Supreme Court and remanded the case to the North Carolina courts.

III. The Court's decision was rendered in a *Per Curiam* opinion. The Justices did not issue any separate opinions.

Languages:

English.

*Identification: USA-2015-1-002*

a) United States of America / **b)** Supreme Court / **c)** / **d)** 29.04.2015 / **e)** 13-1499 / **f)** Williams-Yulee v. Florida Bar / **g)** 2015 U.S. LEXIS 2983 (2015) / **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:

Electoral campaign contributions, solicitation / Interest, compelling / Judicial office, election to / Standard of review, strict scrutiny / Underinclusive regulation.

Headnotes:

The Constitution guarantees the right of candidates for judicial office to speak in support of their campaigns; however, the exercise of this right may be limited by restrictions that are narrowly tailored to serve a compelling state interest.

The state has a compelling interest in preserving public confidence in the integrity of its judiciary.

The role of the judiciary differs from the role of the legislative and executive branches; therefore, a government may regulate judicial elections differently

than it regulates elections for the political branches because the state interest in preserving public confidence in the integrity of its judiciary extends beyond that of preventing the appearance of corruption in legislative and executive elections.

Constitutional protection of free speech requires that a regulation be narrowly tailored, not that it be perfectly tailored.

A regulation will not be fatally underinclusive simply because it does not address all aspects of a problem at the same time: policymakers may focus on their most pressing concerns even if they conceivably could have restricted even greater amounts of speech.

Summary:

I. The Code of Judicial Conduct of the State of Florida, in Canon 7C.1, prohibits candidates in State judicial elections from personally soliciting financial contributions to their election campaigns. Florida is one of 39 States in the United States in which judges in the State courts are chosen by popular election.

Lanell Williams-Yulee, a candidate for a county judgeship in Florida, mailed to local voters a letter soliciting contributions to her campaign. She also posted the letter online. The Florida Supreme Court ruled that her solicitations violated Canon 7C.1 and imposed a public reprimand and an order that she pay the costs of the proceeding against her.

Ms Williams-Yulee admitted that she had signed and sent the fundraising letter, but argued that she could not be disciplined because her solicitations were protected speech under the First Amendment to the U.S. Constitution. The First Amendment states in relevant part that "Congress shall make no law...abridging the freedom of speech." It is applied to the States through the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution.

II. The Supreme Court of the United States affirmed the decision of the Florida Supreme Court. In doing so, it subjected Canon 7C.1 to a strict scrutiny standard of review under which a State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest

The U.S. Supreme Court determined that Florida has a compelling interest in preserving public confidence in the integrity of its judiciary. The Court noted that it has recognised in its case-law that the safeguarding of public confidence in the fairness and integrity of the

nation's elected judges is a vital state interest of the highest order. This public confidence might be diminished if a judge comes into office after asking for favours. While recognising that candidates for judicial office have a First Amendment right to speak in support of their campaigns, the Court declared that a State's decision to elect judges does not mean that public confidence in their integrity must be compromised.

The Court stated that its case-law reviewing campaign finance restrictions in non-judicial elections was of limited relevance in the instant case. This is because a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. States may regulate judicial elections differently than they regulate elections for the political branches because the role of the judiciary differs from the role of the legislative and executive branches. Politicians are expected to be responsive to the preferences of their supporters, but this is not true of judges.

The Court also rejected Ms Williams-Yulee's argument that Canon 7C.1 was fatally underinclusive because it did not restrict other speech potentially damaging to judicial integrity and its appearance. An underinclusive regulation can raise doubts about whether the government is in fact pursuing the interest it invokes. To support her argument, Ms Williams-Yulee pointed out that Canon 7C.1 allows a judge's campaign committee to solicit campaign contributions and allows judicial candidates to write thank you notes to campaign donors.

In response, the Court noted that the First Amendment does not impose an absolute underinclusiveness limitation. A State is not required to address all aspects of a problem at the same time: policymakers may focus on their most pressing concerns. Accordingly, even when applying strict scrutiny, the Court has upheld the constitutionality of laws that conceivably could have restricted even greater amounts of speech in advancing their stated interests.

Moreover, the Court concluded, Florida has reasonably concluded that solicitation by a candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. Likewise, permitting a judicial candidate to write thank you notes to campaign donors does not pose a significant threat to the State's interest.

Ms Williams-Yulee also argued that Canon 7C.1 restricted speech too much because it was not narrowly tailored to advance the State's compelling interest through the least restrictive means. No one, she contended, will lose confidence in the integrity of the judiciary based on a personal solicitation to a broad audience via a letter posted online and distributed via mass mailing. In rejecting this argument, the Court said that the State's interest retains its validity whenever the public perceives that a judge personally is asking for money. Moreover, the First Amendment requires that Canon 7C.1 be narrowly tailored, not that it be perfectly tailored. The impossibility of perfect tailoring is especially apparent, the Court observed, when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary.

The Court also addressed, and rejected, Ms Williams-Yulee's arguments that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. The Court concluded that a rule requiring judges to recuse themselves from every case in which they had solicited contributions from a participant would place heavy burdens on judicial resources, erode public confidence in judicial impartiality, and create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal. As for campaign contribution limits, a State may decide that the threat to public confidence created by personal solicitation exists apart from the amount of money that a judicial candidate seeks.

III. The Court's decision was decided on a five to four vote among the Justices. Five Justices authored separate opinions. Justice Breyer filed a concurring opinion and Justice Ginsburg filed an opinion concurring in part and concurring in the judgment. Justices Alito, Kennedy and Scalia each authored dissenting opinions.

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2015-1-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 29.05.2014 / **e)** Series C 260 / **f)** Case of Norin Catrیمان *et al* v. Argentina / **g)** / **h)** CODICES (English, Spanish).

Keywords of the systematic thesaurus:

- 3.13 General Principles – **Legality.**
- 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Prisoners.**
- 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**
- 5.2.3 Fundamental Rights – Equality – **Affirmative action.**
- 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
- 5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**
- 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning.**
- 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**
- 5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**
- 5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture.**
- 5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Indigenous Peoples, rights / Appeal, right / Ethnic group, cultural identity / Judgment, appeal, requirements / Prisoner, transfer, right / Terrorism, definition / Terrorism, intent, special.

Headnotes:

When defining offenses of a terrorist nature, the principle of legality requires that a necessary distinction be made between such offenses and ordinary offenses, so that every individual and also the criminal judge have sufficient legal elements to know whether an action is penalised under one or the other offence.

The special intent or purpose of instilling fear in the general population is a fundamental element to distinguish conduct of a terrorist nature from conduct that is not, and without which the conduct would not meet the definition.

The Court indicates the importance that the special criminal offense of terrorism is not used in the investigation, prosecution and punishment of criminal offenses when the wrongful act could be investigated and tried as an ordinary offense because it is a less serious conduct.

The ethnic origin of an individual is a category protected by the American Convention. Hence, the American Convention prohibits any discriminatory norm, act or practice based on an individual's ethnic origin. Consequently, no norm, decision or practice of domestic law, applied by either State authorities or by private individuals, may reduce or restrict in any way the rights of an individual based on his or her ethnic origin. This is equally applicable to the prohibition, under Article 24 ACHR, of unequal treatment based on ethnic origin under domestic law or in its application.

A difference of treatment is discriminatory when it has no objective and reasonable justification; in other words, when it does not seek a legitimate purpose and when the means used are disproportionate to the purpose sought.

States are obliged to take affirmative action in order to reverse or change discriminatory situations in their societies that prejudice a specific group of persons. This involves a special obligation of protection that the State must exercise with regard to the actions and practices of third parties, who, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.

The Court takes into account that ethnic group refers to communities of individuals who share, *inter alia*, characteristics of a socio-cultural nature, such as cultural, linguistic, spiritual affinities and historical and traditional origins. Indigenous Peoples fall within this category and the Court has recognised that they have specific characteristics that constitute their cultural identity, such as their customary law, their economic and social characteristics, and their values, practices and customs.

When adopting measures that seek to protect the persons subject to their jurisdiction against acts of terrorism, States have the obligation to ensure that the criminal justice system and procedural guarantees abide by the principle of non-discrimination. States must ensure that the objectives and effects of the measures taken in the criminal prosecution of terrorist actions are not discriminatory and do not allow individuals to be subjected to ethnic stereotypes or characterisations.

The measure of preserving witness anonymity is subject to judicial control, based on the principles of necessity and proportionality, taking into account that this is an exceptional measure and verifying the existence of a situation of risk for the witness. When making this assessment, the court must bear in mind the impact that the measures have on the right of defence of the accused.

It is important for the State to ensure the effects of the use of the measure of preserving the anonymity of witnesses by counterbalancing measures, such as:

- a. the judicial authority must be aware of the identity of the witness and be able to observe his demeanour under questioning in order to form his or her own impression of the reliability of the witness and of the testimony, and
- b. the defence must be granted every opportunity to examine the witness directly at some stage of the proceedings on matters that are not related to his identity or actual residence; this is so that the defence may assess the demeanour of the witness while under cross-examination in order to be able to dispute his or her version or, at least, raise doubts about the reliability of the testimony.

Even when counterbalancing procedures have been adopted and appear to be sufficient, a conviction should not be based, either solely or to a decisive extent, on anonymous statements. Otherwise, it would be possible to convict the accused by the disproportionate use of a probative measure that was obtained while impairing his or her right of defence. Since this is evidence obtained in conditions in which the rights of the accused have been limited, the testimony of anonymous witnesses must be

used with extreme caution, and must be assessed together with the body of evidence, the observations and objections of the defence, and the rules of sound judgment. The decision as to whether this type of evidence has weighed decisively in the judgment convicting the accused will depend on the existence of other types of supportive evidence so that, the stronger the corroborative evidence, the less likely that the testimony of the anonymous witness will be treated as decisive evidence.

When deciding the objections submitted by the appellant, the higher court hearing the appeal must ensure that the guilty verdict provides clear, complete and logical grounds in which, in addition to describing the content of the evidence, sets out its assessment thereof and indicates the reasons why it considered – or did not consider – it reliable and appropriate to prove the elements of criminal responsibility and, therefore, to overcome the presumption of innocence.

When interpreting and applying their domestic laws, States must take into consideration the inherent characteristics that differentiate members of the indigenous peoples from the general population and that constitute their cultural identity. The prolonged duration of pre-trial detention may have different effects on members of indigenous peoples owing to their economic, social and cultural characteristics and, in the case of community leaders, may also have negative consequences on the values, practices and customs of the community or communities in which they exercise their leadership.

Visits by family members to individuals deprived of liberty are an essential element of the right to the protection of the family both of the person deprived of liberty and for the family members, not only because they are an opportunity for contact with the outside world, but also because the support of family members for those deprived of liberty while they serve their sentence is fundamental in many aspects, ranging from affective and emotional support to financial support. States, as guarantors of the rights of individuals in their custody, have the obligation to adopt the most appropriate measures to facilitate and to implement contact between the individuals deprived of liberty and their families.

One of the difficulties in keeping up relationships between those deprived of liberty and their family members may be their confinement in prisons that are very far from their homes, or of difficult access because the geographical conditions and communication routes make it very expensive and complicated for members of the family to make frequent visits, which could result in a violation of both the right to protection of the family and other rights, such as the right to personal integrity, depending on the particularities of each case.

Therefore, the State must facilitate the transfer of prisoners to prisons closer to the places where their families live. In the case of Indigenous persons deprived of liberty, the adoption of this measure is especially important given the significance of the ties that these individuals have with their place of origin or their community.

Summary:

I. The case regards eight persons, all Chilean nationals, seven of whom were traditional authorities or members of the Mapuche indigenous people, and the latter of whom was an activist working to defend the rights of this community. Criminal proceedings were held against them for events that occurred in 2001 and 2002, resulting in their conviction as perpetrators of offenses that were categorised as terrorism in application of Law 18.314, known as the “Counter-terrorism Act.” None of the acts for which they were tried (arson of a wooded property and of a private company’s truck, as well as threat of arson) affected anyone’s physical integrity or life. This criminal law was inconsistent with the principle of legality, and the victims of the case were subjected to a series of irregularities that affected due process, including unjustified and discriminatory consideration of their ethnic origin.

On 29 May 2014, the Inter American Commission of Human Rights submitted the case, alleging violations to Articles 1.1, 2, 8.1, 8.2, 8.2.f, 8.2.h, 9, 13, 23 and 24 ACHR.

II. On the merits, the Court concluded that the application of a presumption regarding the subjective element of terrorist intent with regard to the eight victims violated the principle of legality and the right to the presumption of innocence, established in Articles 9 and 8.2 ACHR, in relation to the obligation to respect and ensure rights, established in Article 1.1 and 1.2 ACHR.

Furthermore, the Court determined that the allegations of a violation of the right to an impartial judge or court, established in Article 8.1 ACHR, are closely linked to the presumption of the terrorist intent “to instill [...] fear in the general population” (a subjective element of the definition) that, as the Court had already declared, violates the principle of legality and the guarantee of presumption of innocence. Thus, the alleged violation of Article 8.1 ACHR was considered to be subsumed in the previously declared violation of Articles 9 and 8.2 ACHR.

Additionally, the Court held that the mere use of arguments which reveal stereotypes and biases as grounds for the judgments constituted a violation of the

principle of equality and non-discrimination and the right to equal protection of the law, recognised in Article 24 ACHR, in relation to Article 1.1 ACHR.

The Court also concluded that, when delivering a guilty verdict, a decisive significance was accorded to the testimony of an anonymous witness, which constitutes a violation of the right of the defence to examine witnesses established in Article 8.2.f ACHR, in relation to Article 1.1 ACHR, to the detriment of two of the victims.

The Court also indicated that the State violated the right to appeal the guilty verdict of two of the victims because the appellate court that received their request for annulment merely described the arguments of the court below, without providing a review of the latter's factual and legal decisions.

The Court also established that the State violated the rights to personal liberty, not to be subject to arbitrary arrest, and not to suffer pre-trial detention in conditions that were not adapted to international standards, recognised in Article 7.1, 7.3 and 7.5 ACHR, and the right to presumption of innocence, established in Article 8.2 ACHR, all in relation to Article 1.1 ACHR. According to the Court, denying the release of the accused because they would be a danger to society has an open-ended meaning that can permit objectives that are not in accordance with the Convention. Since criminal responsibility had not been established legally, the victims had the right to be presumed innocent under Article 8.2 ACHR. The State had the obligation not to restrict their liberty more than strictly necessary, because pre-trial detention is a precautionary rather than a punitive measure.

The Court also held that Chile violated the right to freedom of thought and expression protected in Article 13.1 ACHR, in relation to Article 1.1 ACHR, to the detriment of three of the victims who had been convicted of prison sentences varying between 5 and 10 years, because it applied an ancillary penalty which disqualified them, for 15 years, "from [...] exploiting a social communication medium or from being a director or administrator of one, or from performing functions related to the emission and diffusion of opinions and information." According to the Court, the imposition of the ancillary penalty could limit their right to freedom of thought and expression in the exercise of their functions as leaders or representatives of their communities. This has a negative impact on the social dimension of the right to freedom of thought and expression, which, as the Court has established, involves the right of everyone to receive the opinions, reports, and news of third parties. In addition, it could have produced an intimidating and inhibiting effect on the exercise of freedom of expression derived from the

specific effects of the undue application of the Counterterrorism Act to members of the Mapuche indigenous people.

The Court further found that the State violated the political rights protected by Article 23 ACHR, in relation to Article 1.1 ACHR, to the detriment of the victims, given that, the imposition of ancillary penalties that affect various political rights, such as the right to vote, the right to participate in the direction and administration of public matters, and access to public functions, either indefinitely or for a prolonged period of time (15 years), was contrary to the principle of proportionality of the penalties and seriously undermined political rights. It also emphasised that, owing to three of the victims' status as Mapuche leaders, the nature of their functions and their social position, not only were their individual rights affected, but also those of the members of the Mapuche indigenous People they represented.

Finally, the Court held that confining a person in a prison that was very far from his family home and arbitrarily denying repeated requests for his transfer to a prison that was nearer, to which the Prison Service had agreed, violated the right to protection of the family established in Article 17.1 ACHR, in relation to the obligation to ensure rights established in Article 1.1 of this treaty.

Accordingly, the Court ordered, *inter alia*, that the State:

- i. adopt all the administrative, judicial or any other type of measure necessary to nullify all the effects of the criminal judgments convicting the victims;
- ii. provide the necessary and appropriate medical and psychological or psychiatric treatment to the victims that request it, immediately and free of charge;
- iii. award scholarships in Chilean public establishments to the children of the eight victims; and
- iv. regulate, clearly and rigorously, the procedural measure of witness protection consisting in anonymity in order to avoid violations such as those declared in this judgment, ensuring that this is an exceptional measure, subject to judicial control based on the principles of necessity and proportionality, and that this type of evidence is not used decisively to justify a guilty verdict.

Languages:

Spanish, English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2015-1-001

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 04.09.2014 / **e)** C-114/12 / **f)** Commission v. Council / **g)** ECLI:EU:C:2014:2151 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.16 Institutions – **International relations.**
4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**
4.17.2.1 Institutions – European Union – Distribution of powers between the EU and member states – **Sincere co-operation between EU Institutions and member States.**

Keywords of the alphabetical index:

European Union, treaty, competence, exclusive / Broadcasting organisation, protection of neighbouring rights / Treaty, European Union legislation, impact.

Headnotes:

There is a risk that common EU rules might be adversely affected by international commitments, or that the scope of those rules might be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules.

As regards, more specifically, the negotiations for a Convention of the Council of Europe on the protection of neighbouring rights of broadcasting organisations, falls within an area covered to a large extent by common EU rules. As is clear from numerous directives, those rights are the subject, in EU law, of a harmonised legal framework which seeks, in particular, to ensure the proper functioning of the internal market and which, have established a favourable regime with high and homogeneous protection for broadcasting organisations.

Moreover, the negotiations on those elements are capable of affecting or altering the scope of those common rules. Therefore, those negotiations fall within the exclusive competence of the European Union.

Any competence, especially where it is exclusive, must have its basis in conclusions drawn from a specific analysis of the relationship between the envisaged international agreement and the EU law in force, from which it is clear that such an agreement is capable of affecting the common EU rules or of altering their scope.

The fact that that harmonised legal framework has been established by various legal instruments which also govern other intellectual property rights is not such as to call into question the correctness of that approach. The assessment of the existence of a risk that common EU rules will be adversely affected, or that their scope will be altered, by international commitments cannot be dependent on an artificial distinction based on the presence or absence of such rules in one and the same instrument of EU law.

Summary:

I. On 19 December 2011, the Council and the Representatives of the Governments of the Member States meeting in the Council adopted the decision authorising the Commission to participate in the negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations and to conduct these negotiations on behalf of the Union as regards matters falling within the Union's competence.

As set out in a statement relating to the adoption of the contested decision, the Commission, throughout the procedure leading to its adoption, had maintained that the EU has exclusive competence in the matter and opposed the adoption of a 'hybrid act' by the Council and the Representatives of the Governments of the Member States.

After the adoption of the decision, the Commission claimed the Court should annul the contested decision for breach of the procedure and the principle of sincere cooperation conditions, on the grounds that the decision infringed the conditions to authorise negotiations of international agreements by the European Union on the protection of neighbouring rights of broadcasting organisations. According to the Commission, neighbouring rights of broadcasting organisations, as governed by EU law, form part of a consistent and balanced body of intellectual property rules intended to ensure the unity of the legal order of the European Union in that area. In those circumstances, and having regard to the close link

between the rights and activities of broadcasting organisations and those of other intellectual property rightholders, any change to the rights of one group or the other would be such as to influence the interpretation and application of the EU rules as a whole.

II. The Court noted that Article 3.2 TFEU, defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty.

According to the Court's case-law, there is a risk that common EU rules might be adversely affected by international commitments, or that the scope of those rules might be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules.

Noting that the contested decision concerns the Convention on the protection of neighbouring rights of broadcasting organisations, the Court felt it fell within an area covered to a large extent by common EU rules and that those negotiations may affect common EU rules or alter their scope. Therefore, those negotiations fall within the exclusive competence of the European Union even if the areas covered by the international commitments and those covered by the EU rules coincide fully. Therefore, it follows that the contested decision was adopted in breach of Article 3.2 TFEU.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-002

a) European Union / **b)** Court of Justice of the European Union / **c)** Fifth Chamber / **d)** 11.09.2015 / **e)** C-112/13 / **f)** / **g)** ECLI:EU:C:2014:2195 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national Sources – Law of the European Union/EU Law and domestic law – **EU secondary law and constitutions.**

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

4.7.1.2 Institutions – Judicial bodies – Jurisdiction – **Universal jurisdiction.**

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:

European Union, national jurisdiction / European Union, Court of Justice, preliminary request, national court, obligation to refer.

Headnotes:

European Union law and, in particular, Article 267 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they consider a national statute to be contrary to Article 47 of the Charter, to apply, in the course of the proceedings, to the constitutional court for that statute to be generally struck down, and may not simply refrain from applying that statute in the case before them, to the extent that the priority nature of that procedure prevents — both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question — all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, EU law and, in particular, Article 267 TFEU must be interpreted as not precluding such national legislation to the extent that those ordinary courts remain free:

- to make a reference to the Court at whatever stage of the proceedings they consider appropriate, and even at the end of the interlocutory procedure for the review of constitutionality, in respect of any question which they consider necessary,
- to adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order, and
- to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue before it can be construed in such a way as to meet those requirements of EU law.

Summary:

I. This request for a preliminary ruling, from the *Oberster Gerichtshof* (Austria), concerns the interpretation of Article 267 TFEU and Article 24 of Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The request has been made in proceedings between A, on the one hand, and B and Others, on the other, concerning an action for damages brought against A by B and Others before the Austrian courts.

According to the *Oberster Gerichtshof*, the effect of that judgment is that Austrian courts may not, of their own motion, refrain from applying a statute that is contrary to the Charter; rather, 'without prejudice to the possibility of making a reference to the Court of Justice for a preliminary ruling', they must lodge an application with the *Verfassungsgerichtshof* for that law to be struck down. Furthermore, the *Verfassungsgerichtshof* has ruled that, if a right guaranteed by the Austrian Constitution has the same scope as a right guaranteed by the Charter, it is not necessary to make a request to the Court for a preliminary ruling under Article 267 TFEU. In such circumstances, the interpretation of the Charter would not be relevant for the purposes of ruling on an application for a statute to be struck down, that being a decision which may be given on the basis of rights guaranteed by the Austrian Constitution.

II. The Court ruled that in the case of rules of procedural law under which the ordinary courts called upon to decide on that they must request the constitutional court to strike down the legislation generally, and cannot simply refrain from applying that legislation in the particular case concerned, is not consistent with the obligations of the ordinary courts under Article 267 TFEU and the principle of the primacy of EU law. It should also be observed that the priority nature of an interlocutory procedure for the review of the constitutionality of a national law (the content of which merely transposes the mandatory provisions of an EU directive) may not undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly. Since then, the interlocutory review of the constitutionality of a law (the content of which merely transposes the mandatory provisions of an EU directive) can be

carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required to refer to the Court of Justice a question on the validity of that Directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory review of constitutionality has itself referred that question to the Court.

The referring court asks, in essence, whether Article 24 of Regulation no. 44/2001, considered in the light of Article 47 of the Charter, must be interpreted as meaning that, if a national court appoints, in accordance with national law, a representative *in absentia* for a defendant upon whom the document instituting proceedings has not been served because there is no known place of residence for him, the appearance entered by the court-appointed representative amounts, for the purposes of Article 24 of Regulation no. 44/2001, to an appearance being entered by the defendant, establishing the international jurisdiction of that court. Thus, the tacit prorogation of jurisdiction by virtue of the first sentence of Article 24 of Regulation no. 44/2001 is based on a deliberate choice made by the parties to the dispute regarding jurisdiction, which presupposes that the defendant was aware of the proceedings brought against him.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-003

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 02.12.2014 / **e)** C-148/13 to C-150/13 / **f)** A, B, C v. Staatssecretaris van Veiligheid en Justitie / **g)** ECLI:EU:C:2014:2406 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Asylum, application, examination / Asylum, seeker, persecution, country of origin, sexual orientation / Sexual orientation, proof.

Headnotes:

The competent authorities examining an application for asylum based on a fear of persecution on grounds of the sexual orientation of the applicant for asylum must hold the declared sexual orientation to be an established fact on the basis solely of the declarations of the applicant. It follows that, although it is for the applicant for asylum to identify his sexual orientation, which is an aspect of his personal identity, applications for the grant of refugee status on the basis of a fear of persecution on grounds of that sexual orientation may, in the same way as applications based on other grounds for persecution, be subject to an assessment process, provided for in Article 4 of Directive 2004/83.

However, the methods used by the competent authorities to assess the statements and documentary or other evidence submitted in support of those applications must be consistent with the provisions of Directive 2004/83 and 2005/85 and, as is clear from recitals 10 and 8 in the preambles to those directives respectively, with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life guaranteed by Article 7 of the Charter.

Article 4.3 of Directive 2004/83 as well as Article 13.3.a of Directive 2005/85 must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application

being subject to an assessment by those authorities founded on questions based only on stereotyped notions concerning homosexuals.

However, having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.

Summary:

I. A, B and C, third country nationals, each lodged an application for asylum in the Netherlands, relying on their fear of persecution in their country of origin on account of their homosexuality. However, the competent authorities rejected their applications on the grounds that their sexual orientation had not been proven.

II. In these cases, the Court of Justice was asked to rule on the interpretation of Directive 2004/83/EC. The methods used by the competent authorities to assess the statements and documentary or other evidence submitted in support of those applications must be consistent with the fundamental rights guaranteed by EU law and, notably, the Charter of Fundamental Rights.

Furthermore, the assessment must be made on an individual basis and must take account of the individual situation and personal circumstances of the applicant (including factors such as background, gender and age) in order for it to be determined whether the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

Against that background, the Court gives the following guidance as to the methods of assessment used by national authorities.

Firstly, assessment of applications for asylum on the basis solely of stereotyped notions associated with homosexuals does not allow those authorities to take account of the individual situation and personal circumstances of the applicant concerned.

Secondly, while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning the details of the applicant's sexual practices are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect of private and family life.

Thirdly, as regards the option for the national authorities of allowing, as certain applicants for asylum proposed, homosexual acts to be conducted, the submission to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, the Court makes clear that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by the Charter.

Fourthly, having regard to the sensitive nature of information that relates to a person's personal identity and, in particular, his sexuality, the conclusion of a lack of credibility cannot be reached on the sole basis that, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-004

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 09.12.2014 / **e)** C-261/13 P / **f)** Schönberger v. Parliament / **g)** ECLI:EU:C:2014:2423 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
4.17.3 Institutions – European Union – **Distribution of powers between Institutions of the EU**.
5.3.37 Fundamental Rights – Civil and political rights – **Right of petition**.

Keywords of the alphabetical index:

European Union, Parliament, petition, judicial appeal / European Parliament, act, judicial appeal / Petition, appeal against decision dismissing examination of the petition.

Headnotes:

Pursuant to Article 263.1 TFEU, the Court is required to review the legality of acts of the Parliament which are intended to produce legal effects vis-à-vis third parties. Acts the legal effects of which are binding on, and capable of affecting the interests of, an applicant by bringing about a distinct change in his legal position are acts which may be the subject of an action for annulment.

In those circumstances, a decision by which the Parliament considers that a petition addressed to it does not meet the conditions laid down in Article 227 TFEU must be amenable to judicial review, since it is liable to affect the right of petition of the person concerned. The same applies to a decision by which the Parliament, disregarding the very essence of the right of petition, refuses to consider, or refrains from considering, a petition addressed to it and, consequently, fails to verify whether it meets the conditions laid down in Article 227 TFEU.

A negative decision by which the Parliament takes the view that the conditions laid down in Article 227 TFEU have not been met must provide a sufficient statement of reasons to allow the petitioner to know which of those conditions was not met in his case. In that respect, the requirement is satisfied by a summary statement of reasons.

By contrast, it is clear from the provisions of the Treaty on the Functioning of the European Union and from the rules adopted by the Parliament for the organisation of the right of petition that, where the Parliament takes the view that a petition meets the conditions laid down in Article 227 TFEU, it has a broad discretion, of a political nature, as regards how that petition should be dealt with. It follows that a decision taken in that regard is not amenable to judicial review, regardless of whether, by that decision, the Parliament itself takes the appropriate measures or considers that it is unable to do so and refers the petition to the competent institution or department so that that institution or department may take those measures.

Summary:

I. The applicant, Mr Schönberger, a former official of the European Parliament, addressed a petition to the European Parliament in respect of his staff report for 2005. The Petitions Committee declared his petition admissible but informed Mr Schönberger that it was unable to deal with the substance of his petition and that it would be forwarded to the Director-General for Personnel in order for him to take appropriate action. The General Court rejected the action brought by Mr Schönberger on the ground that the petition was considered to be admissible and was therefore non-challengeable. If, according to Advocate General Jääskinen, Mr Schönberger's action is to be dismissed as inadmissible, it is only because decisions of the Petitions Committee are non-challengeable.

II. The Court confirmed the judgment and underlined the fact that the right of petition, see Articles 20.2.d, 24.2 and 227 TFUE as well as Article 44 Charter of Fundamental Rights of the European Union, is a tool for direct political dialogue and is the expression of democratic interaction between a citizen and elected representatives which should, except in exceptional cases, remain shielded from intervention by the EU courts.

In that respect, it must be noted that the nature of the relationship between the Parliament and those who address it by means of a petition is confirmed by the rules laid down by the Parliament for the examination of petitions. In those circumstances, a decision by which the Parliament considers that a petition addressed to it does not meet the conditions laid down in Article 227 TFEU must be amenable to judicial review.

By contrast, it is clear from the provisions of the Treaty on the Functioning of the European Union and from the rules adopted by the Parliament for the organisation of the right of petition that, where the Parliament takes the view that a petition meets the conditions laid down in Article 227 TFEU, it has a broad discretion, of a political nature, as regards how that petition should be dealt with. It follows that a decision taken in that regard is not amenable to judicial review. In the present case, it is evident from the judgment under appeal itself that the Parliament, far from disregarding the appellant's right to petition it, examined the petition addressed to it, took a decision as to its admissibility and decided to refer it to the Parliament's Director-General for Personnel for further action, thereby dealing with the petition in the manner which it deemed appropriate. In view of the foregoing considerations, and since the other grounds of appeal are, in those circumstances, ineffective, the appeal must be dismissed.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2015-1-005

a) European Union / **b)** Court of Justice of the European Union / **c)** Plenary Assembly / **d)** 18.12.2014 / **e)** Opinion 2/13 / **f)** / **g)** ECLI:EU:C:2014:2475 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

4.8.8.5.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – International relations – **Conclusion of treaties.**

4.8.8.5.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – International relations – **Participation in international organisations or their organs.**

4.16 Institutions – **International relations.**

4.16.1 Institutions – International relations – **Transfer of powers to international institutions.**

Keywords of the alphabetical index:

European Union, accession to the European Convention on Human Rights / European Union, law, primacy / European Union, law, unity / European Union, law, effectiveness.

Headnotes:

The accession of the European Union to the European Convention on Human Rights as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy

In so far as Article 53 ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than

those guaranteed by the European Convention on Human Rights, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 ECHR is limited – with respect to the rights recognised by the Charter that correspond to those guaranteed by the European Convention on Human Rights – to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. However, there is no provision in the agreement envisaged to ensure such coordination.

The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law. In so far as the European Convention on Human Rights would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol 16 ECHR and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the European Convention on Human Rights would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the European Convention on Human Rights — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

Summary:

I. Upon the recommendation of the Commission, the Council adopted a decision on 4 June 2010 authorising the opening of negotiations for an accession agreement. The Commission was designated as negotiator. On 5 April 2013, the negotiations resulted in agreement on the draft accession instruments. In that context, on 4 July 2013, the Commission asked the Court of Justice to give its Opinion on the compatibility of the draft agreement with EU law, pursuant to Article 218.11 TFEU.

II. In its Opinion, the Court, after noting that the problem of the lack of any legal basis for the EU's accession to the European Convention on Human Rights has been resolved by the Treaty of Lisbon, points out that since the EU cannot be considered to be a State, such accession must take into account the particular characteristics of the EU, which is precisely what is required by the conditions to which accession is subject under the Treaties themselves.

The Court points out in particular that, in so far as the European Convention on Human Rights gives the Contracting Parties the power to lay down higher standards of protection than those guaranteed by the European Convention on Human Rights, the European Convention on Human Rights should be coordinated with the Charter. Where the rights recognised by the Charter correspond to those guaranteed by the European Convention on Human Rights, the power granted to Member States by the European Convention on Human Rights must be limited to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. The Court finds that there is no provision in the draft agreement to ensure such coordination.

In so far as the European Convention on Human Rights would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law. However, the agreement envisaged contains no provision to prevent such a development.

The Court notes that Protocol 16 ECHR, signed on 2 October 2013, permits the highest courts and tribunals of the Member States to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the European Convention on Human Rights or the protocols thereto. Given that, in the event of accession, the European Convention on Human Rights would form an integral part of EU law, the mechanism established by that protocol could affect the autonomy and effectiveness of the preliminary ruling procedure provided for by the Treaty on the Functioning of the European Union, notably where rights guaranteed by the Charter correspond to rights secured by the European Convention on Human Rights. The Court considers that the draft agreement fails to make any provision in respect of the relationship between those two mechanisms.

Next, the Court recalls that the Treaty on the Functioning of the European Union provides that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for by the Treaties. The draft agreement still allows for the possibility that the EU or Member States might submit an application to the European Court of Human Rights concerning an alleged violation of the European Convention on Human Rights by a Member State or the EU in relation to EU law. The very existence of such a possibility undermines the requirements of the Treaty on the Functioning of the European Union.

Lastly, the Court analyses the specific characteristics of EU law as regards judicial review in matters of the common foreign and security policy (hereinafter, "CFSP"). Nevertheless, on the basis of accession as provided for by the draft agreement, the European Court of Human Rights would be empowered to rule on the compatibility with the European Convention on Human Rights of certain acts, actions or omissions performed in the context of the CFSP, notably those whose legality the Court cannot, for want of jurisdiction, review in the light of fundamental rights. Such a situation would effectively entrust, as regards compliance with the rights guaranteed by the European Convention on Human Rights, the exclusive judicial review of those acts, actions or omissions on the part of the EU to a non-EU body.

In the light of the problems identified, the Court concludes that the draft agreement on the accession of the European Union to the European Convention on Human Rights is not compatible with EU law.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-006

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 18.12.2015 / **e)** C-562/13 / **f)** Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida / **g)** ECLI:EU:C:2014:2453 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
 5.3.13.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Suspensive effect of appeal**.

Keywords of the alphabetical index:

Foreigner, removal, suspension / Foreigner, illness, serious, deterioration, risk / Foreigner, health, deterioration, risk / Foreigner, health care, emergency.

Headnotes:

Articles 5 and 13 of Directive 2008/115, taken in conjunction with Articles 19.2 and 47 of the Charter, and Article 14.1.b of Directive 2008/115, are to be interpreted as precluding national legislation which:

- does not endow with suspensive effect an appeal against a decision ordering a third country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision may expose

that third country national to a serious risk of grave and irreversible deterioration in his state of health, and

- does not make provision, in so far as possible, for the basic needs of such a third country national to be met, in order to ensure that that person may in fact avail himself of emergency health care and essential treatment of illness during the period in which that Member State is required to postpone removal of the third country national following the lodging of the appeal.

Summary:

I. Mr Abdida submitted an application pursuant to Article 9b of the Law of 15 December 1980 for leave to reside on medical grounds, on the basis that he was suffering from a particularly serious illness. That application was accepted as admissible and, as a result, Mr Abdida received social assistance from the *Centre public d'action sociale* (hereinafter, "CPAS"). Then Mr Abdida's application for leave to reside was rejected and he was ordered to leave Belgium. In the meantime, the CPAS decided to withdraw Mr Abdida's social assistance. Mr Abdida appealed against the decision refusing him leave to remain before the *Conseil du contentieux des étrangers* (Belgian asylum and immigration board) and lodged an appeal against the CPAS' decision withdrawing social assistance before the *Tribunal du travail* (Labour Court).

II. In this context, the Court of Justice ruled on the interpretation of Directive 2008/115, taken in conjunction with the Charter of Fundamental Rights.

With regard, in the first place, to the characteristics of the remedy that must be made available to challenge a return decision such as the decision at issue before the referring court, it is apparent from Article 13.1 of Directive 2008/115, that a third country national must be afforded an effective remedy to appeal against or seek review of a decision ordering his return. It follows that that Directive does not require that the remedy provided for in Article 13.1 should necessarily have suspensive effect.

In the very exceptional cases in which the removal of a third country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-refoulement, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115, taken in conjunction with Article 19.2 of the Charter, proceed with such removal. Those very exceptional cases are characterised by the seriousness and irreparable nature of the harm that may be caused by the removal of a third country national to a

country in which there is a serious risk that he will be subjected to inhuman or degrading treatment. In order for the appeal to be effective in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health, that third country national must be able to avail himself, in such circumstances, of a remedy with suspensive effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive 2008/115, taken in conjunction with Article 19.2 of the Charter.

As regards, in the second place, Member States are required to provide to a third country national suffering from a serious illness who has appealed against a return decision whose enforcement may expose him to a serious risk of grave and irreversible deterioration in his state of health the safeguards, pending return, established in Article 14 of Directive 2008/115. The Court stated that Article 9.1.b of Directive 2008/115 provides that Member States are to postpone removal for as long as a suspensory effect is granted in accordance with Article 13.2 of Directive 2008/115. It is apparent that Article 9.1.b of Directive 2008/115 must cover all situations in which a Member State is required to suspend enforcement of a return decision following the lodging of an appeal against the decision.

In particular, the Member State concerned is required, pursuant to Article 14.1.b of Directive 2008/115, to make provision, in so far as possible, for the basic needs of a third country national suffering from a serious illness where such a person lacks the means to make such provision for himself. The requirement to provide emergency health care and essential treatment of illness under Article 14.1.b of Directive 2008/115 may, in such a situation, be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned. It should, however, be noted that it is for the Member States to determine the form in which such provision for the basic needs of the third country national concerned is to be made.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-007

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 12.02.2015 / **e)** C-48/14 / **f)** Parliament v. Council / **g)** ECLI:EU:C:2015:91 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

4.17.3 Institutions – European Union – **Distribution of powers between Institutions of the EU.**

4.17.4 Institutions – European Union – **Legislative procedure.**

Keywords of the alphabetical index:

European Union, act, legal basis, choice, criteria / Legal certainty, cooperation sincere / Water, human consumption, protection / Radioactive substance, health, danger.

Headnotes:

If the Treaties contain a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision. In this context, Article 31 EA constitutes a more specific legal basis for protecting the health of populations against radioactive substances in water intended for human consumption than the general legal basis resulting from Article 192.1 TFEU.

Indeed, on the one hand the purpose pursued by the contested Directive thus corresponds to the purpose of a basic standard within the meaning of Article 30 EA, which aims to protect the health of the general public against the dangers arising from ionising radiation.

On the other hand, as regards the content of the contested Directive, it lays down the parametric values and frequencies and methods for monitoring radioactive substances in water intended for human consumption. The content of the contested Directive also corresponds to the content of a basic standard within the meaning of Article 30 EA which, in accordance with points (a) and (b) of the second paragraph of that article, in respect of the ionising radiation, sets maximum permissible doses compatible with adequate safety and the maximum permissible levels of exposure and contamination.

The principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law.

Sincere cooperation is exercised by the institutions within the limits of the powers conferred by the Treaties on each institution. The obligation resulting from Article 13.2 TEU is therefore not such as to change those powers.

Summary:

I. The European Parliament sought the annulment of Council Directive 2013/51/Euratom laying down requirements for the protection of the health of the general public with regard to radioactive substances in water intended for human consumption. The Parliament claims that the main objective of the contested Directive corresponds to that of EU policy in the field of the environment, listed in Article 191.1 TFEU, particularly the objectives of the protection of human health and the prudent and rational use of natural resources. In its view, the contested Directive should have been based on Article 192.1 TFEU.

II. The Court dismissed the action for annulment.

First of all regarding the choice of legal basis, the Court emphasised that according to Article 191.1 TFEU, EU policy on the environment is to contribute to the pursuit, in particular, of the protection of human health. Nevertheless, the Court recalled that the provisions of Chapter 3 of Title II of the EAEC Treaty are to be interpreted broadly in order to give them practical effect. Those provisions, which include Articles 30 EA and 31 EA, accordingly are intended to ensure the consistent and effective protection of the health of the general public against the dangers arising from ionising radiations, whatever their source and whatever the categories of persons exposed to such radiations. Consequently, the directive was validly adopted on the basis of Article 31 EA.

Next, regarding the violation of the principle of legal certainty, the Court noted that in the field of health protection of the population, ensured by the provisions of Chapter 3 of Title II of the Euratom Treaty, there is no contradiction in the relationship between Directive 2013/51, laying down requirements for the protection of the health of the population with regard to radioactive substances in water intended for human consumption, and Directive 98/83 concerning the quality of water intended for human consumption. Indeed, firstly, the two directives set the same parameter values. On the other hand, compared to Directive 98/83 regarding, in general, the quality of water intended

for human consumption, Directive 2013/51 is *lex specialis* as regards the health protection of the population against the dangers of radioactive substances in such waters. In this regard, the principle *lex specialis derogat legi generali* applies even if the *lex generalis* and *lex emanate* from the same institution. It follows that, in the event of any inconsistency between the regimes established by these two Directives, the provisions of Directive 2013/51 prevail over those of Directive 98/83, as is expressly confirmed in recital 5 of the Directive 2013/51, so that no breach of the principle of legal certainty can result.

Finally, according to the Court, given that, in adopting Directive 2013/51, laying down requirements for the protection of human health with regard to radioactive substances in water intended for human consumption, the Council used an appropriate legal basis, namely Article 31 EA, it cannot be argued that it breached the principle of loyal cooperation.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-008

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 26.02.2015 / **e)** C-472/13 / **f)** Shepherd / **g)** ECLI:EU:C:2015:117 / **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.**

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

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

5.3.26 Fundamental Rights – Civil and political rights – **National service.**

Keywords of the alphabetical index:

Asylum, foreigner, subsidiary protection / Military service, desertion, asylum request / Conscientious objector, alternative to desertion.

Headnotes:

1. Article 9.2.e of Council Directive 2004/83/EC of 29 April 2004 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:

- it covers all military personnel, including logistical or support personnel;
- it concerns the situation in which the military service performed would itself include, in a particular conflict, the commission of war crimes, including situations in which the applicant for refugee status would participate only indirectly in the commission of such crimes if it is reasonably likely that, by the performance of his tasks, he would provide indispensable support to the preparation or execution of those crimes;
- it does not exclusively concern situations in which it is established that war crimes have already been committed or are such as to fall within the scope of the International Criminal Court's jurisdiction, but also those in which the applicant for refugee status can establish that it is highly likely that such crimes will be committed;
- the factual assessment which it is for the national authorities alone to carry out, under the supervision of the courts, in order to determine the situation of the military service concerned, must be based on a body of evidence capable of establishing, in view of all the circumstances of the case, particularly those concerning the relevant facts as they relate to the country of origin at the time of taking a decision on the application and to the individual position and personal circumstances of the applicant, that the situation in question makes it credible that the alleged war crimes would be committed;
- the possibility that military intervention was engaged upon pursuant to a mandate of the United Nations Security Council or on the basis of a consensus on the part of the international community or that the State or States conducting the operations prosecute war crimes are circumstances which have to be taken into account in the assessment that must be carried out by the national authorities; and

- the refusal to perform military service must constitute the only means by which the applicant for refugee status could avoid participating in the alleged war crimes, and, consequently, if he did not avail himself of a procedure for obtaining conscientious objector status, any protection under Article 9.2.e of Directive 2004/83 is excluded, unless that applicant proves that no procedure of that nature would have been available to him in his specific situation.

2. Article 9.2.b and 9.2.c of Directive 2004/83 must be interpreted as meaning that, in circumstances such as those in the main proceedings, it does not appear that the measures incurred by a soldier because of his refusal to perform military service, such as the imposition of a prison sentence or discharge from the army, may be considered, having regard to the legitimate exercise, by that State, of its right to maintain an armed force, so disproportionate or discriminatory as to amount to acts of persecution for the purpose of those provisions. It is, however, for the national authorities to ascertain whether that is indeed the case.

Summary:

I. In August 2008, an American soldier, Andre Shepherd, sought asylum in Germany. He had left his unit, which had been stationed in Germany since April 2007, after receiving an order to return to Iraq. Mr Shepherd believed that he should no longer participate in a war he considered unlawful and in the war crimes that were, in his view, committed in Iraq. During his first tour of duty in Iraq, near Tikrit, between September 2004 and February 2005, he had not participated directly in either military action or combat operations, but had worked as a helicopter maintenance mechanic. Upon his return from that tour, he re-enlisted in the United States army, in which he had initially enlisted in December 2003 for a period of 15 months. In support of his asylum request, Mr Shepherd claims that, as a result of his desertion, he is at risk of criminal prosecution. Moreover, since desertion is a serious offence in the USA, it affects his life by putting him at risk of social ostracism in his country.

His asylum application having been rejected by the German Federal Office for Migration and Refugees, Mr Shepherd asked the Administrative Court, Munich to annul that decision and to order that he be granted refugee status. As a result, the referring court sought to ascertain whether, essentially, a person in the circumstances of Mr Shepherd could invoke an act of persecution referred in Article 9.2.e of Directive 2004/83 in support of his request for refugee status.

II. In its judgment, the Court held that the scope of the abovementioned Article of Directive 2004/83 extends to military personnel who are not directly involved in fighting, including logistical or support personnel, in the event that they could have been called upon, in the execution of their military service, to be the instigator of acts such as those covered by the said provision or to have participated in them in some other way. In order to determine whether this is the case, the Court noted that the national authorities, under the supervision of the courts, must examine whether there are objective reasons for considering that the person concerned could have been called upon to commit war crimes.

The Court, however, held that a person who refuses to perform military service is not eligible for refugee status under Article 9.2.e of the said directive unless that person has first sought, without success, to avail themselves of all the available procedures to obtain conscientious objector status, or if it is shown that no such procedure is available to him.

Lastly, according to the Court, in so far as an asylum-seeker relies upon Article 9.2.c of Directive 2004/83, it is necessary that the competent national authorities assess whether the prosecution or punishment for desertion is so disproportionate or discriminatory that they fall within the acts of persecution covered by this Directive.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-009

a) European Union / **b)** General Court of the European Union / **c)** / **d)** 27.02.2015 / **e)** T-188/12 / **f)** Breyer v. Commission / **g)** ECLI:EU:T:2015:124 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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, written submission presented to the courts of the European Union.

Headnotes:

The written submissions produced by a Member State lodged before the Court of Justice in infringement proceeding under Article 258 TFEU, and transmitted to the Commission, as a party to the proceeding, must be qualified as documents held by an institution within the meaning of Article 2.3 of Regulation (EC) no. 1049/2001, regarding public access to European Parliament, Council and Commission documents, read in conjunction of its Article 3.a.

This conclusion cannot be called into question by the fact that the written submissions are not addressed to the institution concerned, but to the Court of Justice, and that the former only received the copies transmitted by the latter. If, pursuant to Article 2.3 of Regulation no. 1049/2001, only the documents held by an institution, which are produced or received by it and at its disposal, fall within the scope of the regulation, it is not required, however, with a view to inclusion of the documents received by the institution within the scope of the regulation, that such documents have been addressed to the institution concerned and have been transmitted directly by the author. Furthermore, if the term “document” is defined broadly by Article 3.a of Regulation no. 1049/2001, based on the existence of conserved documents, it is accepted that the existence of such documents within the meaning of the Article above-mentioned are not affected by the fact that the documents in question have been transmitted to the institution concerned in form of copies instead of originals.

As with the documents drafted by the Commission with a view to a judicial proceeding, the written submissions lodged by a Member State before the Court of Justice in an infringement proceeding brought by the Commission against that Member State, have special characteristics in so far as these documents are involved, by their very nature, in the judicial activities of the Court. Indeed, since in its written submission, the defendant Member State may, in particular, raise any available arguments to support its defence, it is on the basis of these

elements submitted by the Member State that the Court render the judgment.

In this regard, although included in the judicial activities of the Courts of the EU, submissions made by a Member State in infringement proceedings do not, as is the case of those made by the Commission, fall within the exclusion of the right of access instituted by Article 15.3.4 TFEU, relating to in the judicial activities of the Court. Indeed, other than the fact that documents produced by a Member State with a view to a judicial proceeding share very common characteristics, there is no reason for a distinction to be drawn, with a view to the inclusion of these documents within the scope of the right of access to document, between those originating from the Commission and those from a Member State, in accordance with Article 15.3.4 TFEU, or by the fact that these documents originate from different authors, or by nature of document.

Thus, Article 15.3.4 TFEU, should not be interpreted as introducing, with regard to access to documents drafted by an institution with a view to a judicial proceeding, any authorship rule, in accordance with which, a distinction should be carried out between documents established by an institution with a view to an judicial proceeding, and those produced by a Member State during the trial phase of an infringement proceeding.

Nevertheless, a distinction must be drawn between the exclusion of the judicial activities of the Court of Justice from the right of access to documents pursuant to Article 15.3.4 TFEU, on the one hand, and documents drafted with a view to proceedings before the Court, on the other. The latter, although included in the judicial activities of the Court, do not fall within the exclusion instituted by the Treaties and are, on the contrary, subject to the right of access. Thus, it is clear from Article 15.3.4 TFEU that written submissions lodged by a Member State in court proceeding fall within the scope of Regulation no. 1049/2001, regarding public access to European Parliament, Council and Commission documents, provided that the conditions for the application of the regulation are fulfilled, and that it is without prejudice to the application, if appropriate, of one of the exceptions laid down by Article 4 of the regulation, and the possibility for the Member State concerned to ask the institution concerned not to disclose its documents.

Summary:

I. In March 2011, Mr Patrick Breyer requested the Commission to grant him access to, among others, the written submissions that Austria had presented to

the Court of Justice in infringement proceedings brought by the Commission against that Member State for failing to transpose the Data Retention Directive. Those judicial proceedings were concluded by a judgment of the Court of 29 July 2010. The Commission refused access to those documents, of which it held a copy, on the grounds that they do not fall within the scope of Regulation no. 1049/2001. Mr Breyer then brought an action before the General Court of the European Union seeking the annulment of the decision refusing access.

II. The General Court annuls the Commission's decision refusing access.

According to the General Court, the written submissions at issue are not documents of the Court of Justice which would, if they had been, be excluded from the scope of the right to access and, therefore, from the scope of Regulation no. 1049/2001.

Indeed, a distinction must be drawn between the exclusion of the judicial activities of the Court of Justice from the right of access to documents on the one hand, and documents drafted with a view to proceedings before the Court, on the other. The latter, although included in the judicial activities of the Court, do not fall within the exclusion instituted by the Treaties and are, on the contrary, subject to the right of access.

According to the General Court, there is no reason for a distinction to be drawn, with a view to the inclusion of documents within the scope of the right of access to documents, between those originating from the Commission and those from a Member State. The General Court also recalls that, by adopting Regulation no. 1049/2001, the EU legislature abolished the 'authorship rule', in accordance with which, when a document held by an institution was created by a third party, the request for access to the document had to be addressed directly to its author.

Supplementary information:

This judgment was the subject of an appeal: C-213/15 P – *Commission v. Breyer*, pending case.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-010

a) European Union / **b)** Court of Justice of the European Union / **c)** Fifth Chamber / **d)** 05.03.2015 / **e)** C-220/14 P / **f)** Ezz e.a v. Council / **g)** ECLI:EU:C:2015:147 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.16 Institutions – **International relations**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Act, legal basis, judicial control, purpose / European Union, common foreign and security policy, restrictive measure.

Headnotes:

1. Review of the legal basis of an act enables the powers of the author of the act to be verified and the procedure for the adoption of that directive to be checked as to whether it was vitiated by any irregularity. According to settled case-law, the choice of legal basis for an EU measure must rest on objective factors amenable to judicial review, including the purpose and content of that measure.

However, given the broad goals and objectives of the CFSP, as expressed in Articles 3.5 and 21 TEU, and the specific provisions relating to that policy, in particular Articles 23 and 24 TEU, the General Court did not commit an error of law in finding that Decision 2011/172/CFSP concerning restrictive measures against certain persons, entities and bodies in view of the situation in Egypt could legally be adopted on the basis of Article 29 TEU, since it forms part of a policy to support new Egyptian authorities intended to promote political and economic stabilisation of that State and more specifically, to assist the authorities of that country in their fight against the misappropriation of public funds and, in so doing, is fully based on the CFSP and meets the objectives mentioned in Article 21.2.b and 21.2.b.d TEU.

2. The condition laid down in Article 1.1 of Decision 2011/172/CFSP, under which all funds and resources of persons or entities identified as responsible for the misappropriation of Egyptian public funds are frozen must be interpreted as meaning that the existence of legal proceedings related to actions for embezzlement may be accepted as the basis for restrictive measures, without there being any need to describe the personal involvement of the person concerned.

Summary:

I. In the wake of the political events which took place in Egypt in and after January 2011, the Council of the European Union adopted, on 21 March 2011, on the basis of Article 29 TEU, Decision 2011/172/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt, which establishes a freezing of assets. In addition it lists by name the 19 natural persons which the Council regards as meeting the criteria laid down in Article 1.1. In order to implement this Decision, the Council adopted Regulation no. 270/2011.

An action requesting the annulment of Decision 2011/172 and Regulation no. 270/2011 was lodged by some of the listed persons. In particular, they claimed that the implemented acts lacked a proper legal basis.

The General Court having dismissed the action, the applicants appealed to the Court.

II. The Court of Justice first of all reaffirmed that the choice of legal basis for a European Union measure must be based on objective factors which include the purpose and content of the act and that Decision 2011/172/CFSP is fully based on the CFSP and meets the objectives mentioned in Article 21.2.b and 21.2.d TEU.

Second, the Court emphasised that the General Court did not err in law when, in the judgment under appeal, it identified the objective of those acts as being to assist the Egyptian authorities in their fight against the misappropriation of State funds.

In that regard the Court held that it was not for the Council or the General Court to verify whether the investigations to which the appellants were subject were well founded, but only to verify whether that was the case as regards the decision to freeze funds in the light of the request for assistance.

With regard to the individual circumstances of each applicant, the Court noted that the merits of their inclusion on the lists in the Annex to Decision 2011/172/CFSP and Regulation no. 270/2011 had been examined by the General Court. In this regard, given the specific objective of the freezing of funds, i.e. the immobilisation of assets that may have become part of the applicants' assets as a result of embezzlement committed against the Egyptian authorities, the temporary and reversible nature of the measures taken, and the provisions allowing for the release of funds in certain cases, the General Court was not required to conduct a review of the proportionality of the restrictive measure with regard to each of the applicants.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-011

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 14.04.2015 / **e)** C-409/13 P / **f)** Council v. Commission / **g)** ECLI:EU:C:2015:217 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
4.17.3 Institutions – European Union – **Distribution of powers between Institutions of the EU**.
4.17.4 Institutions – European Union – **Legislative procedure**.

Keywords of the alphabetical index:

European Union, institutional balance / European Union, institutions, cooperation, genuine / European Union, external relations, programme of financial assistance to third countries / European Commission, legislative initiative, withdrawal / European Commission, legislative initiative, modification.

Headnotes:

Under Article 13.2 TEU, each EU institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions.

With regard to the Commission's power of legislative initiative under the ordinary legislative procedure, it follows from Article 17.2 TEU in conjunction with Articles 289 and 293 TFEU that, just as it is, as a rule, for the Commission to decide whether or not to submit a legislative proposal and, as the case may be, to determine its subject-matter, objective and content, the Commission has the power, as long as the Council has not acted, to alter its proposal or even, if need be, withdraw it. The power of withdrawal cannot, however, confer upon that institution a right of veto in the conduct of the legislative process, a right which would be contrary to the principles of conferral of powers and institutional balance. Consequently, if the Commission, after submitting a proposal under the ordinary legislative procedure, decides to withdraw that proposal, it must state to the Parliament and the Council the grounds for the withdrawal, which, in the event of challenge, have to be supported by cogent evidence or arguments.

In this regard, where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d'être*, the Commission is entitled to withdraw it. It may, however, do so only after having due regard, in the spirit of sincere cooperation which must govern relations between EU institutions in the context of the ordinary legislative procedure, to the concerns of the Parliament and the Council underlying their intention to amend that proposal.

It is apparent from Article 17.2 TEU, read in conjunction with Articles 289 and 293 TFEU, that the Commission has the power not only to submit a legislative proposal but also, provided that the Council has not yet acted, to alter its proposal or even, if need be, withdraw it. Since that power of the Commission to withdraw a proposal is inseparable from the right of initiative with which that institution is vested and its exercise is circumscribed by the provisions of the FEU Treaty, there can be no question of an infringement of the principle of democracy laid down in Article 10.1 and 10.2 TEU.

Summary:

I. Macro-financial assistance is macro-economic financial aid granted to third countries experiencing short-term balance of payments difficulties. Initially, it was granted, on a case-by-case basis, by Council decisions adopted on the basis of Article 352 TFEU. Since the entry into force of the Treaty of Lisbon, Article 212 TFEU constitutes a specific legal basis for decisions to grant macro-financial aid, which must be adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure, without prejudice to the urgency procedure laid down in Article 213 TFEU in the context of which the Council may act alone.

On 4 July 2011, the Commission submitted a proposal for a framework regulation of the European Parliament and of the Council laying down general provisions for macro-financial assistance to third countries on the basis of Articles 209 and 212 TFEU. Article 7 of that proposal, related to the procedure for granting macro-financial assistance, provided that any country wishing to be granted such assistance was to submit a written request to the Commission. If the conditions were met, the assistance requested would be granted by the Commission in accordance with the 'examination' procedure established by Article 5 of Regulation (EU) no. 182/2011.

The proposal for a framework regulation formed the subject-matter of a general approach of the Council, in which it proposed, in particular, as regards Article 7.2 of that proposal, to replace the conferral of implementing powers on the Commission with the application of the ordinary legislative procedure.

The approach of replacing the implementing act procedure with the ordinary legislative procedure formed then the subject of an agreement in principle between the Parliament and the Council. After expressing its disagreement with that approach, the Commission withdrew the proposal for a framework regulation. The decision of the Commission was contested by the Council.

II. The Court of Justice dismissed the action brought by the Council claiming that the decision of the Commission should be annulled.

In rejecting the argument based on an alleged infringement of the principle of conferral of powers and the principle of institutional balance, the Court of Justice held that the power of legislative initiative conferred on the Commission by the Treaty does not come down to submitting a proposal and, subsequently, promoting contact and seeking to reconcile the positions of the Parliament and the

Council. The Court recognises that the Commission has the power, as long as the Council has not acted, to withdraw its proposal. According to the Court, the amendment planned by the Parliament and the Council would have run counter to achievement of the objective pursued by the proposal for a framework regulation consisting in improving the effectiveness of the EU policy relating to macro-financial assistance. Consequently, the decision of the Commission to withdraw the proposal for a framework regulation does not infringe the principle of conferral of powers or the principle of institutional balance.

As regards the alleged infringement of the principle of democracy laid down in Article 10.1 and 10.2 TEU, according to the Court, since the power of the Commission to withdraw a proposal is inseparable from the right of initiative with which that institution is vested and its exercise is circumscribed by the provisions of the Treaty, there can be no question, in this instance, of an infringement of that principle.

Turning to the alleged infringement of the principle of loyal cooperation, the Court rejected, first of all, the argument that the Commission's announcement of its intention to withdraw the proposal for a framework regulation was belated, considering that, since there was no consensus between the co-legislators in respect of retaining the ordinary legislative procedure for the adoption of each decision granting macro-financial assistance, the Commission cannot be reproached for not having already mentioned at that time the possibility that the proposal for a framework regulation would be withdrawn. The Court further held that the Commission sought to reach a solution which, while safeguarding the objectives pursued by the proposal for a framework regulation in respect of macro-financial assistance, sought to take the concern of the Parliament and the Council into account. Moreover, it was clear from the working documents of the institutions concerned that the co-legislators clearly perceived those warnings from the Commission.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-012

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 14.04.2015 / **e)** C-527/13 / **f)** Lourdes Cachaldora Fernández v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS) / **g)** ECLI:EU:C:2015:215 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Social security, contribution, equality / Part-time work, legal obstacle.

Headnotes:

Article 4.1 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, must be interpreted as not precluding a rule of national law which provides that the contribution gaps existing within the reference period for calculating a contributory invalidity pension, after a period of part-time employment, are taken into account by using the minimum contribution bases applicable at any time, reduced as a result of the reduction coefficient of that employment, whereas, if those gaps follow full-time employment, there is no provision for such a reduction.

In the light of the foregoing, the national provision at issue cannot, on the basis of the matters set out in the order for reference, be regarded as placing at a disadvantage predominantly a particular category of workers, in this case those working part-time and, in particular, women. The national provision cannot, therefore be regarded as being an indirectly discriminatory measure within the meaning of Article 4.1 of Directive 79/7.

The Framework Agreement on part-time work, concluded on 6 June 1997, set out in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC of 7 April 1998, must be interpreted as not applying to legislation of a Member State which provides that the

contribution gaps existing within the reference period for calculating a contributory invalidity pension, after a period of part-time employment, are taken into account by using the minimum contribution bases applicable at any time, reduced as a result of the reduction coefficient of that employment, whereas, if those gaps follow full-time employment, there is no provision for such a reduction. In this regard, it is apparent that the pension is a statutory social security pension that cannot be regarded as constituting an employment condition.

In addition, an interpretation of 'obstacles of a legal nature', as referred to in Clause 5.1.a of the Framework Agreement, under which Member States would be forced to adopt, outside the area of employment conditions, measures relating to a pension such as that at issue in the main proceedings, would amount to imposing general social policy obligations on those Member States concerning measures that fall outside the scope of that Framework Agreement.

Lastly, in view of the random nature of the impact of that provision on part-time workers, national legislation such as that in issue cannot be regarded as a legal obstacle likely to limit the opportunities for part-time work.

Summary:

I. Ms Cachaldora Fernández, who is a Spanish citizen, paid contributions to the Spanish social security scheme between 15 September 1971 and 25 April 2010, making a total of 5,523 days of employment on a full-time basis except between 1 September 1998 and 23 January 2002, when she was employed on a part-time basis. On the other hand, Ms Cachaldora Fernández did not pursue any occupational activity between 23 January 2002 and 30 November 2005 and therefore paid no contributions to the social security scheme during that period. On 21 April 2010, Ms Cachaldora Fernández applied to the INSS for an invalidity pension.

In accordance with the national regulations at issue in the main proceedings, the amount of that pension was calculated on the basis of the contributions which Ms Cachaldora Fernández had paid during the eight years preceding the date of the triggering event, that is to say, between March 2002 and February 2010. It is apparent from the decision for reference that, as regards the period between March 2002 and November 2005, the competent authorities thus took into consideration the minimum bases on the contributions paid during the period immediately preceding the interruption of their payment, to which they applied the coefficient for part-time work.

Ms Cachaldora Fernández lodged a complaint against that decision, claiming that, for the purposes of calculating her pension, for the period between March 2002 and November 2005, the full amount of the minimum contribution bases for each year should be taken into consideration and not the reduced amount thereof resulting from the application of the coefficient for part-time work.

The INSS rejected that complaint on the ground that the proposed calculation method is not consistent with Article 7.2 of Royal Decree no. 1131/2002, which establishes that "the periods during which there was no obligation to pay contributions shall be included taking into consideration the minimum contribution basis of all the bases applicable to each period, corresponding to the number of hours worked under the contract on the date on which that obligation to pay contributions was interrupted or expired". Consequently, Ms Cachaldora Fernández lodged an appeal against that decision before the Juzgado de lo Social no. 2 de Ourense. By judgment of 13 October 2010, that court dismissed her application and upheld the administrative decision of the INSS.

II. The Court of Justice held that a rule of national law which provides that the contribution gaps existing within the reference period for calculating a contributory invalidity pension, after a period of part-time employment, are taken into account at the level of the minimum contribution bases applicable at any time, reduced as a result of the reduction coefficient of that employment, whereas, if those gaps follow full-time employment, there is no provision for such a reduction. The national provision at issue cannot, on the basis of the matters set out in the order for reference, be regarded as placing at a disadvantage predominantly a particular category of workers, in this case those working part-time and, in particular, women.

Indeed, the national law in question did not apply to all part-time workers but only to workers who had, after the end of a part-time employment, an interruption in their contributions during the reference period eight years preceding the date of the operative event for their disability. Therefore, general statistical data about a group of part-time workers, taken as a whole, are not relevant to establish that a much higher number of women than men are affected by this law. Moreover, it is not excluded that certain part-time workers can also benefit from this law in the case where, during the remainder of the reference period or even throughout their whole careers, they had only worked part-time but the last contract that preceded the cessation of their professional activity is a full-time contract. Such workers will be better off as they will receive a pension overvalued in relation to the contributions actually paid.

With regard to the Framework Agreement on part-time work set out in the Annex to Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC, the Court held that the pension claimed by the applicant constituted a statutory social security pension which did not fall within the scope of the Framework Agreement. The Court added, in this regard, that given the random nature of the impact of the national law in question on part-time workers, it could not be considered as a legal obstacle which would limit the opportunities for part-time working.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-013

a) European Union / **b)** Court of Justice of the European Union / **c)** Fourth chamber / **d)** 16.04.2015 / **e)** Joint cases C-446/12 to C-449/12 / **f)** Willems e.a / **g)** ECLI:EU:C:2015:238 / **h)** CODICES (English, French).

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:

Passport, biometric / Identity card, biometric data, storage / Biometric data, use / Biometric data, storage.

Headnotes:

1. Article 1.3 of Regulation no. 2252/2004, on standards for security features and biometrics in passports and travel documents issued by Member States, as amended by Regulation no. 444/2009, must be interpreted as meaning that that regulation is

not applicable to identity cards issued by a Member State to its nationals, regardless of the period of validity and the possibility of using them for the purposes of travel outside that State.

2. Article 4.3 of Regulation no. 2252/2004 must be interpreted as meaning that it does not require Member States to guarantee, in their legislation, that biometric data collected and stored in accordance with that regulation will not be collected, processed and used for purposes other than the issue of the passport or travel document, since that is not a matter which falls within the scope of that regulation.

Indeed, as regards all other uses and storage of that data, it is clear from Article 4.3 of Regulation no. 2252/2004, which deals with the use of such data '[f]or the purpose of this Regulation', read in the light of recital 5 in the preamble to Regulation no. 444/2009, which amended Regulation no. 2252/2004, that the use and storage of that data are not governed by the latter regulation. That recital states that Regulation no. 2252/2004 is without prejudice to any other use or storage of these data in accordance with national legislation of Member States and that it does not provide a legal base for setting up or maintaining databases for storage of those data in Member States, that matter being within the exclusive competence of the Member States.

Summary:

I. The applicants in the main proceedings, Mr Willems and Ms Roest and Ms van Luijk, each made passport applications. In each case, the Burgemeesters concerned rejected those applications, since the persons in question had refused to provide digital fingerprints. Mr Kooistra made an application for the issue of a Dutch identity card which was also refused on the ground that he had refused to provide digital fingerprints and a facial image.

The applicants refused to provide that biometric data on the ground that creating and storing it constitute a serious breach of their physical integrity and their right to privacy.

Similarly, they submitted that in the future the authorities might use biometric data for purposes other than those for which it was provided to them. In particular, the storage of that data in a database might lead to its use for judicial purposes or by the intelligence and security services. It follows from Regulation no. 2252/2004 that, for the purposes of the application of that regulation, biometric data, such as digital fingerprints, may be used only in order to verify the authenticity of the document and the identity of the holder. Such use is also contrary to fundamental rights.

Since their respective actions against the decisions of the Burgemeesters were rejected at first instance, the applicants in the main proceedings brought appeals before the referring court.

II. The Court of Justice stated that, according to the wording of Article 1.3 of Regulation no. 2252/2004, that regulation does not apply to identity cards issued by Member States to their nationals, whether or not they are temporary and whatever the period of their validity.

In that connection, the Court noted that it is true that identity cards, such as the Dutch identity card, may serve as identification of the holder with regard to non-Member States which have concluded bilateral agreements with the Member State concerned, and, in accordance with Articles 4 and 5 of Directive 2004/38, for the purposes of travel between several Member States.

The Court further recalled that the use and storage of biometric data for the purposes specified in Article 4.3 of the regulation are compatible with the requirements of Articles 7 and 8 of the Charter.

However, the Court ruled that as regards all other uses and storage of that data, Regulation no. 2252/2004 is without prejudice to any other use or storage of these data in accordance with Member States' national legislation and that it does not provide a legal basis for the setting up or maintenance of databases for storage of this data in Member States, that matter falling within the exclusive competence of the Member States.

Accordingly, the Court held that the said regulation must be interpreted as meaning that it does not require a Member State to guarantee, in its legislation, that biometric data will not be collected, processed and used by the State for purposes other than those covered by Article 4.3 of this regulation.

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-2015-1-014

a) European Union / **b)** Court of Justice of the European Union / **c)** Fourth Chamber / **d)** 29.04.2015 / **e)** C-528/13 / **f)** Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang / **g)** ECLI:EU:C:2015:288 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.
3.16 General Principles – **Proportionality**.
5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

Keywords of the alphabetical index:

Public health, protection / Blood donation, deferral, permanent, homosexuality / Homosexuality, blood donation, deferral, permanent.

Headnotes:

The requirements flowing from the protection of fundamental rights are binding on Member States when they implement EU rules, so that they are bound to apply the rules in accordance with those requirements. In that context, the Member States must make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with those fundamental rights.

According to Article 21.1 of the Charter of Fundamental Rights of the European Union, any discrimination based on sexual orientation must be prohibited. This provision is a particular expression of the principle of equal treatment, which is a general principle of EU law enshrined in Article 20 of the Charter.

Point 2.1 of Annex III to Directive 2004/33, implementing Directive 2002/98 as regards certain technical requirements for blood and blood components, must be interpreted as meaning that the criterion for permanent deferral from blood donation in that provision relating to sexual behaviour covers the situation in which a Member State, having regard to the prevailing situation there, provides for a permanent contraindication to blood donation for men who have had sexual relations with other men where it is established, on the basis of current medical, scientific and epidemiological knowledge and data, that such sexual behaviour puts those persons at a high risk of acquiring severe infectious diseases and that, with due

regard to the principle of proportionality, there are no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods than such a counter indication for ensuring a high level of health protection of the recipients. It is for the referring court to determine whether, in the Member State concerned, those conditions are met.

In that connection, it is for the referring court to determine in particular whether the questionnaire and individual interview with a medical professional, provided for in Annex II B.2 to Directive 2004/33, are able to identify more precisely the type of behaviour presenting a risk for the health of recipients, in order to impose a less onerous contraindication than a permanent contraindication for the entire group of men who have had sexual relations with a man.

Summary:

I. On 29 April 2009, the medical doctor of the *Établissement français du sang* (hereinafter, the “EFS”) refused the blood donation that Geoffrey Léger wished to make, on the ground that he stated that he was homosexual. By his refusal, the EFS doctor applied the ministerial decree, which regards the fact that a prospective donor has had sexual relations with another man as a permanent contraindication to giving blood.

Mr Léger brought before the *Tribunal administratif de Strasbourg* an action for annulment of that decision. He argues in particular that the ministerial decree, in that it lays down the permanent contraindication referred to above, infringes Directive 2004/33, in particular Point B of Annex II thereto and Point 2.1 of Annex III thereto. Moreover, he claims the ministerial decree also infringes Articles 3, 8 and 14 ECHR and the principle of equality.

II. The Court of Justice declared that the referring court will have to determine whether, in France, in the case of a man who has had sexual relations with another man, there is a high risk of acquiring severe infectious diseases that can be transmitted by blood. For the purposes of that examination, the *Tribunal administratif de Strasbourg*, will have to take account of the epidemiological situation in France.

Having regard to the fact that French law is liable to discriminate against male homosexuals on the basis of sexual orientation, the Court recalls that any limitations on the exercise of the rights and freedoms recognised by the Charter of Fundamental Rights of the EU may be imposed only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights

and freedoms of others. In that connection, the Court rules that, although the permanent deferral provided for in French law helps to minimise the risk of transmitting an infectious disease to recipients and, therefore, to the general objective of ensuring a high level of human health protection, the principle of proportionality might not be respected.

Furthermore, if there are no such techniques, the *Tribunal administratif de Strasbourg* will have to ascertain whether there are less onerous methods of ensuring a high level of health protection for recipients other than permanent deferral from blood donation and, in particular, whether the questionnaire and the individual interview with a medical professional are able to identify high risk sexual behaviour more accurately.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2015-1-015

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 13.05.2015 / **e)** C-536/13 / **f)** Gazprom / **g)** ECLI:EU:C:2015:316 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4 Sources – Categories – Written rules – **International instruments.**
4.7.14 Institutions – Judicial bodies – **Arbitration.**

Keywords of the alphabetical index:

European Union, judicial cooperation in civil matters / Arbitration, exclusion / Arbitration, New York Convention of 1958 / Arbitration, access to courts, exclusion / Arbitration, mandatory.

Headnotes:

Council Regulation no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.

Therefore, proceedings for the recognition and enforcement of an arbitral award such as that at issue in the main proceedings are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought, and not by Regulation no. 44/2001.

Thus, in the circumstances of the main proceedings, any potential limitation of the power conferred upon a court of a Member State – before which a parallel action has been brought – to determine whether it has jurisdiction would result solely from the recognition and enforcement of an arbitral award, such as that at issue in the main proceedings, by a court of the same Member State, pursuant to the procedural law of that Member State and, as the case may be, the New York Convention, which govern this matter excluded from the scope of Regulation no. 44/2001.

Summary:

I. *Lietuvos dujos* AB (*Lietuvos dujos*) is a company formed under Lithuanian law whose business consists in buying gas from Gazprom (Russian Federation), conveying it and distributing it in Lithuania, and also in managing the gas pipelines and transporting gas to the Region of Kaliningrad of the Russian Federation. The Ministry of Energy brought an action against that company before the *Vilniaus apygardos teismas* (Regional Court, Vilnius), in order to secure an investigation of its activities.

Being of the view that that action breached the arbitration clause contained in the shareholders' agreement concluded with E.ON Ruhrgas International GmbH and the State Property Fund acting on behalf of the Republic of Lithuania, Gazprom filed a request for arbitration against the Ministry of Energy at the Arbitration Institute of the Stockholm Chamber of Commerce, asking the

arbitral tribunal to order the Ministry of Energy to withdraw the action which it had brought before the Lithuanian courts.

The arbitral tribunal made a final award ('the arbitral award') in which it granted Gazprom's request in part.

The *Vilniaus apygardos teismas* upheld the action brought by the Ministry of Energy and decided to appoint experts to conduct an investigation of the activities of *Lietuvos dujos*. It also found that that action fell within its jurisdiction and could not be the subject of arbitration under Lithuanian law.

Lietuvos dujos brought an appeal against that decision before the *Lietuvos apeliacinis teismas* (Court of Appeal, Lithuania). Gazprom brought an action before that same court, asking it to recognise and enforce the arbitral award in application of the 1958 New York Convention.

The *Lietuvos apeliacinis teismas*, relying on the 1958 New York Convention, decided not to grant Gazprom's application. By another order, the *Lietuvos apeliacinis teismas* dismissed the appeal brought by *Lietuvos dujos* against the decision of the *Vilniaus apygardos teismas* to initiate an investigation of the activities of *Lietuvos dujos*.

Both of those orders of the *Lietuvos apeliacinis teismas* have been the subject of appeals in cassation to the referring court, the *Lietuvos Aukščiausiasis Teismas* (Supreme Court, Lithuania).

Lietuvos Aukščiausiasis Teismas is seized of an appeal against the order of the *Lietuvos apeliacinis teismas* refusing recognition and enforcement of the arbitral award, classified by the referring court as an anti-suit injunction, by which an arbitral tribunal ordered the Ministry to withdraw or limit some of the claims brought by it before the Lithuanian courts. In parallel, the referring court is also seized of an appeal against an order of the *Lietuvos apeliacinis teismas* confirming the decision of the *Vilniaus apygardos teismas* to initiate an investigation of the activities of *Lietuvos dujos*, which, according to the referring court, is a civil matter within the meaning of Article 1.1 of Regulation no. 44/2001.

According to the referring court, an arbitral award prohibiting a party from bringing certain claims before a national court could undermine the practical effect of Regulation no. 44/2001, in the sense that it could restrict the exercise by such a court of its power to determine itself whether it has jurisdiction to hear a case falling within the scope of that regulation.

II. In its decision, the Court stated that the referring court is asking the Court not whether such an injunction issued by a court of a Member State is compatible with Regulation no. 44/2001, but whether it would be compatible with that regulation for a court of a Member State to recognise and enforce an arbitral award ordering a party to arbitration proceedings to reduce the scope of the claims formulated in proceedings pending before a court of that Member State.

In that regard, the Court began by recalling first of all that arbitration does not fall within the scope of Regulation no. 44/2001, since the latter governs only conflicts of jurisdiction between courts of the Member States.

Next, the Court pointed out that, in the circumstances of the main proceedings, as the order has been made by an arbitral tribunal there can be no question of an infringement of that principle by interference of a court of one Member State in the jurisdiction of the court of another Member State.

The Court has also ruled that the proceedings for the recognition and enforcement of an arbitral award such as that at issue in the main proceedings are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought, and not by Regulation no. 44/2001 and that any potential limitation of the power conferred upon a court of a Member State – before which a parallel action has been brought – to determine whether it has jurisdiction would result solely from the recognition and enforcement of an arbitral award, such as that at issue in the main proceedings, by a court of the same Member State, pursuant to the procedural law of that Member State and, as the case may be, the New York Convention, which govern this matter excluded from the scope of this Regulation.

In conclusion, the Court stated that Regulation no. 44/2001 must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2015-1-001

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 27.01.2015 / e) 59552/08 / f) Rohlena v. Czech Republic / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Penalty, heavier, imposing / Offence, continuous / Domestic violence, criminal law, application to earlier acts / Offence, foreseeability, sufficient.

Headnotes:

In order to determine whether or not a conviction of a continuous offence under a legislative provision that only entered into force after some of the acts were committed constituted retroactive application of more detrimental criminal law prohibited by Article 7 ECHR, the Court must examine (a) whether, at the time they were committed, the acts, including those carried out before the entry into force of the provision, constituted an offence that was accessible and defined with sufficient foreseeability by domestic law and (b) whether the application of the provision to encompass acts committed before its entry into force entailed a real possibility of a heavier penalty being imposed.

Summary:

I. The applicant was charged with repeatedly physically and mentally abusing his wife between 2000 and 2006. In 2007 the trial court found him guilty of the continuing offence of abusing a person living under the same roof as defined in Article 215a of the Criminal Code as worded since 1 June 2004. It

considered that that definition extended to acts perpetrated prior to that date to the extent that at the time they had, as in the applicant's case, amounted to another offence. The conviction was upheld by the appeal court and the Supreme Court. Referring to its case-law, the Supreme Court observed that where the offence was a continuing one that was regarded as a single act, the criminal nature of that act had to be assessed under the law in force at the time of the last act constituting the offence. That law also applied to the preceding acts on condition that these would have been criminal acts under the preceding law. In the present case the applicant's acts prior to the amendment of the Criminal Code of 1 June 2004 had amounted to violence against an individual or group of individuals within the meaning of Article 197a of the Criminal Code and assault within the meaning of Article 221 of that Code.

In 2008 the Constitutional Court dismissed as manifestly ill-founded a constitutional appeal lodged by the applicant, considering that the courts' decisions in his case had not been of a retrospective effect prohibited by the Constitution.

II. The applicant had been convicted of a criminal offence under Article 215a of the Criminal Code which had been introduced by virtue of 2004 amendments to that Code also in respect of acts committed before that date. The domestic courts found that a continuous criminal offence was to be considered a single act whose legal classification had to be assessed under the law in force at the time of the completion of the last occurrence of the offence, provided that the acts committed under any previous law would also have been punishable under that law. Thus, Article 215a also applied to the assaults committed by the applicant before 2004 as they had amounted to criminal conduct under the previous law. In interpreting the domestic law, the domestic courts had referred to the concept of a continuing criminal offence, which consisted of individual acts driven by the same purpose, constituting the same offence and linked by virtue of being carried out in an identical or similar manner, which occurred close together in time and pursued the same object. The applicant's conduct before 1 June 2004 had amounted to punishable criminal offences under the domestic law in force at that time and had thus comprised the constituent elements of the Article 215a offence. Thus, holding the applicant liable under that provision also in respect of acts committed before that date had not constituted retroactive application of more detrimental criminal law as prohibited by the Convention.

In these circumstances, and considering also the clarity with which the relevant domestic provisions were formulated and interpreted by the national courts, the applicant had been in a position to foresee that he could be held criminally liable for a continuous offence also as regards the period before 2004, and to regulate his conduct accordingly. Therefore, the offence of which the applicant had been convicted had a basis in the relevant “national ... law at the time when it was committed”, which in turn had defined the offence sufficiently clearly to meet the quality requirement of foreseeability under Article 7 ECHR.

Finally, the Court rejected the applicant's argument that the imposition of a penalty under the 2004 provision had resulted in a more severe penalty than would have otherwise been imposed. Nothing indicated that the domestic courts' approach had had the adverse effect of increasing the severity of the applicant's punishment. On the contrary, had the acts perpetrated by him prior to 1 June 2004 been assessed separately from those he committed afterwards, the applicant could have received at least the same sentence as the one actually imposed, or even a harsher one.

The Court therefore found no violation of Article 7 ECHR.

Languages:

English, French.



Identification: ECH-2015-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 05.02.2015 / **e)** 22251/08 / **f)** Bochan v. Ukraine / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction.**

4.7.7 Institutions – Judicial bodies – **Supreme court.**

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:

Extraordinary appeal, Supreme Court / Court proceeding, reopening / Circumstance, exceptional / European Court of Human Rights, judgment, execution, arbitrary, remedy.

Headnotes:

While Article 6.1 ECHR is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6.1 ECHR and of the safeguards of a fair trial that it affords to litigants. This can be the case, when a national court gives a grossly arbitrary construction of the European Court's judgment in dismissing “appeal in the light of exceptional circumstances”.

Summary:

I. The applicant was involved in longstanding but ultimately unsuccessful litigation over title to land in the domestic courts. In 2001 she lodged an application with the European Court complaining of unfairness in the domestic proceedings. In a judgment of 3 May 2007 the Court found a violation of Article 6.1 ECHR on the grounds that the domestic courts' decisions had been reached in proceedings which failed to respect the Article 6.1 ECHR fair-hearing guarantees of independence and impartiality, legal certainty and the requirement to give sufficient reasons. It awarded the applicant EUR 2,000 in respect of non-pecuniary damage.

Relying on the European Court's judgment, the applicant then lodged an “appeal in the light of exceptional circumstances” (“exceptional appeal”) in which she asked the Ukrainian Supreme Court to quash the domestic courts' decisions in her case and to allow her claims in full. In March 2008 the Supreme Court dismissed her appeal after finding that the domestic decisions were correct and well-founded. In June 2008 it declared a further exceptional appeal lodged by the applicant inadmissible.

In her application to the European Court in the instant case, the applicant complained under Article 6.1 ECHR and Article 1 Protocol 1 ECHR that

in dismissing her exceptional appeal the Supreme Court had failed to take into account the European Court's findings in its judgment of 3 May 2007.

II. The Court had to determine three issues: whether it was prevented by Article 46 ECHR from dealing with the applicant's complaints given that the Committee of Ministers of the Council of Europe was still supervising execution of the judgment of 3 May 2007; whether the domestic proceedings on the applicant's exceptional appeal attracted the European Convention on Human Rights guarantees; and, if so, whether the requirements of Article 6.1 ECHR had been complied with.

a. Whether the Court was prevented by Article 46 ECHR from examining the complaints: The Grand Chamber reiterated that the Committee of Ministers' role in the sphere of execution of the Court's judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment.

Some of the applicant's pleadings in the present case could be understood as complaining about an alleged lack of proper execution of the Court's judgment of 3 May 2007. However, complaints of a failure either to execute the Court's judgments or to redress a violation already found by the Court fell outside the Court's competence. The applicant's complaints concerning the failure to remedy the original violation of Article 6.1 ECHR in her previous case were thus inadmissible.

However, the applicant had also raised a new grievance concerning the conduct and fairness of the proceedings decided by the Supreme Court in March 2008. She alleged, in particular, that the reasoning employed by the Supreme Court in that decision had manifestly contradicted the Court's pertinent findings in its 2007 judgment. This new grievance was thus about the manner in which the March 2008 decision had been reached in the proceedings concerning the applicant's exceptional appeal, not about the outcome of those proceedings as such or the effectiveness of the national courts' implementation of the Court's judgment. It thus concerned a situation distinct from that examined in the 2007 judgment and contained relevant new information relating to issues undecided by that judgment. Accordingly, the Court was not prevented by Article 46 ECHR from examining the applicant's new complaint about the unfairness of the proceedings that had culminated in the Supreme Court's decision of March 2008.

b. Applicability of Article 6 ECHR to the proceedings concerning the applicant's exceptional appeal: While Article 6.1 ECHR was not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6.1 and of the safeguards of a fair trial that it affords to litigants. The Court therefore had to examine the nature, scope and specific features of the exceptional appeal at issue in the instant case.

The applicable national legal framework made available to the applicant a remedy enabling a judicial review of her civil case by the Supreme Court in the light of the European Court's finding that the original domestic decisions were defective. By virtue of the kind of judicial review it provided for, the exceptional appeal brought by the applicant could be viewed as a prolongation of the original (terminated) civil proceedings, akin to a cassation procedure as defined by Ukrainian law. That being so, while the special features of this cassation-type procedure could affect the manner in which the prescribed procedural guarantees of Article 6.1 ECHR operate, the Court was of the view that those guarantees should be applicable to it in the same way as they applied to cassation proceedings in civil matters generally.

That conclusion derived from the applicable domestic legal provisions was corroborated by reference to the scope and nature of the "examination" actually carried out by the Supreme Court in March 2008 before it dismissed the applicant's exceptional appeal, leaving the contested decisions unchanged. The Supreme Court reviewed the case materials and the court decisions from the original proceedings in the light of the applicant's new submissions based mainly on the Court's 2007 judgment.

Thus, in the light both of the relevant provisions of the Ukrainian legislation and of the nature and scope of the proceedings culminating in the Supreme Court's decision of March 2008 in relation to the applicant's exceptional appeal, followed by its confirmatory decision of June 2008, the Court considered that the proceedings were decisive for the determination of the applicant's civil rights and obligations. Consequently, the relevant guarantees of Article 6.1 ECHR applied to those proceedings. Therefore, the Court rejected the preliminary objection.

c. Compliance with Article 6.1 ECHR: The Court reiterated that it was not its role to act as a fourth instance and to question under Article 6.1 ECHR the judgments of the national courts, unless their findings could be regarded as arbitrary or manifestly unreasonable.

In the instant case, the Supreme Court had, in its decision of March 2008, grossly misrepresented the European Court's findings in its judgment of 3 May 2007. In particular, it had recounted that the European Court had found the domestic courts' decisions lawful and well-founded and had awarded just satisfaction for the violation of the "reasonable-time" guarantee (when in fact that complaint had been rejected as manifestly ill-founded). Those affirmations were palpably incorrect. The Supreme Court's reasoning did not amount merely to a different reading of a legal text. For the Court, it could only be construed as being "grossly arbitrary" or as entailing a "denial of justice", in the sense that the distorted presentation of the 2007 judgment had the effect of defeating the applicant's attempt to have her property claim examined in the light of that judgment in the framework of the cassation-type procedure provided for under domestic law. The impugned proceedings had thus fallen short of the requirement of a "fair trial" under Article 6.1 ECHR. Therefore, there has been a violation of Article 6.1 ECHR.

Languages:

English, French.



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* 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.

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¹⁰ For example, assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For 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.

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⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

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⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

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⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

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⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

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⁸³ Including other consultations.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹¹ For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

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⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

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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".

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.

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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.

¹²⁰ Including the right to be present at hearing.

¹²¹ Including challenging of a judge.

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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".

¹²⁶ Including compensation issues.

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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.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

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