

# THE BULLETIN

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*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.*

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*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

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

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Inter-American Court of Human Rights ..... J. Recinos

Strasbourg, April 2016

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There was no relevant constitutional case-law during the reference period 1 May 2015 – 31 August 2015 for the following countries:

Armenia, Austria, Slovenia.

Précis of important decisions of the reference period 1 May 2015 – 31 August 2015 will be published in the next edition, *Bulletin* 2015/3, for the following country:

Moldova.

# Azerbaijan

## Constitutional Court

### Important decisions

*Identification:* AZE-2015-2-002

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 22.06.2015 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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.**

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

*Keywords of the alphabetical index:*

Criminal Code / Criminal law / Criminal proceedings / Theft, plunder, information technology.

*Headnotes:*

Theft by entering into a computer system of ATMs and withdrawing cash, implementing different types of payments, or transferring money from a bank account into a personal account constitutes plunder by means of information technology.

Since payment cards contain information on the person and the money, on his or her bank account, this card should be considered an electronic data storage device.

*Summary:*

I. The Court of Appeal of Sumgait City requested the Constitutional Court to interpret Article 177.2.3-1 of the Criminal Code (hereinafter, "CC"). As stipulated in the application, the issue had arisen after T. Tagiyeva was sentenced by the Sumgait City Court on 18 December 2014 under Article 177.1 of the CC for stealing an ATM card and a paper containing the pin

code, avoiding payment of terminal 300 manats and causing material damage.

Due to ambiguous jurisprudence on the provision "commission with use of electronic data storage device, or information technologies" in Article 177.2.3-1 of the CC, the Court of Appeal of Sumgait City concluded that it was necessary to interpret this Article.

Property is included among a number of objects protected by criminal legislation, and its protection is defined as one of the main objectives of the Criminal Code.

II. The Constitutional Court noted that when a person is tried for a criminal act, it must be clear what constitutes that act. If the person tried was found guilty, there must be an unambiguous showing that fault was at the hands of the person accused for commissioning the crime and that his or her right to a fair trial was observed. Otherwise, it would lead to an innocent person being wrongfully prosecuted or the person who commissioned the crime to evade from punishment. Either way, it would violate the principles of legality, equality before the law, responsibility for justice, and humanity on which the Criminal Code is based.

The Plenum of the Constitutional Court began by clarifying the crimes committed with the aim of plunder. Among crimes against property committed with the aim of plunder, the crimes differ in terms of public danger. The crimes committed with the aim of plunder by encroaching on various objects of property are frequently referred to as property crimes. Such crimes are contrary to the law of "subjects of material world", whereby their appropriation is for the benefit of the perpetrator or for the benefit of other persons, but not that of the property owner.

Theft constitutes a type of crime committed for plunder. According to the criminal legislation, theft is the secret plunder of someone else's property (Article 177.1 of the CC).

The Plenum of the Constitutional Court notes that theft of a bank card (withdrawal of cash by other means or falsification) and plunder from ATMs by using a card belonging to someone else or carrying out monetary payments constitute a different public danger to that of simple theft by the method and means of commission.

According to point 2.1.1 "Rules of issue and use of payment cards" adopted by the Board of the Central Bank on 10 July 2012, the payment card is a payment tool used for implementation of non-cash payments

and for receiving cash. According to points 2.1.6 and 2.1.19 of these rules, the card account is the current bank account open for maintaining the accounting of the operations, which are carried out by means of the card. Filling the card with data on the cardholder and printing identification data on the card are carried out by method of expression or an engraving at production of the payment card.

All bank operations carried out by means of the card are realised within the terms of the contract signed between the cardholder and the issuer (bank). The perpetrator, inserting the card into the ATM and carrying out the corresponding operations by means of the keyboard, does not enter directly into the safe of the bank. However, by connecting to an operating bank system, the perpetrator enters into the account and instructs the bank to carry out a certain operation. Unlike breaking the ATM, there is no physical entrance into the storage (i.e., ATM safe).

When a person commits a theft of cash by using a stolen cash card issued to another person (i.e., the cardholder), the person does not use any technology. Instead, the person enters into a bank's computer system with the identification number (PIN code) known to him. Then, the person withdraws money from the cardholder or carries out various payments at the expense of the cardholder.

The definition of "information technology" in Article 177.2.3-1 of the CC includes a set of tools or means during a transfer, reception or information processing. According to Article 2 of the Law "On information, informatisation and information security", information technology is defined as a system of methods and means used during the processing of information, including the application of computer facilities and communication technology.

Theft by information technology constitutes plunder by means of entering into a computer system of ATMs (ultimately the bank, with the use of special programmes and installations) and withdrawing cash, implementing different types of payments, or transferring money from the bank account into a personal account.

The Constitutional Court concluded that, because the payment card contains information on the person and the money which is on his or her bank account, this card should be considered an electronic data storage device. As such, the crime of theft was committed under Article 177.2.3-1 of the CC.

*Languages:*

Azeri, English (translation by the Court).



# Belarus

## Constitutional Court

### Important decisions

*Identification:* BLR-2015-2-002

**a)** Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 27.05.2015 / **e)** D-983/2015 / **f)** On the conformity of the Law of the Republic of Belarus “On Alternative Service” to the Constitution of the Republic of Belarus / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2015; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

*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.**
- 4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**
- 5.3.26 Fundamental Rights – Civil and political rights – **National service.**

*Keywords of the alphabetical index:*

Military service, refusal / Religious conscience.

*Headnotes:*

The Law “On Alternative Service” (hereinafter, the “Law”) establishes the guarantees, the mechanism and the procedure to substitute alternative service for military service in view of individual religious objections to the latter, thereby securing the constitutional right of the citizens of the Republic of Belarus to perform alternative service. The individual being denied this right is entitled to appeal to the regional (Minsk municipal) conscription commission or the court. If the regional (Minsk municipal) conscription commission decides to reject the appeal the individual shall not be deprived of his right to judicial remedy. In this regard the Constitutional Court notes that along with securing the citizens’ right to

appeal to the court the legislator should specify the procedure for adjudication of such appeals with due account for the nature of the relations.

*Summary:*

In the exercise of obligatory preliminary review the Constitutional Court considered in court session the constitutionality of 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.

First, Article 57 of the Constitution provides that defence of Belarus shall be the responsibility and sacred duty of the citizen; the procedure regulating military service, grounds and conditions for exemption from military service or its substitution by alternative service shall be determined by law.

In the Decision of 26 May 2000 “On Some Issues of Realisation of Article 57 of the Constitution of the Republic of Belarus” the Constitutional Court pointed out the necessity to secure the right of the citizens to substitute alternative service for military service, in particular on the basis of religious beliefs, and to develop an appropriate mechanism in order to secure it.

The Constitutional Court notes that the Law has been adopted with a view to fill a gap in the constitutional and legal regulation of social relations involving the exercise of the citizens’ constitutional right to perform alternative service.

Second, the Law defines alternative service as a socially useful activity which the citizens shall perform in substitution of military service and which is not related to the service in the Armed Forces, other forces and military units (Article 1). The Law also determines the areas where the individuals may perform alternative service, notably in public health care facilities, social service, housing and communal services, agriculture and forestry, landscaping enterprises, construction and repair of roads and rail facilities (Article 4.1). The definition provided by the Law for alternative service as socially useful activities in the said areas of the public life emphasises its social nature.

Third, according to the Constitution the State shall guarantee the rights and freedoms of the citizens that are enshrined in the Constitution and laws, and specified by the State’s international obligations (Article 21.3 of the Constitution).

Article 60 of the Constitution guarantees protection of everyone's rights and freedoms by a competent, independent and impartial court within the time limits specified by law.

According to Article 8 of the Universal Declaration of Human Rights everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by Law.

Article 2.3 of the International Covenant on Civil and Political Rights enshrines undertakings of each State Party to the Covenant to ensure that any person whose rights or freedoms as therein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity, and to develop the possibilities of judicial remedy (subparagraphs "a" and "b").

Pursuant to the said provisions of the Constitution and international legal acts the Constitutional Court points to the following. According to Article 17.2 of the Law the individual is entitled to appeal to the regional (Minsk municipal) conscription commission or the court against the refusal to substitute alternative service for military service. When applying this Article of the Law it should be remembered that the decision of the regional (Minsk municipal) conscription commission to reject such appeal shall not deprive the individual of his right to judicial remedy.

In a number of its decisions the Constitutional Court reiterated that when regulating relations affecting the rights and freedoms of the individuals and guarantees for their exercise, the failure to comply with the constitutional principle of the supremacy of law and the principle of legal certainty, based on it, may lead to ambiguous understanding of normative legal acts or their separate provisions as well as to their improper application that will not contribute to ensuring a required level of constitutional legality.

In this regard the Constitutional Court notes that along with securing the citizens' right to appeal to the Court, in particular, against the refusal of the district (municipal) conscription commission to substitute alternative service for military service, the legislator should specify the procedure for adjudication of such appeals with due account for the nature of the relations regulated by the Law.

The Constitutional Court underlines that the contents of the Law aims to secure at the level of the Law the exercise of the constitutional right of the citizens to substitute alternative service for military service due to individual religious objections to perform it.

The Constitutional Court has recognised the Law "On Alternative Service" to be conforming to the Constitution.

#### *Cross-references:*

Constitutional Court:

- no. D-98/2000, 26.05.2000, *Bulletin* 2000/BLR [BLR-2000-B-001].

#### *Languages:*

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



#### *Identification:* BLR-2015-2-003

**a)** Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 02.07.2015 / **e)** D-989/2015 / **f)** On the Right of Witnesses in Criminal Proceedings to Legal Assistance / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2015; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

#### *Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law**.  
 3.10 General Principles – **Certainty of the law**.  
 5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance**.

#### *Keywords of the alphabetical index:*

Witness, legal assistance, right / Criminal proceedings, witness, legal assistance, right.

#### *Headnotes:*

According to the Criminal Procedure Code all persons participating in criminal proceedings shall have the right to legal assistance for protection of their rights and freedoms, including the right to legal assistance of lawyers and their other representatives. The right of a witness to legal assistance during investigative and other procedural actions shall not depend on the



discretionary powers of the preliminary investigation bodies and shall be ensured at all stages of the criminal procedure and cannot be restricted under any circumstances.

### *Summary:*

The Constitutional Court considered the case on existence of a legal gap concerning regulation of the right of witnesses in criminal proceedings to legal assistance. The proceedings were initiated by the Constitutional Court in accordance with Article 158 of the Law "On the Constitutional Proceedings" on the basis of the application submitted by the National Human Rights Public Association "Belarusian Helsinki Committee" on the necessity to eliminate a legal gap and to enshrine in the legislation the right of individuals acting as witnesses in criminal proceedings to legal assistance. The applicant points out the absence of rules on legal assistance for witnesses in the procedural legislation. In practice this fact often leads to the refusal to deliver legal assistance to witnesses and to violation of the rights guaranteed by the Constitution.

When considering the case the Constitutional Court proceeded from the following. The right of everyone to legal assistance to exercise and protect his or her rights and freedoms, including the right to make use, at any time, of assistance of lawyers enshrined in Article 62.1 of the Constitution is one of the most important principles of a democratic state based on the rule of law.

This constitutional provision confirms the commitment of the Republic of Belarus to the generally recognised principles of international law in the field of administration of justice concerning persons charged with a criminal offence and corresponds to the international instruments which extend the scope of the right to qualified legal assistance to other participants in the criminal proceedings, including witnesses.

By virtue of the Law "On Legal Practice and Advocacy in the Republic of Belarus" any individual or legal entity on the territory of Belarus has the right to seek legal assistance from a lawyer of their choice in order to protect their rights and interests before the courts, state bodies and other organisations that are competent to settle such legal issues and before other individuals (Article 6.2); the Court, state body, organisation or official cannot refuse to recognise the right of a lawyer to represent the rights and interests of an individual or legal entity seeking legal assistance, except in the cases stipulated by legislative acts (Article 17.3).

The Criminal Procedure Code (hereinafter, the "CPC") stipulates that all individuals participating in criminal proceedings shall be equal before the law and shall have the right, without any discrimination, to equal protection of their rights and legitimate interests; everyone has the right to legal assistance in criminal proceedings in order to exercise and protect the rights and freedoms, including the right to use legal assistance of lawyers and other representatives in the cases and according to the procedure established by the CPC (Article 20.1 and 20.4); restriction of the rights and freedoms of individuals participating in criminal proceedings shall be permitted only on the grounds and according to the procedure established by the CPC (Article 10.2).

However, the CPC does not contain provisions enshrining directly the right of witnesses to competent legal assistance, although the witnesses' testimony is an important source of evidence and failure to perform obligations provided for by the CPC may result in criminal liability.

The absence in the CPC of a rule enshrining obligation of the body conducting criminal proceedings to allow a lawyer to participate in criminal proceedings as a representative of a witness does not permit to realise properly the constitutionally guaranteed right to legal assistance, including during the investigation and other procedural actions with the participation of the witness.

The necessity to provide this right to the witness is conditioned by the fact that the knowledge of his or her basic procedural rights and obligations is essential not only for the due conducting of the criminal proceedings, but also serves as an additional guarantee of observance by the official of the body conducting criminal proceedings, as well as by the witness of legal requirements the violation of which could result in criminal liability of those involved in criminal proceedings.

In addition, the testimony of a witness given in the presence of a lawyer, according to the Constitutional Court, will have a greater degree of certainty and legal significance for taking a lawful and well-grounded decision upon the criminal case.

Thus, the criminal procedure law which is aimed at enshrining the due legal procedure of conducting the criminal process, contributing to the formation of respect of the human rights and freedoms, the strengthening justice, does not provide for the mechanism of exercising the witness' right to legal assistance.

In its decision the Constitutional Court stated that the right to legal assistance shall not depend on the discretionary powers of the preliminary investigation bodies and shall be ensured at all stages of the criminal procedure and cannot be restricted under any circumstances.

Thus, in order to ensure the principle of the rule of law, to implement the constitutional right of everyone to legal assistance to exercise and protect his or her rights and freedoms, including the right to make use, at any time, of assistance of lawyers the Constitutional Court recognised it necessary to eliminate a legal gap in the CPC concerning legal regulation of the exercise by witnesses in criminal proceedings of their right to qualified legal assistance.

The Constitutional Court proposes that the Council of Ministers prepare an appropriate draft law on making alterations and addenda to the CPC aimed at regulation of the right of a witness to make use of legal assistance of a lawyer during investigative and other procedural actions and submit it to the House of Representatives of the National Assembly.

#### *Languages:*

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



## Belgium Constitutional Court

### Important decisions

*Identification:* BEL-2015-2-006

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 21.05.2015 / **e)** 63/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 29.06.2015 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

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

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

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

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

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.**

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

*Keywords of the alphabetical index:*

Prisoner, rights / Prisoner, prison work, work contract / Prison, solitary confinement cell / Detention, solitary confinement / Detention, punishment cell / Prisoner, private visit / Prison, internal regulations / Prison, hostage taking.

*Headnotes:*

Prisoners engaged in prison work are in a situation which is too far removed from that of employees for it to be possible for a useful comparison to be made of the legal regime governing the work of both categories.

By assigning to the competent legislature the power to lay down in which cases and under what conditions the right to respect for private and family life may be violated, Article 22 of the Constitution offers all citizens a guarantee that there shall be no interference with this right except under rules adopted by a democratically elected deliberative assembly.

A delegation to another power is not contrary to the principle of legality, provided that such authorisation is defined with a sufficient level of precision and relates to the carrying out of measures, the main features of which have previously been laid down by the legislature.

Hostage taking is an extremely serious act which justifies the prolongation of confinement in a punishment cell.

### *Summary:*

I. The not-for-profit association "Ligue des Droits de l'Homme" filed an application with the Court to set aside the law of 1 July 2013 amending the Prisons Principles Act of 12 January 2005 and the legal status of prisoners.

The first plea, alleging a violation of the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution), related to Article 84.4 of the Principles Act which provides that the work made available in prison is not subject to a work contract within the meaning of the law of 3 July 1978 on work contracts.

In a second plea, the applicant argued that Article 130.2 of the Principles Act violated the right to private and family life (Article 22 of the Constitution, read in combination with Article 8 ECHR), in that it made failure to comply with the provisions of the internal regulations a Class B disciplinary offence.

The third plea alleged that Article 132.4 of the Principles Act violated the rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) in that it extended confinement in a punishment cell to a maximum period of nine to fourteen days in the case of hostage taking.

II. With regard to the first plea, the Court looked at whether prisoners undertaking prison work and employees constituted sufficiently comparable categories in terms of the legal regime governing the work carried out by both. It concluded that prison work was substantively different from employment, particularly in the light of certain ways in which the working relationship was formed, the objectives

assigned to work carried out in the prison environment and the specific circumstances and constraints of such work.

Regarding the second plea, the Court held that the applicant limited its criticism to the fact that the provision at issue exposed prisoners to the disciplinary sanctions of solitary confinement or confinement in a punishment cell, or withdrawal or restriction of contacts with outside visitors.

The criticism related to the failure to uphold the principle of legality, the lack of accessibility and the absence of foreseeability resulting from the provision at issue.

The Court held that the contested provision met the requirement of procedural legality, given that the legislature had, in drawing up the internal regulations, laid down the elements to be complied with, had clearly defined the margin of appreciation allowed to the prison director and had specified the nature of the breaches of those regulations and the penalties affecting private and family life which could be imposed as a punishment.

Referring to the case-law of the European Court of Human Rights, the Court observed that the requirement of foreseeability also applied in relation to the protection of the private and family life of prisoners. It then noted that under the law, a copy of the internal regulations was made available to prisoners to enable them to be aware of the rules with which they must comply and the penalties that could be imposed if those rules were not complied with. The contested provision laid down the punishments for infringements of the rules contained in the regulations. These rules took account of the specific nature of each establishment and were required to be worded in sufficiently clear and precise terms to enable prisoners to be aware of the consequences of their acts. In order to determine the nature and degree of the punishment, account was taken of the seriousness of the offence, the circumstances in which it occurred, any mitigating circumstances and any provisional measures that may have been imposed. In the event of any challenge or objection, it was for the competent court to examine whether those conditions had been met.

The Court dismissed the second plea.

Lastly, with regard to the third plea alleging that Article 132.4 of the Principles Act violated the rules of equality and non-discrimination, the Court held that the distinguishing criterion decided upon, based on whether or not hostages had been taken, was an objective criterion.

Furthermore, the extension of the duration of confinement in a punishment cell in the case of hostage taking was relevant to the objective of dissuading prisoners from taking hostages and, more generally, to the commitment to maintain order and security in prisons. Hostage taking was an extremely serious act.

Finally, the Court held that the extension of the maximum duration of confinement in punishment cells, in connection with hostage taking, was not a disproportionate measure given the above objectives. In this regard, it took account of the fact that it was not automatically applied in every instance of hostage taking but was an option, left to the discretion of the prison director, and that other provisions in the law governing confinement in punishment cells also contained several measures designed to protect prisoners' rights.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2015-2-007

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 11.06.2015 / **e)** 84/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.08.2015 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

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

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

3.16 General Principles – **Proportionality.**

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

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

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

#### *Keywords of the alphabetical index:*

Crime, means of prevention, private data, collection / Serious crime, fight against / Personal data, collection / Personal data, storage / Communication, recording / Internet, interference / E-mail, interference / Communication, telephone, interference / Personal data protection / Charter of Fundamental Rights.

#### *Headnotes:*

In imposing the blanket retention of all data on traffic relating to telephone communications (landline and mobile), access to the Internet, e-mail and telephone communications via the Internet, covering everyone and all means of communication regardless of any link with the objective of combating serious crime, the law of 30 July 2013 constitutes a discriminatory and disproportionate violation of the right to privacy and the protection of personal data, and breaches the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in conjunction with the right to respect for private life and the protection of personal data and the principle of proportionality (Articles 7, 8 and 52.1 of the Charter of Fundamental Rights of the European Union).

This law partially transposes into Belgian law the European “Data Retention” Directive which the Court of Justice of the European Union declared invalid in its judgment of 8 April 2014 (C-293/12 and C-594/12).

#### *Summary:*

I. The not-for profit associations “*Liga voor Mensenrechten*” and “*Ligue des Droits de l’Homme*” filed an application for the partial (Article 5) or total setting aside of the law of 30 July 2013 amending Articles 2, 126 and 145 of the Electronic Communications Act and Article 90*decies* of the Code of Criminal Procedure.

Principally, they argued that the contested provisions violated the private life of users of telecommunications and electronic communications by obliging operators to retain all communication traffic data for a period of up to two years.

II. The Court observed that the law at issue constituted the partial transposition into Belgian law of the European “Data Retention” Directive and Article 15.1 of the Directive on privacy and electronic communications, but noted that in its Grand Chamber judgment of 8 April 2014, in response to the request for preliminary rulings from the High Court (Ireland) and the Austrian Constitutional Court (CJEU, C-293/12, *Digital Rights Ireland Ltd* and C-594/12,

*Kärntner Landesregierung e.a.*), the Court of Justice of the European Union had declared the “Data Retention” Directive invalid. The CJEU had held that Articles 3 and 6 of Directive 2006/24/EC, which obliged providers of publicly available electronic communications services and providers of public communications networks to retain for a given period data on the private life of individuals and their communications, as indicated in Article 5 of that Directive, constituted interference with the right to respect for private life guaranteed by Article 7 of the Charter”.

The Court of Justice had also held, in paragraph 35 of the judgment, that “the access of the competent national authorities to the data constitutes a further interference with that fundamental right (see, as regards Article 8 ECHR, European Court of Human Rights, *Leander v. Sweden*, 26 March 1987, § 48, Series A, no. 116; *Rotaru v. Romania* [GC], no. 28341/95, § 46, ECHR 2000-V; and *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 79, ECHR 2006-XI). Accordingly, Articles 4 and 8 of Directive 2006/24 laying down rules relating to the access of the competent national authorities to the data also constitute an interference with the rights guaranteed by Article 7 of the Charter.

This interference by the Directive was described as being particularly serious (paragraph 37), even though the Directive did not authorise acquisition of knowledge of the content of the electronic communications as such (paragraph 39). The Constitutional Court then cited the grounds given in paragraphs 48 to 66 of the CJEU judgment, relating to the review of the proportionality of the contested interference.

The Court held that there was no distinction between the contested law and the Directive. The categories of data which were to be retained were identical to those listed in the Directive, and no distinction was made as to the individuals concerned or in terms of any special rules to be introduced in the light of the objective of combating the crimes enumerated in Article 126.2 of the law of 13 June 2005 replaced by the law at issue. As the Court of Justice had found with regard to the Directive (paragraph 58), the law also applied to individuals for whom there was no evidence to suggest that their conduct might have a link, even an indirect or remote one, with the crimes listed in the contested law. Similarly, the law applied without exception to individuals whose communications were covered by professional secrecy.

In the Court’s view, the contested Article 5 did not, any more than the Directive did, require there to be any relation between the data to be retained and a threat to public security. Neither did it limit the data in

question to a particular time period or geographical area, or to a group of individuals liable to be involved in an offence referred to in the law, or to persons whose data thus retained could help prevent, identify or prosecute such offences.

The Court further found that the law laid down no substantive or procedural condition regarding access to the data. Furthermore, with regard to how long the data should be retained, the law made no distinction between the categories of data as to their potential usefulness for the objective pursued, and no distinction according to the individuals concerned.

For the same reasons that had led the Court of Justice of the European Union to declare the “Data Retention” Directive invalid, the Court found that in passing Article 5 of the contested law, the legislature had exceeded the limits imposed by the principle of proportionality under Articles 7, 8 and 52.1 of the Charter of Fundamental Rights of the European Union. Article 5 of the law therefore violated Articles 10 and 11 of the Constitution read in conjunction with those provisions.

The Court concluded that it was also necessary to annul Articles 1 to 4, 6 and 7 of the contested law of 30 July 2013, on account of their inseparable nature with Article 5, and consequently the entire law.

#### *Cross-references:*

##### Constitutional Court of Romania:

- Judgment no. 461/2014, 16.09.2014, *Bulletin* 2014/3 [ROM-2014-3-006].

##### European Court of Human Rights:

- *Leander v. Sweden*, no. 9248/81, 26.03.1987, Series A, no. 116, § 48;
- *Rotaru v. Romania* [GC], no. 28341/95, § 46, 04.05.2000, ECHR 2000-V;
- *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 79, 29.06.2006, ECHR 2006-XI.

##### Court of Justice of the European Union:

- C-293/12, *Digital Rights Ireland Ltd* and C-594/12, *Kärntner Landesregierung e.a.*, 08.04.2014.

#### *Languages:*

French, Dutch, German.



*Identification:* BEL-2015-2-008

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 16.07.2015 / **e)** 106/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.10.2015 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

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

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

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

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

*Keywords of the alphabetical index:*

Protected person, provisional administrator, assistance / Equality, identical treatment, mental health / Unemployment, summons to interviews / Unemployment, exclusion.

*Headnotes:*

The obligation to inform the provisional administrator of a protected person enables the said administrator to ensure effective protection of the interests of the person for whom he or she has responsibility and to fulfil his or her role. There is no justification for not informing him or her of any summons sent by a FOREM (Walloon public employment and training service) placement and/or vocational training office to a job-seeker placed under provisional administration since the failure to respond to those summonses automatically deprives the job-seeker of the social benefits which are part of the assets which the provisional administrator is responsible for managing.

*Summary:*

I. The Court was asked by the Liège Labour Court to give a preliminary ruling on Article 488bis.k of the Civil Code. This provision protects adults who, on account of their state of health, are deemed to be

totally or partially incapable of managing their assets and are assigned a provisional administrator responsible for handling their assets and assisting them in this regard. It provides that the service of documents and notifications intended for individuals assigned a provisional administrator shall be made to the latter. The provisional administrator of a protected person asked the Liège Labour Court to annul a decision by the National Employment Office which withdrew unemployment benefit from the person under his responsibility as she had failed to attend the FOREM placement and/or vocational training office to which she had been summoned on two occasions in order to proactively assess how earnestly she was seeking employment. These summonses had not been notified to the provisional administrator. The lower court did not decide on whether or not such notification was imposed by Article 488bis.k, but asked the Constitutional Court whether the effect of this provision, insofar as it did not cover summonses sent to a job-seeker placed under provisional administration and the decision to remove said person from the list of job-seekers, was to treat on an identical basis, without reasonable justification, persons who were in very different situations – on the one hand, job-seekers having full capacity to exercise their social rights and comply with the associated obligations, and on the other, job-seekers placed under provisional administration on account of temporary or permanent impairment to their mental health, making them unable to deal on a day-to-day basis with their administrative affairs, and consequently to comply with these same obligations without the assistance of their provisional administrator.

II. The Constitutional Court concluded that this was discriminatory. The obligation laid down in Article 488bis.k of the Civil Code must enable provisional administrators to ensure effective protection of the interests of the persons under their responsibility and fulfil their role. There could be no justification for not informing them of summonses sent by the FOREM to job-seekers placed under provisional administration when the failure to comply with those summonses automatically deprived job-seekers of the social benefits which are part of the assets which provisional administrators are responsible for managing. The Court did not consider it relevant to use as an argument the limits of the role of provisional administrators or the extent of the capacity remaining to those placed under provisional administration, especially in the exercise of their personal rights, as it was for the provisional administrator to demand the application of social legislation in respect of protected persons.

In the interpretation of that provision made by the lower court, to the effect that it did not oblige the FOREM to notify its decisions to a provisional administrator, the provision in the Civil Code violated Articles 10 and 11 of the Constitution. The Court therefore suggested a conciliatory interpretation. Both interpretations were included in the operative part, together with a finding of a violation in the case of the first and of non-violation in the case of the second.

*Languages:*

French, Dutch, German.



## Bosnia and Herzegovina Constitutional Court

### Important decisions

*Identification:* BIH-2015-2-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Grand Chamber / **d)** 13.06.2012 / **e)** AP 2900/09 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 64/12 / **h)** CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Marriage, common-law, establishment / Pension / Law, application, incorrect.

*Headnotes:*

Where courts had applied arbitrarily the provisions of the Law on Civil Procedure, giving rise to an interpretation that the establishment of the existence of a common-law marriage was the establishment of a fact rather than a legal relationship, which runs directly counter to the relevant provisions of Family Law, represents a breach of the right to a fair trial.

*Summary:*

I. The applicant in these proceedings had filed a claim for the exercise of a right to a family pension before the Croatian Pension Insurance Fund – Zagreb Regional Unit – which had, in turn, requested from the applicant the submission of a ruling “establishing the common-law marriage”.

The competent ordinary courts in the Federation of Bosnia and Herzegovina rejected the applicant’s petition for the establishment of the existence of a common-law marriage, making reference to the provisions of Article 54 of the Law on Civil Procedure, thus providing a reasoning that a lawsuit seeking establishment cannot seek the establishment of facts.

The applicant explained, in her lawsuit before the ordinary courts, that she had lived in a common-law marriage with Ivan Usar from the beginning of July 1992 to 24 September 1993, when he got killed; that during the common-law marriage their child, underage I.U., was born. She contended that Ivan Usar, who had had an engagement in the Croatian Defense Council forces, secured for her the right to a family pension following his death, and that the establishment of the existence of a common-law marriage is necessary for her to exercise the right arising from pension insurance.

She maintained that the ordinary courts had applied arbitrarily the material provisions of Article 54 of the Law on Civil Procedure.

II. The Constitutional Court noted that, under Article 54 of the Law on Civil Procedure, the “plaintiff may request in a lawsuit that the court establishes only the existence or non-existence of a right or legal relation or the authenticity or inauthenticity of a document, and that Article 3 of the Family Law of the Federation of Bosnia and Herzegovina stipulates that a common-law marriage, under this Law, is a union of a woman and a man who are not married or in a common-law marriage with another person, which has lasted for a minimum of three years or less if they have a child out of that union.”

It is clear from the provisions of the Family Law that mutual maintenance of common-law marriage partners is an obligation and right, as prescribed by the Law; waiving one’s rights and obligations in terms of maintenance has no legal effect. It is also clear that, upon the cessation of a common-law marriage, a partner who meets the conditions under this Law may file a lawsuit for maintenance within one year of the day of the cessation of the common-law marriage. It is also evident that the legislator did not make any distinction between a marriage and a common-law marriage in terms of legal relations; “a family, under this Law, is a union of parents and children and other blood relatives, in-laws, adoptive parents and adoptees and persons from a common-law marriage if they live together in the same household.” The Constitutional Court therefore held that life in a common-law marriage implies certain rights and obligations, hence the existence of “a legal relation” between those who live or who have lived in a common-law marriage.

It emerged from the reasoning of the rulings in dispute that the ordinary courts had concluded that an applicant may only file such a claim as a preliminary legal issue in some other civil or administrative procedure related to the exercise of other rights. In the opinion of the Constitutional Court, such

inconsistency in considering that issue and the ordinary courts’ understanding that this issue is simultaneously the establishment of facts and a preliminary issue runs counter to the definition of the term “preliminary issue” in the way it was set out in the Law on Civil Procedure, to which the ordinary courts referred in the challenged decisions. According to this provision, a preliminary issue implies precisely the issue of “whether a right or legal relation exists, that is to say not a fact”. The Court may resolve the issue itself, under this provision, unless otherwise stipulated by special regulations.

Since the ordinary courts had concluded, in the challenged decisions, that the case concerned a preliminary issue, the establishment of “the existence of a right or legal relationship, it follows that, through the consistent application of the provisions of the Law on Civil Procedure, they were authorised and competent to decide on the merits of the applicant’s claim.

The Constitutional Court also noted that the applicant in this matter was not seeking the exercise of a right (which is in any way related to the existence of a common-law marriage) in the Federation of Bosnia and Herzegovina, but rather in the Republic of Croatia, arising from the Notification issued by the Croatian Pension Insurance Fund – Zagreb Regional Unit – with which the applicant had filed a claim for the exercise of a right to a family pension and which had requested from her the submission of a ruling “establishing the common-law marriage”. The Court held that references made by the ordinary courts to national regulations (the provisions of the Law on Administrative Procedure of the Federation of Bosnia and Herzegovina and the Law on Civil Procedure of the Federation of Bosnia and Herzegovina) were related to the resolution of a legal matter in the Republic of Croatia, and thus to refer the applicant to obtain a ruling establishing a common-law marriage in another state, not in her own, was, at the very least, ill-founded.

The Constitutional Court held that, in these proceedings, the ordinary courts had arbitrarily applied the provisions of the Law on Civil Procedure, arriving at an interpretation whereby common-law marriage was deemed to be a fact rather than a legal relationship, which runs counter to the relevant provisions of the Family Law, which point to the existence of a legal relationship between common-law marriage partners. As a result, the applicant’s right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR had been violated.



*Languages:*

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

*Identification:* BIH-2015-2-004

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Grand Chamber / **d)** 09.10.2013 / **e)** AP 3329/10 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 86/13 / **h)** CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.  
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

*Keywords of the alphabetical index:*

Confiscation, property, preventive measure.

*Headnotes:*

A decision by the ordinary court, which affects the balance between the public interest and that of an applicant, by imposing an exaggerated personal burden which prevented him from disposing of his property freely, would be in breach of the right to property.

*Summary:*

I. The Court of Bosnia and Herzegovina had handed down rulings which dismissed the applicant's request for the restoration of objects that had been temporarily seized, (money, cell phones, computer, pistol, bank and credit cards, an identification card issued in the Republic of Serbia, notebooks, and house and office keys). The rationale behind the rulings was that the objects in question were needed as evidence in an investigation under way against the applicant and other suspects over the existence of grounds for suspicion that they had committed the criminal offence of organised crime in connection with the criminal offence of abuse of office or authority,

and that the Prosecutor's Office decides which evidence to use or what items might serve as evidence in order to prove certain facts. The temporarily seized objects could not, therefore, be restored to the owner at that stage of the proceedings. The applicant suggested that the rulings violated his right to property under Article II.3.k of the Constitution and Article 1 Protocol 1 ECHR.

II. The Constitutional Court noted that it was undisputed that the applicant was the owner of the items in question and thus "the seized objects constitute the appellant's property within the meaning of Article 1 Protocol 1 ECHR."

The Court had to establish whether the applicant's property was interfered with, whether the interference was in accordance with the law and in the public interest and whether the interference was proportionate to the legitimate aim to be achieved; whether a fair balance was struck between the applicant's right and the general interest.

Having taken into account the case-law of the European Court of Human Rights, and having noted that the rulings did not deprive the applicant of his property (in terms of a definite seizure with no likelihood of the items being restored), the Constitutional Court held that the present case concerned the control of the use of property within the meaning of Article 1.2 Protocol 1 ECHR.

The Constitutional Court also had to examine whether the interference with the applicant's right to property was in accordance with the law. It noted that the challenged rulings dismissed as ill-founded the applicant's request for the return of the items on the basis that they were needed as evidence in the investigation conducted against the applicant and other suspects over the existence of grounds for suspicion that they had committed the criminal offence of organised crime under Article 250.2 in connection with the criminal offence of abuse of office or authority under Article 220.3 of the Criminal Code of Bosnia and Herzegovina and on the basis that the Prosecutor's Office decides which evidence to use or which items may serve as evidence in order to prove certain facts. This meant the items in question could not be restored to their owner at that stage of the proceedings.

The Constitutional Court observed that the challenged rulings were adopted in accordance with the relevant provisions of the Criminal Procedure Code, in particular Articles 65 and 74, from which it follows that items which have been seized on a temporary basis will be returned to their owner once it has become clear that they constitute objects to be seized under the Criminal Code, or which may serve as evidence in criminal

proceedings and that there are no reasons for their seizure within the meaning of Article 391 of the above Law.

The legal basis for adopting the challenged decisions stems from the facts outlined above. And the legislation cited above, which met the requirements regarding availability, i.e. accessibility (published in the Official Gazette, a public periodical) and clarity (the cited provisions of the Criminal Code and the Criminal Procedure Code were sufficiently clearly phrased to allow everyone to assess the consequences of their behaviour). The Constitutional Court accordingly concluded that “the interference” with the applicant’s right to property was done in accordance with the law.”

The Constitutional Court noted that it was indisputable that the public interest exists in cases where objects are being seized for the purpose of conducting an investigation in criminal proceedings.

However, an assessment had to be made as to whether the control over the applicant’s property was proportionate to the legitimate aim sought to be achieved, whether it struck a fair balance between the applicant’s right and the general interest.

The Constitutional Court noted that the Court of Bosnia and Herzegovina had dismissed as ill-founded the applicant’s motion for restoration of the temporarily seized objects, holding that whilst an investigation is on-going, the Prosecutor’s Office is authorised to decide which objects are relevant for the proceedings and can serve as evidence in criminal proceedings. Given that the Prosecutor’s Office assessed that it intended to use the temporarily seized objects as evidence in criminal proceedings against the applicant, the Court of Bosnia and Herzegovina was not in a position to disregard this estimate and to allow the return of the items.

However, the Constitutional Court observed, apart from a general statement, that the items were to serve as evidence during the investigation and that it could not disregard the Prosecutor’s Office’s assessment that the items were relevant for the criminal proceedings, the Court of Bosnia and Herzegovina had failed to provide specific facts for its decision that there were justified reasons for further retention of the seized objects.

The Constitutional Court also emphasised that the applicant had been prevented since 16 September 2008 and 1 September 2008, the date when the Court of Bosnia and Herzegovina issued an order on the temporary seizure of the items, from making use of them, and that this situation had persisted up to the

point of the adoption of this decision, i.e. for five years. The Constitutional Court noted that the Court of Bosnia and Herzegovina stated, in the second-instance ruling, that the case was still at the investigation stage, where the Prosecutor’s Office decides which evidence to use, i.e. which evidence it can use to prove certain facts, and that the items could not be restored to the owner at this stage. However, the Constitutional Court observed that the investigation, which the Prosecutor’s Office instituted on 12 September 2008 over the reasonable suspicion that the applicant had committed the criminal offence of organised crime under Article 250.2 in connection with the criminal offence of abuse of office or authority under Article 220.3 of the Criminal Code of Bosnia and Herzegovina, was still pending and there was uncertainty over when it might be finalised; the provisions of the Criminal Procedure Code did not provide a time limit for the conclusion of the investigation.

The Constitutional Court accordingly held that the rulings of the Court of Bosnia and Herzegovina failed to strike “a fair balance” between the general interest and the applicant’s right; an exaggerated burden had been imposed on him in terms of preventing him from freely disposing of his property, and the burden of uncertainty as to whether and when his property might be returned, which violated his right to property under Article II.3.k of the Constitution and Article 1 Protocol 1 ECHR.

III. In terms of the admissibility of decisions adopted in proceedings of temporary seizure of objects and decisions adopted in the procedure of control of the justifiability of the measure prohibiting meetings with certain persons in relation to the right under Article II.3.e of the Constitution and Article 6.1 ECHR, the Constitutional Court held that the respective proceedings did not concern the establishment of the well-foundedness of criminal charges against the applicant in terms of Article 6.1 ECHR. That Article was not therefore applicable in the present case. Since Article II.3.e of the Constitution does not provide a wider scope of protection than Article 6.1 ECHR, it follows that the allegations stated in the appeal in relation to the violation of the right to a fair trial are incompatible *ratione materiae* with the Constitution.

#### *Languages:*

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



# Brazil

## Federal Supreme Court

### Important decisions

*Identification:* BRA-2015-2-016

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 26.04.2012 / **e)** Claim of non-compliance with a fundamental precept 186 / **f)** Racial quotas / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 205, 20.10.2014 / **h)**.

*Keywords of the systematic thesaurus:*

5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.

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

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

*Keywords of the alphabetical index:*

Affirmative action / Institution, higher education, autonomy / Minority, ethnic, protection, positive discrimination.

*Headnotes:*

Racial and indigenous quotas for admission to a public university do not violate the constitutional principle of equal protection.

*Summary:*

I. The applicant filed a claim of non-compliance with a constitutional precept (which is a subsidiary action to address constitutionality) requesting a preliminary injunction in order to challenge internal university rules that set places aside for black and native students in the 2009 entrance exam for admission in the federal University of Brasília.

The claimant argued that affirmative action programmes grounded on racial criteria are unnecessary in Brazil, since skin colour does not create social exclusion in this country nor is it the origin of inequality among whites and non-whites. Therefore, the claimant contended, establishing quotas for blacks in universities creates a

consciousness of strict racial categories, violates the constitutional principle of equal protection and creates discrimination against poor whites. Finally, the claimant argued that quotas favour the black middle class.

II. The Supreme Court unanimously dismissed the claim. The Court held that affirmative action programmes, fostered to remedy past inequality due to discrimination by granting temporary advantages to historically underprivileged social groups, do not violate the constitutional principle of equal protection (Article 5, caput, of the Federal Constitution). The Court stressed that, in fact, such programmes fully comply with the search for an effective material equality rather than a merely formal one, which is guaranteed by the Constitution.

However, the Court emphasised that the legitimacy of affirmative action programmes grounded on racial criteria relies on a limited period of time aiming at overcoming social inequality while its causes persist. Otherwise, such programmes would unreasonably benefit certain social groups over society as a whole and violate the principle of proportionality, as they would not be narrowly tailored to their goals.

The Court remarked that, as it has been scientifically proven, race has no biological or genetic concept. Actually, it is a historic and cultural concept, created to justify the discrimination of some groups over others. However, as this concept was conceived to set social hierarchies, it may also be used to overcome them. Thus, the social consciousness of a race concept justifies racial criteria in the selection process for admission, which aims at including groups that have experienced slavery, repression and prejudice. The meritocratic system would only be fair if all applicants were subject to the same conditions.

Finally, the Court highlighted that universities have autonomy over academic, teaching, financial and patrimonial matters, which encompasses the discretion to establish selection criteria. The use of racial or socioeconomic status criteria ensures the pluralism of ideas in the academic community, which is a principle that guides higher education and is a fundamental principle of the Brazilian state under article 1.V of the Constitution.

*Cross-references:*

- Articles 1.V and 5 of the Federal Constitution.

*Languages:*

English (translation by the Court).



*Identification:* BRA-2015-2-017

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 03.10.2013 / **e)** Extraordinary appeal 583523 / **f)** Non-reception of the misdemeanour for the unjustified carrying of instruments commonly used in larceny / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 208, 22.10.2014 / **h)**.

*Keywords of the systematic thesaurus:*

5.2 Fundamental Rights – **Equality**.

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

*Keywords of the alphabetical index:*

Equality, in criminal procedure / Human dignity, violation / Law, pre-constitutional, status / Recidivism / Vagrancy.

*Headnotes:*

A law establishing a presumption that some individuals are more prone to perpetrate a crime, based only on subjective aspects (social and economic condition, or recidivism in crimes against property, or being under surveillance), violates the constitutional principles of human dignity and equality. The challenged law was enacted before the current Federal Constitution of 1988 entered into force, and did not remain valid under the Federal Constitution.

*Summary:*

I. This case refers to an extraordinary appeal filed against a decision that affirmed an accusation against the appellant that he had committed the misdemeanour set out in Article 25 of Decree-Law 3688/1941 (Misdemeanour Law, “LCP” in the Portuguese acronym). This Article concerns the unjustified carrying of instruments commonly used in larceny by someone who was previously sentenced for larceny or theft, or while they are under surveillance or if they are known as a vagrant or beggar.

The appellant argued that Article 25 of the LCP breaches the constitutional principle of equality, because it treats individuals unequally due to their

social and economic condition. He argued that this offence unreasonably forbids some people to possess certain objects such as crowbars and picklocks. Furthermore, the misdemeanour would violate the harm principle of the criminal law, as the mere possession of an object does not potentially cause harm.

II. The Supreme Court, judging a preliminary objection, did not analyse the application or expiry of the statute of limitations. The Court asserted that the complaint, on its merits, is relevant and that, if the norm is declared not ‘received’ by the Federal Constitution (i.e. being invalid as incompatible with the Constitution when it entered into force), it would mean that the conduct of the appellant is lawful. This conclusion would be more beneficial for him than the application of the statute of limitations.

In the merits, unanimously, the Court granted the extraordinary appeal to declare the incompatibility of Article 25 of the LCP with the Constitution. This norm violates the constitutional principles of human dignity and equality, established by Articles 1.III, 5 and 5.I of the Federal Constitution.

The Court stated that the harm principle binds the interpretation and the application of the penal law. To qualify the conduct of a person as a crime, it is necessary to assess the extent of the potential or actual harm to the legal interest protected by the norm. This understanding allows the review of legislative activity and the analysis of the constitutionality of penal laws by the Supreme Court.

Moreover, the Court asserted that Article 25 of the LCP sets forth a criminal offence concerning an abstract danger and that lawmakers established an absolute presumption of the harm of the conduct in relation to the legal interests they intended to protect (property and public safety). The inadequacy of the norm lies in the establishment of discriminatory conditions regarding the accused, as it considers their background as an essential element of the misdemeanour and criminalises their personal condition. The norm does not aim at penalising acts that cause significant harm or danger to legal interests. In this case, lawmakers favoured the penal law of the accused (which penalises the accused for who they are) instead of the penal law of the fact (according to which the accused will be penalised for their actual conduct), the latter theory being that adopted in Brazil. Such unequal treatment breaches the constitutional principles of human dignity (Article 1.III) and equality (Article 5 and 5.I of the Federal Constitution).

Finally, the Court explained that the LCP was written during a dictatorship, a time when fundamental rights were neglected and property rights prevailed over other rights, including freedom.

III. In other opinions, concurring Justices added that Article 25 of the LCP also violates the principles of culpability and of presumption of innocence, as the burden of proof would lie on the accused to demonstrate that they would not use the prohibited instrument in a criminal act. It would mean the accused would be obliged to show negative evidence to rebut the presumption.

#### *Cross-references:*

- Articles 1.III, 5 and 5.I of the Federal Constitution;
- Article 25 of Decree-law 3688/1941.

#### *Languages:*

English (translation by the Court).



#### *Identification: BRA-2015-2-018*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 16.10.2013 / **e)** Extraordinary appeal 626489 / **f)** Fundamental right to social security and limitations period to the revision of social security benefits / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 184, 23.09.2014 / **h)**.

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Limitation period / Pension, private sector, retiree / Pension, law, retrospective effect / Retirement, right.

#### *Headnotes:*

The establishment of a time period to revise social security benefits does not violate the fundamental right to social security. A law that institutes a pre-emptive period to revise social security benefits has

immediate application, including to benefits which have already been granted.

#### *Summary:*

I. This case refers to an extraordinary appeal in which the Supreme Court discussed whether the ten-year pre-emptive period to request a social security benefit revision, introduced by Provisional Decree 1523/1997, applies to benefits which were granted before this rule came into force. In this case, a disability pension was granted in 1995. In 2009, a request was made for revision of the benefit; therefore, after expiry of the 10-year period.

The Federal Small-Claims Court denied the request, on the grounds that the right to revise was barred due to pre-emption. The decision was reversed by the Court of Second Instance to favour the pensioner. The Court of Second Instance considered that pre-emption is a rule of substantive law and that it only affects legal relations established after it came into force. The National Institute of Social Security filed an extraordinary appeal to the Supreme Court against this decision.

II. The Supreme Court unanimously granted the appeal, in accordance with the opinion of the Justice rapporteur (the Court's decision-making procedure involves the initial production of a report by one of the judges). Initially, the Court explained that the controversy arose because the Social Security Benefits Law did not provide a pre-emptive period to request the benefit or its revision. There was only a pre-emptive period to demand overdue and unpaid amounts (five years). Thus, the Justice rapporteur analysed whether the establishment of this time limit was legitimate, and whether it applied to pensions granted before the act that established it came into force.

The Court deemed it necessary to distinguish the fundamental right to social security from the pecuniary amount of benefits. The value of benefits is influenced by social, economic and actuarial circumstances: age pyramid, levels of private savings, employment and income. Lawmakers are responsible for combining these factors to set the criteria for social security benefits. Therefore, only the criteria that breach the core of the right to social security are illegitimate. Accordingly, the Court understood that pre-emption does not violate such core, because it only affects the claim to discuss the economic amount of the benefit. The right to social security remains untouched, since a period to initially apply for benefits was not established.

Concerning the enforcement of pre-emption, the Court explained that the granting of benefits or the establishment of calculation criteria is governed by the law which is in force when the requirements to grant the benefit are fulfilled (*tempus regit actum*). However, pre-emption is not a requirement for the right to social security; it is, instead, part of the legal regime which was instituted to regulate the payment of benefits. In such case, the legislation must apply immediately. It does not mean that the legislation applies retroactively; rather, it only means that it applies immediately, even to previously established situations.

III. In a separate opinion, a concurring Justice stressed that the challenged provision has retrospective effects (not retroactive effects), because it attributes future effects to already existing legal relations. The Justice added that if the rule affects only benefits which were granted after it came into force, it breaches the principle of equality because it creates two kinds of pensioners: one with an unlimited period to apply for the revision of the benefit and another with a ten-year period to do it.

#### *Supplementary information:*

This case is the topic 313 of the General Repercussion: application of the pre-emption period set forth in the Provisional Decree 1523/1997 to social security benefits granted before it was enacted.

#### *Languages:*

English (translation by the Court).



#### *Identification:* BRA-2015-2-019

**a)** Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 11.11.2014 / **e)** Question of order on preventive detention for extradition 732 / **f)** Standing of the INTERPOL to request preventive detention for extradition / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 021, 02.02.2015 / **h)**

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Extradition / Extradition, guarantees / Extradition, treaty / International organisation / Police, criminal.

#### *Headnotes:*

The International Criminal Police Organisation (hereinafter, “INTERPOL”) has standing to request preventive detention for extradition. Preventive detention for extradition can only be granted when the double criminality requirement is present. If the extradition treaty signed between Brazil and the receiving country establishes a list of extraditable offences, preventive detention for extradition can only be granted when the offence is in that list.

#### *Summary:*

I. This case refers to a request for preventive detention for extradition, filed by INTERPOL, due to criminal proceedings against the accused, who was charged with the crime of unauthorised access to a protected computer, committed in December 2011. The applicant alleged that the crime is similar to the one provided for by Article 154-A of the Brazilian Penal Code (hereinafter, “CPB”, in the Portuguese acronym), which sets forth the crime of computer trespass.

II. The Second Panel of the Brazilian Supreme Court denied the request. Preliminarily, the Panel asserted that, even though the request was not filed by a foreign state, it was filed by an institution, INTERPOL, which has recently been accorded the standing to request such demand before the Ministry of Justice, according to Law 12878/2013, which amended the Foreigners’ Statute (Law 6815/1980).

However, on the merits, the Panel explained that Article 154-A of the CPB only came into force in a later time (April 2013), after the offence was committed. Hence, the double criminality requirement was not present, which is a basic requirement for the granting of extradition. The Panel highlighted that, in criminal matters, the principle of absolute formal legality (Article 5.XXXIX of the Federal Constitution) is one of the most significant constitutional safeguards, which was instituted to favour any accused and is an invaluable achievement of liberal thought.

Besides the lack of double criminality, the Court also held that the request for extradition would not be granted because cybercrime was not listed as an extraditable offence in the list set forth in the extradition treaty signed between Brazil and the

receiving country. The Panel acknowledged that such limitation is not ordinarily included in treaties, neither is it established in Brazilian norms. However, since the treaty is a specific statute and, in this case, it sets forth a list of crimes, the Panel stated that it must prevail over other domestic statutes, enforcing the “*pacta sunt servanda*” clause.

Finally, the Panel explained that, as the extradition was unviable, the request for preventive detention filed should be denied.

#### *Cross-references:*

- Article 5.XXXIX of the Federal Constitution;
- Article 154 of the Brazilian Penal Code;
- Foreigners’ Statute (Law 6815/1980);
- Law 12878/2013.

#### *Languages:*

English (translation by the Court).



#### *Identification: BRA-2015-2-020*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 27.11.2014 / **e)** Extraordinary appeal 658312 / **f)** The right to fifteen-minute break granted to all women before working overtime and the equal protection principle / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 027, 10.02.2015 / **h)**.

#### *Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law**.

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

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

#### *Keywords of the alphabetical index:*

Equality, different circumstances / Labour market / Positive discrimination / Regulation, social, differentiation by gender / Woman, advancement of rights / Woman, protection, special.

#### *Headnotes:*

All women are entitled to a fifteen-minute break before working overtime and this right does not violate the equal protection principle. The Federal Constitution sets forth the possibility to grant different treatment under specific circumstances. The constitutional framers noted the need to grant greater protection to women due to their historical exclusion from the labour market; their organic and biological differences, including lower physical strength; and their ordinary accumulation of activities, both in the workplace and at home.

#### *Summary:*

I. This case concerned whether women should be granted the right to a fifteen-minute break before working overtime. The right is contained in Article 384 of the Consolidation of Labour Laws (hereinafter, the “Law”), which was enacted before the present 1988 Constitution entered into force. An extraordinary appeal was filed against a decision that declared this right to have been ‘received’ by the Federal Constitution (i.e. valid under the 1988 Constitution), and which ordered those minutes to be paid as overtime.

The appellant claimed that such provision is unconstitutional since it violates the equal protection principle, provided for by Articles 5.I and 7.XXX of the Federal Constitution, which set out the equality between genders. The appellant also claimed that unequal treatment based merely on gender may urge discrimination in the work environment, especially because recovering from tiredness works the same way for both sexes.

II. The Supreme Court, by majority, denied the appeal and acknowledged the compliance of Article 384 of the Law with the constitutional framework. The Court found that there is no violation of the equal protection principle and, accordingly, upheld the decision ordering overtime payments.

The Court stressed that the Federal Constitution ensures the equality of all citizens before the law, and also sets forth the possibility to grant different treatment under specific circumstances. Therefore, the constitutional framers noted the need to grant greater protection to women due to their historical exclusion from the labour market; their organic and biological differences, including lower physical strength; and their ordinary accumulation of activities, both in the workplace and at home. The protective provision should extend women’s fundamental rights and meet the principle of proportionality to offset the

differences between genders. Thus, one cannot adopt an interpretation that offers the same protection for male employees, since positive discrimination in favour of women does not cause arbitrary treatment nor does it benefit women over men.

In this regard, several laws which deal with the protection of women due to gender inequality were issued, such as:

- i. protection in the labour market through specific incentives;
- ii. labour rights extended to female domestic workers;
- iii. maternity leave longer than paternity leave;
- iv. lower retirement age for women;
- v. prohibition of discrimination against women; and
- vi. special protection for women who are victims of domestic violence.

The Court pointed out that assuming that women would have difficulty finding jobs or that men would most likely be hired over women are not proven facts. The Court concluded that the right to a period of rest is legitimate, since it enables female workers to continue their activities, helps to protect them from the risk of accidents and occupational diseases, and contributes to improving the work environment (Articles 7.XXII, 200.II and 200.VIII of the Constitution).

Finally, the Court settled that the right applies to all working women. However, it is not an irreversible fundamental right. In the future, it may be revoked, or even expanded to all workers. Congress is the organ responsible for such debate.

III. In a dissenting opinion, one Justice stressed the need to grant the break time to men as well. If it is granted only to women, the Justice stated that this right ought to be limited to jobs which require physical effort, since there is no ground that justifies different rules within intellectual jobs. The Justice considered the Article unconstitutional as it creates discrimination in the labour market.

#### *Cross-references:*

- Articles 5.I, 7.XXII, 7.XXX, 200.II, 200.VIII of the Federal Constitution;
- Article 384 of the Consolidation of Labour Laws.

#### *Languages:*

English (translation by the Court).



#### *Identification: BRA-2015-2-021*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 17.12.2014 / **e)** Extraordinary appeal 591054 / **f)** The use of on-going judicial inquiries and criminal prosecutions to calculate sentences and the principle of presumption of innocence / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 37, 26.02.2015 / **h)**.

#### *Keywords of the systematic thesaurus:*

5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.  
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 prosecution / Inquiry / *Res judicata* / Sentencing, circumstance, consideration.

#### *Headnotes:*

The consideration of on-going judicial inquiries and criminal prosecutions as criminal records, in order to increase sentence lengths, breaches the principle of presumption of innocence.

#### *Summary:*

I. This case refers to an extraordinary appeal filed by the Public Prosecutor against a decision that reduced the sentence imposed on the defendant by the Court of First Instance and changed, without a request, the enforcement of the sentence system from closed prison to open prison. The judge based his decision on the argument that judicial inquiries and criminal prosecutions could not be considered as a criminal record in order to increase sentence lengths.

The prosecution argued that the principle of presumption of innocence is relative because of the limitation imposed by the principle of personalisation of penalty and by the principle of equality. The Public Prosecutor argued that it is not reasonable for the legal system to give the same treatment to agents who have previous criminal records and to those who do not.



II. The Supreme Court, by majority vote, denied the extraordinary appeal. The Court stated that judicial inquiries and criminal prosecutions cannot influence the calculation of sentences, since they do not have a final conviction, in compliance with the constitutional principle of presumption of innocence, guaranteed by Article 5.LVII of the Federal Constitution. Thus, only definitive sentences involving the accused could increase the length of sentence imposed.

The Court held that the previously prevailing understanding, which considered on-going processes (but not judicial inquiries) as relevant to sentence length, is incompatible with the concept of the democratic law-based state and with the new constitutional order. It is also incompatible with the case-law of the Inter-American Court of Human Rights, the jurisprudence of the European Court of Human Rights and the recommendations of the Human Rights Committee of the United Nations.

III. In a separate opinion, a dissenting Justice highlighted that recidivism (Article 61 of the Criminal Code), an institute that presumes the existence of a final conviction, should not be confused with an individual's criminal record. The Justice argued that the judgment of guilt is a discretionary act of the judge, who is responsible for examining the various aspects of Article 59 of the Criminal Code to calculate the sentence, such as guilt, social behaviour, personality and background. Finally, the Justice claimed that giving the same treatment to those who have never committed a crime and to those who respond to various judicial inquiries and criminal prosecutions is a violation of the principle of equality.

#### *Cross-references:*

- Article 5.LVII of the Federal Constitution;
- Articles 59 and 61 of the Criminal Code.

#### *Languages:*

English (translation by the Court).



#### *Identification: BRA-2015-2-022*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 25.02.2015 / **e)** Direct Action of Unconstitutionality 4060 / **f)** State law and maximum number of students per classroom / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 81, 04.05.2015 / **h)**.

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Education, school, teacher / Federal balance / Federalism / Federative principle, violation / Students, pupils.

#### *Headnotes:*

The current understanding of the federative principle must avoid interpretations that excessively increase the powers of the Federal Government. The understanding must allow States, Municipalities and the Federal District to innovate in legislative matters, in accordance with the constitutional principle of political pluralism. The concurrent legislative power of States encompasses the possibility to establish the number of students per classroom.

#### *Summary:*

I. This direct action of unconstitutionality was filed against provision 82.VII.a, 82.VII.b and 82.VII.c of Supplementary Law 170/1998 of the State of Santa Catarina, which set a maximum number of students per classroom. The claimant, the National Confederation of Educational Institutions, argued that the Law breached the power of the federal government to enact general rules about education, which is set forth in Article 24.IX and 24.3 of the Federal Constitution. The government of Santa Catarina and the Federal Attorney General defended the challenged law. They argued that it is not unconstitutional because it complements the general rules concerning education (Federal Law 9394/1996 – Law of Education Directives and Bases).

II. The Supreme Court, unanimously, denied the action. The question was whether the concurrent legislative power of states regarding education, set forth in Article 24.IX of the Federal Constitution, allows the establishment of a maximum number of students per classroom.

The Justice rapporteur showed concern about the excessive centralisation of the Brazilian federation. This situation derived from the distribution of powers among the federated entities, in which several matters are attributed to the Federal Government. Furthermore, the case-law of the Court restricts the autonomy of federated entities, by applying the symmetry principle (which requires the organisation of sub-federal government to mirror the organisation of federal government), and has provided constitutional interpretations that increase the competences of the Federal Government. Hence, the Justice rapporteur proposed a move in the case-law to favour regional and local initiatives, unless they are expressly and categorically forbidden by the Federal Constitution. Accordingly, he emphasised that pluralism is one of the fundamental principles of the Brazilian Republic, which is correlated to federalism, as it allows a diversity of forms of political organisation.

Concerning this case, the Court considered that the challenged provisions are specific rules, which fall within the powers of States, as the number of students per classroom depends upon the particular circumstances of each region. Furthermore, the Supplementary Law is compatible with the general norm (Federal Law 9394/1996), which defers to each State as regards specification of the proportion between teachers and students. The impugned Act only complements this framework provision; hence, it is not unconstitutional.

#### *Cross-references:*

- Provision 24.IX and 24.3 of the Federal Constitution;
- Provision 82.VII.a, 82.VII.b and 82.VII.c of the Supplementary Law 170/1998 of Santa Catarina State.

#### *Languages:*

English (translation by the Court).



#### *Identification: BRA-2015-2-023*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 26.02.2015 / **e)** Extraordinary appeal 724347 / **f)** Right of civil servants to damages on the argument that they should have taken office in a previous moment / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 88, 13.05.2015 / **h)**.

#### *Keywords of the systematic thesaurus:*

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

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

5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

#### *Keywords of the alphabetical index:*

Civil servant, recruitment / Damage, compensation, scope / Public administration / Public office, access.

#### *Headnotes:*

A civil servant who has taken office due to a judicial decision is not entitled to damages, on the argument that they should have taken office and earned the salary for the position before that judicial decision, except for situations of evident arbitrariness.

#### *Summary:*

I. This case refers to an extraordinary appeal filed by the Federal Government against a decision that awarded damages to candidates for the job of fiscal auditor. The candidates took office at a late time, due to an illegitimate act of the government. Specifically, the candidates passed the first phase of the civil service exam, but were ranked out of the number of vacancies established in the exam announcement. Later, new vacancies for the job were opened and the government opted to conduct a new civil service exam, instead of calling the candidates of the previous exam. These candidates sued the government and obtained a judicial decision that ordered their submission to the second and last phase of the exam. Eventually, they passed the exam and sued the government again to recover damages. They claimed that the damages should be equivalent to the salary for the job, from the date when they were passed over in favour of other candidates until the date when they were effectively nominated.

II. The Supreme Court, by majority vote, granted the extraordinary appeal. Furthermore, the Court issued a ruling with *erga omnes* effects that a civil servant who has taken office due to a judicial decision is not entitled to damages, on the argument that they should have taken office before that judicial decision, except for situations of evident arbitrariness.

The Court understood, as a general rule, that to allow claims for damages in the instant case would mean enrichment without cause, because the work was not in fact performed. Only nomination for the job, entry into office and actual performance of the duties give rise to the right to be paid wages. The Court emphasised that passing the civil service exam is a requirement to be nominated for the job. However, only passing the civil service exam does not, automatically, give rise to the right to be paid wages. In the case under judgment, the Court also highlighted that the previous judicial decision did not safeguard nomination for the job and entry into office. That decision only safeguarded the candidates' right to perform the second phase of the exam.

The Court excluded from the holding in this judgment cases of evident arbitrariness of the government, as, for example, the groundless veto of a candidate who passed the exam. In exceptional cases, when institutions are manipulated, adequate damages can be granted.

III. In a separate opinion, a concurring Justice remarked that the main question of this case was to decide when the nomination ceases to be a government option and becomes a subjective right of the candidate. The Justice underscored the constitutional guarantee of the ranking in civil service exams (Article 37.IV of the Constitution). Hence, in order to decide such cases, it is necessary to assess if the judicialisation of the right to be nominated results in damages, due to the time elapsed and the noncompliance with Article 37.IV. Accordingly, the Justice found that the State can be held responsible only when the candidate passes all phases of the exam. Passing the exam is a requirement to apply the aforementioned Article.

In separate opinions, dissenting Justices considered that the Constitution establishes the State's objective responsibility for damage incurred (Article 37.6 of the Federal Constitution). Therefore, damages should be awarded if the causation between damage incurred and a government act is proved. Furthermore, the government act which was deemed illegitimate has *ex tunc* effects. Finally, the dissenting Justices disagreed with the reasoning that awarding damages would constitute enrichment without cause, because the amount of damages was an indemnity (not a

payment for a service). The amount of damages should be calculated based on the wage that the candidates would have received if they had worked, had the government not acted illegally. This amount should be reduced by any payments received by the candidates in the performance of other government jobs.

#### *Cross-references:*

- Article 37.IV and 37.6 of the Federal Constitution.

#### *Languages:*

English (translation by the Court).



#### *Identification: BRA-2015-2-024*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 23.04.2015 / **e)** Extraordinary appeal 632853 / **f)** Judicial review of administrative acts in civil service examination / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 125, 29.06.2015 / **h)**.

#### *Keywords of the systematic thesaurus:*

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.  
5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service**.

#### *Keywords of the alphabetical index:*

Judicial review, administrative act / Public administration / Public office, access.

#### *Headnotes:*

The criteria adopted by the examination board in a civil service examination cannot be reviewed by the judiciary.

#### *Summary:*

I. This case refers to an extraordinary appeal in which the Court addressed whether the judiciary may conduct judicial review of an administrative act that

assesses the correct answers in a civil service examination. In this case, the candidates who applied for the first civil service examination for the post of nurse in the Family Health Program of the State of Ceará filed an action to annul the questions in the objective exam.

The State Court upheld the candidates' request. The Court based the decision on the basis that the questions had more than one correct answer and that the examiner disregarded the literature which was indicated in the exam announcement. The State of Ceará filed an extraordinary appeal against that decision, alleging violation of the principle of separation of powers.

II. The Supreme Court, by majority, granted the extraordinary appeal in accordance with the Justice rapporteur's vote. The Court issued a ruling with *erga omnes* effects that the criteria adopted by the examination board in a civil service examination cannot be reviewed by the judiciary. The Court affirmed the understanding that, in matters of civil service examinations, the judiciary has the responsibility to ensure equality between the candidates. However, the judicial branch must refrain from analysing the merits of the administrative act. It should only decide whether they are in compliance with legislation and with the Federal Constitution. In this case, both original and appellate jurisdictions reassessed the answers given by the candidates to determine which items were true or false, according to technical literature in nursing.

III. In a concurring vote, a Justice pointed out that the judicial review of administrative acts is one of the characteristics of the rule of law. However, the judiciary cannot replace the public administration, under penalty of cancelling its primary activity and violating the principle of separation of powers. The intervention of the judiciary should be proportional to the concept of "administrative legality". According to this concept, administrative acts are bound by the Federal Constitution itself, to a greater or lesser extent. The classic notion of administrative acts bound by the norm (subject to review) and discretionary acts based on criteria of choice and opportunity granted to the administrator (not subject to review) is, thus, surpassed by the notion that the merits of the administrative act are directly influenced by constitutional principles. The scope of interference by the judiciary may vary according to how intensely the acts of the public administration are bound by the Federal Constitution: the higher the binding, the greater must be the judicial interference.

### *Supplementary information:*

This case is the subject 485 of General Repercussion: judicial review of the administrative act which assesses questions in a civil service examination.

### *Languages:*

English (translation by the Court).



### *Identification: BRA-2015-2-025*

**a)** Brazil / **b)** Federal Supreme Court / **c)** First Panel / **d)** 26.05.2015 / **e)** Request for a writ of mandamus 33340 / **f)** Banking and business secrecy and financial transactions between BNDES and companies / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 151, 03.08.2015 / **h)**.

### *Keywords of the systematic thesaurus:*

4.7.10 Institutions – Judicial bodies – **Financial courts.**

### *Keywords of the alphabetical index:*

Banking secrecy / Business activity.

### *Headnotes:*

The Federal Court of Audit can request information from the Brazilian Development Bank about financial transactions with a company. Such requisition does not breach the secrecy of banking and business.

### *Summary:*

I. This case refers to a request for a writ of *mandamus*, in which the Supreme Court addressed whether a requisition of the Federal Court of Audit to the Brazilian Development Bank (hereinafter, "BNDES", in the Portuguese acronym) and BNDESPAR (the investment arm of BNDES) about financial transactions with a company breaches banking and business secrecy. Initially, the Federal Court requested BNDES and BNDESPAR to present some documents related to financial transactions with a company. BNDES and BNDESPAR, then, filed this

request for a writ of *mandamus* to suspend the effects of the requisition and to refuse issuance of the information, grounded on banking and business secrecy. BNDES and BNDESPAR argued that, despite being state-owned companies, they must comply with financial market rules and safeguard the secrecy of third parties. The Federal Court of Audit, in its brief, stated that these contracts and transactions are not covered by such secrecy, because they were funded with government resources.

II. The Supreme Court, by majority vote, denied the writ of *mandamus*. First, the Court emphasised that, nowadays, the Federal Court of Audit is one of the main republican bodies that implements democracy and fundamental rights, as it no longer is only an auxiliary body of the legislative branch. This Federal Court is responsible for assessment of the legitimacy, economy and efficiency of acts performed by those who manage governmental resources. Hence, the Federal Court of audit, pursuant to the principle of publicity (Article 37 of the Federal Constitution), can oversee financial transactions funded by governmental resources. Nevertheless, the Court acknowledged that the Federal Court of Audit cannot breach banking secrecy, as a rule, because this secrecy is an exception to the principle of publicity, in order to safeguard the security of society and the security of the State, confidentiality and the social interest.

However, the Court explained that the Federal Court of Audit acted under Article 71.IV of the Federal Constitution, following a request from the Committee on Oversight and Control of the Chamber of Deputies, concerning a subject that was under investigation by the Federal Police. The Court highlighted that the required information came from BNDES itself, not from third parties. Moreover, the Court clarified that, when a company deals with BNDES, it must know that the funds received are appropriated for a specific aim, because BNDES is a development bank, not an ordinary financial institution. Accordingly, the Court stressed that the protection of secrecy must be viewed in relative terms, because the objective of the requisition is to assess the use of governmental resources. Furthermore, the Court stated that companies which deal with BNDES have an enormous advantage, because they raise funds with low interest rates. In return, they must be submitted to stricter governmental and public oversight concerning the use of these funds.

The Court applied the German doctrine of the limits of limitations (*Schranken-Schranken*), to assess the essential core of the fundamental right to secrecy. This doctrine states that the limitation to a fundamental right must be limited according to

reasonableness and proportionality. Accordingly, the requisition from the Federal Court of Audit to BNDES for confidential data is legitimate, because business and banking secrecy can be proportionally limited to allow financial oversight of the government by the constitutionally competent body. Finally, the Court expressed concern about the consequences of a favourable decision to the applicants. If BNDES is exempted from yielding the information required by Federal Court of Audit, the Court sets a precedent that will hamper the efficient working of the Court of Audit, because other state-owned companies will also deny this kind of information.

#### Cross-references:

- Articles 37 and 71.IV of the Federal Constitution.

#### Languages:

English (translation by the Court).



# Bulgaria

## Constitutional Court

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### Statistical data

1 May 2015 – 31 August 2015

Number of decisions: 4

### Important decisions

*Identification:* BUL-2015-2-001

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 14.07.2015 / **e)** 03/15 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 9 / **h)** CODICES (Bulgarian).

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**  
3.9 General Principles – **Rule of law.**  
4.7.4.6 Institutions – Judicial bodies – Organisation – **Budget.**

*Keywords of the alphabetical index:*

State Budget / Constitution, supremacy / Judiciary, independence.

*Headnotes:*

The law setting out the annual State budget for 2015 is unconstitutional as it does not provide sufficient funding for the judicial authorities. The annual budget must ensure the financial resources required for the functioning of all institutions established by the Constitution, including the judicial authorities, in keeping with the fundamental principles of the constitutional system; namely, the rule of law, the supremacy of the Constitution, the separation of powers, the independence of the judicial authorities and the specific features of the functions assigned to them by the Constitution.

*Summary:*

I. The proceedings were initiated by means of an application by the Public Prosecutor asking the Court to establish the unconstitutionality of an article of the Law on the State Budget for 2015.

The Public Prosecutor is of the opinion that the constitutional requirement that the State Budget ensure that the institutions set up by the Constitution have the resources they need to operate effectively is not met if it does not ensure the necessary resources for some of these institutions. Nor is this requirement met if, owing to a shortage of financial resources, the above-mentioned institutions are prevented from functioning in a normal and effective manner for the entire financial year. In view of the above, the Public Prosecutor contended that Article 2.6 of the Law on the State Budget for 2015 is unconstitutional.

II. The Constitution stipulates that the judicial authorities shall have an independent budget as an indispensable requirement for its independence and proper functioning. In view of the different functions assigned by the Constitution to the judicial authorities, the Constitutional Court held that it is necessary that their budget should be in keeping with their needs. In other words, the budget must provide for sufficient resources to guarantee their smooth functioning throughout the financial year. Under the Constitution public institutions do not function solely in accordance with the resources provided for in the Law on the State Budget. The Constitutional Court already ruled in support of this argument in 2003. State agencies must be able to fully and permanently exercise the duties assigned to them by the Constitution. This requirement therefore derives from the Constitution itself and failure to comply with it on the grounds of a shortage of financial resources constitutes a violation of the Basic Law of the country.

In principle, the National Assembly provides the possibility of offsetting a shortage of financial resources in annual budgets by a supplementary subsidy drawn from the State Budget. In the context of its constitutional obligation to guarantee the autonomy and financial independence of the judicial authorities, it introduces further safeguards for the implementation of the budget of the judicial authorities as approved by the members of parliament. However, parliament had not applied this approach to Article 2.6 of the Law on the State Budget for 2015, thereby making this Article unconstitutional.

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Article 2.6 of the Law on the State Budget for 2015 places the judicial authorities in an unequal position in terms of rights compared to the legislative and the executive authorities since they can only function properly insofar as their own income allows. However, the judicial authorities do not function according to the principle of self-financing. Their functioning is guaranteed by the allocation of public funds. For example, the amount of judicial fees is not fixed in a unilateral manner by the judicial authorities in accordance with their needs. Judicial fees are introduced by a law, adopted by the National Assembly, while the amount is fixed by the executive authorities, namely the Council of Ministers. The judicial authorities are not directly involved in collecting their own resources, since this task falls to the National Revenue Agency. As far back as 1995, the Constitutional Court held, in one of its decisions, that any law on the annual state budget that does not guarantee sufficient resources to ensure the proper functioning of an institution established by the Constitution may be declared incompatible with the Constitution. Article 2.6 of the Law on the State Budget for 2015 allows for an unfunded budget, thereby threatening to prevent the functioning of the judicial authorities. Finally such an approach leads to inequality between the three branches of power and constitutes a violation of the principle of the separation of powers enshrined in Article 8 of the Basic Law.

The budget must ensure the financial resources required for the functioning of all institutions established by the Constitution, including the judicial authorities, in keeping with the principle of the separation of powers and the specific features of the functions assigned to them by the Constitution.

The Constitutional Court held that it is for the National Assembly to put in place the necessary conditions for the implementation of the budget of the judicial authorities as approved by the members of parliament, including by compensating the shortfall in their own income through an additional subsidy. The existence of such provisions in the law would guarantee the full funding of the judicial authorities in cases where the income from their activities does not cover the expected expenditure. In such cases the shortfall must be offset by the State budget. Consequently, any corresponding legislative measure will be in keeping with the provisions of the Constitution.

The Court noted that, over the past few years, its case-law concerning similar disputes has been stable and constant. The Court therefore remained true to this case-law with regard to the interpretation and application of the constitutional principles of the

rule of law, the separation of powers and the independence of the judicial authorities. In view of the above, the Court declared Article 2.6 of the Law on the State Budget for 2015 incompatible with the Constitution.

*Languages:*

Bulgarian.



# Canada

## Supreme Court

### Important decisions

*Identification:* CAN-2015-2-005

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 01.05.2015 / **e)** 35745 / **f)** Henry v. British Columbia (Attorney General) / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 24, [2015] 2 S.C.R. 214 / **h)** <http://scc.lexum.org/en/index.html>; 383 *Dominion Law Reports* (4th) 383; 470 *National Reporter* 200; 18 *Criminal Reports* (7th) 338; [2015] S.C.J. no. 24 (*Quicklaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

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

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

*Keywords of the alphabetical index:*

Constitutional right, violation / Charter of rights, enforcement, remedy / Prosecutorial misconduct, wrongful non-disclosure, civil action, liability threshold.

*Headnotes:*

Under Section 24.1 of the Canadian Charter of Rights and Freedoms, “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” Where a claimant seeks Section 24.1 damages based on allegations that the Crown’s failure to disclose violated his or her Charter rights, proof of malice is not required. Instead, a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to

disclose will likely impinge on the accused’s ability to make full answer and defence. This represents a high threshold of liability for a successful Charter damages claim, albeit one that is lower than malice.

*Summary:*

I. The claimant was convicted in 1983 of 10 sexual offences, declared a dangerous offender, and imprisoned for almost 27 years. In 2010, the Court of Appeal quashed all 10 convictions and substituted an acquittal for each. The claimant then brought a civil suit against the Crown, seeking damages under Section 24.1 of the Charter for harm suffered as a consequence of his wrongful convictions and imprisonment. In his Notice of Civil Claim, the claimant pleaded various causes of action, including malicious prosecution by the Crown for failing to make full disclosure of relevant information for the claimant’s trial. Later, the claimant applied for leave to amend his pleadings to claim Charter damages against the Crown for non-malicious conduct. In permitting the claimant to amend his claim accordingly, the application judge found that a threshold of liability lower than malice should apply and that Section 24.1 damages awards are justified where the Crown’s conduct represents a marked and unacceptable departure from the reasonable standards expected of prosecutors. The Court of Appeal unanimously allowed the Crown’s appeal, concluding that the claimant was not entitled to seek Charter damages for the non-malicious acts and omissions of Crown counsel.

II. Four judges of the Supreme Court of Canada allowed the appeal. According to the majority, the claimant should be allowed to amend his pleadings to include a claim for Charter damages based on a breach by the Crown of its constitutional obligation to disclose relevant information. There are several reasons why malice does not provide a useful liability threshold for such Charter damages claims. First, the malice standard is firmly rooted in the tort of malicious prosecution, which has a distinctive history and purpose. Second, malice requires an inquiry into whether the prosecutor was motivated by an improper purpose. Such an inquiry is apt when the impugned conduct is a highly discretionary decision such as the decision to initiate or continue a prosecution. However, the decision to disclose relevant information is not discretionary. It is a constitutional obligation which must be properly discharged by the Crown in accordance with an accused’s Charter right to make full answer and defence. As such, the motives of the prosecutor in withholding information are immaterial. Third, unlike the decision to initiate or continue a prosecution, disclosure decisions do not fall within the core of prosecutorial discretion, and therefore do not



warrant such an onerous threshold of liability to insulate them from judicial scrutiny. Finally, a purposive approach to Section 24.1 militates against the malice standard.

While the malice standard is not directly applicable, the compelling good governance concerns raised in this Court's malicious prosecution jurisprudence must be taken into account in determining the appropriate liability threshold for cases of wrongful non-disclosure. The liability threshold must ensure that Crown counsel will not be diverted from their important public duties by having to defend against a litany of civil claims. Moreover, a widespread "chilling effect" on the behaviour of prosecutors must be avoided. Therefore, the liability threshold must allow for strong claims to be heard on their merits, while guarding against a proliferation of marginal cases.

The liability threshold focuses on two key elements: the prosecutor's intent, and his or her actual or imputed knowledge. The purpose of these elements is not to shield prosecutors from liability by placing an undue burden on claimants to prove subjective mental states. Rather, they are designed to set a sufficiently high liability threshold to address good governance concerns while preserving a cause of action for serious instances of wrongful non-disclosure. In other words, good governance concerns mandate a high threshold that substantially limits the scope of liability. The standard adopted by the application judge, which is akin to gross negligence, does not provide sufficient limits.

In addition to establishing a Charter breach and the requisite intent and knowledge, a claimant must prove that, as a result of the wrongful non-disclosure, he or she suffered a legally cognisable harm. Liability attaches to the Crown only upon a finding of "but for" causation. Regardless of the nature of the harm suffered, a claimant would have to prove, on a balance of probabilities, that "but for" the wrongful non-disclosure he or she would not have suffered that harm. The "but for" causation test may, however, be modified in situations involving multiple alleged wrongdoers.

III. Two judges agreed to allow the appeal but held that in order to access Charter damages, the claimant need not allege that the Crown breached its constitutional obligation intentionally, or with malice. The claimant need only plead facts that, if true, establish (1) a breach of his Charter rights and (2) that damages constitute an appropriate and just remedy to advance the purposes of compensation, vindication or deterrence.

### *Languages:*

English, French (translation by the Court).



### *Identification: CAN-2015-2-006*

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 21.05.2015 / **e)** 35475 / **f)** R. v. Kokopenace / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 28, [2015] 2 S.C.R. 398 / **h)** <http://scc.lexum.org/en/index.html>; 471 *National Reporter* 1; 321 *Canadian Criminal Cases* (3d) 153; 384 *Dominion Law Reports* (4th) 579; 20 *Criminal Reports* (7th) 1; [2015] S.C.J. no. 28 (*Quicklaw*); CODICES (English, French).

### *Keywords of the systematic thesaurus:*

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

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:*

Criminal proceeding, right to a fair hearing / Criminal proceeding, right to trial by jury / Jury, representativeness, obligation of state / Aboriginal people, on-reserve residents, under-representation on jury roll.

### *Headnotes:*

Representativeness is an important feature of the Canadian jury system, but its meaning is circumscribed. What is required is a representative cross-section of society, honestly and fairly chosen. Representativeness focuses on the process used to compile the jury roll, not its ultimate composition. To determine if the state has met its representativeness obligation, the question is whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will be provided when the state makes reasonable efforts to compile the jury roll using random selection from lists that draw from a broad cross-section of

society, and to deliver jury notices to those who have been randomly selected. When this process is followed, the jury roll will be representative and an accused's right to a representative jury guaranteed by the Canadian Charter of Rights and Freedoms will be respected.

### *Summary:*

I. The respondent, an Aboriginal man from a First Nation reserve, was convicted of manslaughter after a trial by judge and jury. He then learned that there may have been problems with the inclusion of Aboriginal on-reserve residents on the jury roll for the district, which raised questions about the representativeness of the jury. The representativeness issue was therefore raised on appeal, where fresh evidence was introduced regarding the efforts made in preparing the jury rolls for the district. The Court of Appeal was satisfied that the respondent received a fair trial and that his jury was not tainted by a reasonable apprehension of bias or partiality. However, the majority held that the respondent's rights to a fair trial and to a trial by jury guaranteed by Section 11.d and 11.f of the Charter had been violated and ordered a new trial. All three judges rejected the respondent's claims based on the right to equality guaranteed by Section 15 of the Charter.

II. The majority of the Supreme Court of Canada allowed the appeal. According to the four majority judges, jury representativeness is captured by both Section 11.d and 11.f of the Charter. The role of representativeness under Section 11.d is limited to its effect on independence and impartiality. A problem with representativeness that does not undermine these concepts will not violate this provision. Even if the jury does not appear to be biased, Section 11.d will be violated if the process used to compile the jury roll raises an appearance of bias at the systemic level. This may occur when a particular group is deliberately excluded, or when efforts in compiling the jury roll are so deficient as to create an appearance of partiality. The narrow way in which representativeness is defined in Canadian jurisprudence means that impartiality is guaranteed through the process used to compile the jury roll, not through the ultimate composition of the jury roll or the jury itself. A jury roll containing few individuals of the accused's race or religion is not in itself indicative of bias.

The role of representativeness in Section 11.f is broader: it promotes impartiality, legitimises the jury's role as the conscience of the community and promotes public trust in the criminal justice system. The absence of representativeness will therefore automatically undermine the Section 11.f right to a trial by jury.

If the state deliberately excludes a particular subset of the population that is eligible for jury service, it will violate an accused's right to a representative jury, regardless of the size of the group affected. However, if it is a question of unintentional exclusion, it is the quality of the state's efforts in compiling the jury roll that will determine whether an accused's right to a representative jury has been respected. If the state makes reasonable efforts but part of the population is excluded, the state will nonetheless have met its constitutional obligation. In contrast, if the state does not make reasonable efforts, the size of the population that has been inadvertently excluded will be relevant. When only a small segment of the population is affected, there will still have been a fair opportunity for participation by a broad cross-section of society.

The state met its representativeness obligation in this case. Assessed in light of what was known at the time and against the proper standard, the state's efforts to include Aboriginal on-reserve residents in the jury process were reasonable. Accordingly, there was no violation of Section 11.d or 11.f of the Charter.

III. In a concurring opinion, one judge is of the view that the unintentional exclusion of some segments of the community from the jury roll does not amount to a constitutional defect, but that the state could, in exceptional circumstances, violate an accused's Charter rights by unintentionally but substantially excluding a segment of the population. In that case, it may be that such substantial exclusion rises to a level that could leave the jury unable to fulfil its representative function, thereby depriving it of legitimacy in the eyes of society, and undermining its independence and impartiality.

Two judges, dissenting, are of the view that to be properly selected, a jury must be drawn from a random sample of eligible people in the district who, by virtue of that random selection, are representative of its population. A representative jury roll is therefore one that substantially resembles the group of persons that would be assembled through a process of random selection of all eligible jurors in the relevant community. According to the dissenting judges, the jury roll in this case was not representative because its composition was a substantial departure from what random selection among all potentially eligible jurors in the district would produce, in view of the under-representation of Aboriginal on-reserve residents on the jury. There was a sufficient connection between state action and inaction and the lack of a representative jury roll to find that there was a breach by the state of the respondent's right to a representative jury roll as guaranteed under Section 11.d and 11.f of the Charter.

The Supreme Court rejected unanimously the respondent's claims based on the right to equality guaranteed by Section 15 of the Charter. With respect to his personal claim, the respondent has not clearly articulated a disadvantage. With respect to his request for public interest standing to advance a claim on behalf of Aboriginal on-reserve residents who were potential jurors, it cannot be granted because the respondent may have different, potentially conflicting interests from those of potential jurors.

### *Languages:*

English, French (translation by the Court).



### *Identification:* CAN-2015-2-007

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 11.06.2015 / **e)** 36059 / **f)** R. v. Smith / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 34, [2015] x S.C.R. x / **h)** <http://scc.lexum.org/en/index.html>; 472 *National Reporter* 1; 20 *Criminal Reports* (7th) 246; [2015] A.C.S. no. 34 (*Quicklaw*); CODICES (English, French).

### *Keywords of the systematic thesaurus:*

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.  
 3.16 General Principles – **Proportionality**.  
 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.  
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person**.

### *Keywords of the alphabetical index:*

Constitutional right, violation, remedy / Charter of rights, right to life, liberty and security of person / Criminal offence, possession and possession for purpose of trafficking, cannabis.

### *Headnotes:*

Under Section 7 of the Canadian Charter of Rights and Freedoms, “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the

principles of fundamental justice.” The prohibition on non-dried forms of medical marijuana imposed by the Marijuana Medical Access Regulations (hereinafter, the “MMARs”) unjustifiably infringes Section 7 of the Charter. In addition, an accused operating outside the MMARs and not himself using marijuana for medical purposes has standing to challenge the constitutional validity of the scheme.

### *Summary:*

I. The accused produced edible and topical marijuana derivatives for sale by extracting the active compounds from the cannabis plant. He operated outside the MMARs, which limit lawful possession of medical marijuana to dried marijuana. The accused does not himself use marijuana for medical purposes. The police charged him with possession and possession for purpose of trafficking of cannabis contrary to Sections 4.1 and 5.2, respectively, of the Controlled Drugs and Substances Act (hereinafter, the “CDSA”). The trial judge held that the prohibition on non-dried forms of medical marijuana unjustifiably infringes Section 7 of the Charter and a majority of the Court of Appeal dismissed the appeal.

II. In an unanimous decision, the Supreme Court of Canada dismissed the appeal and affirmed the accused's acquittal. Firstly, the Court held that the accused has standing to challenge the constitutionality of the MMARs. Accused persons have standing to challenge the constitutionality of the law under which they are charged, even if the alleged unconstitutional effects are not directed at them, or even if not all possible remedies for the constitutional deficiency will end the charges against them.

On the merits, the Court concluded that the prohibition on possession of non-dried forms of medical marijuana limits the Section 7 Charter right to liberty of the person in two ways. First, the prohibition deprives the accused as well as medical marijuana users of their liberty by imposing a threat of imprisonment on conviction under Section 4.1 or 5.2 of the CDSA. Second, it limits the liberty of medical users by foreclosing reasonable medical choices through the threat of criminal prosecution. Similarly, by forcing a person to choose between a legal but inadequate treatment and an illegal but more effective one, the law also infringes security of the person.

The Court further held that these limits are contrary to the principles of fundamental justice because they are arbitrary; the effects of the prohibition contradict the objective of protecting health and safety. The evidence amply supports the trial judge's conclusions that inhaling marijuana can present health risks and that it is less effective for some conditions than

administration of cannabis derivatives. In other words, there is no connection between the prohibition on non-dried forms of medical marihuana and the health and safety of the patients who qualify for legal access to medical marihuana.

In this case, according to the Court, the objective of the prohibition is the same under both the Sections 7 and 1 Charter analyses: the protection of health and safety. It follows that the same disconnect between the prohibition and its object that renders it arbitrary under Section 7 frustrates the requirement under Section 1 that the limit on the right be rationally connected to a pressing objective. The infringement of Section 7 is therefore not justified under Section 1.

The Court held however that Sections 4 and 5 of the CDSA should not be struck down in their entirety. The appropriate constitutional remedy is a declaration that these provisions are of no force and effect, to the extent that they prohibit a person with a medical authorisation from possessing cannabis derivatives for medical purposes; however, contrary to an order of the Court of Appeal, that declaration is not suspended because it would leave patients without lawful medical treatment and the law and law enforcement in limbo.

#### *Languages:*

English, French (translation by the Court).



## Chile Constitutional Tribunal

### Important decisions

*Identification:* CHI-2015-2-003

**a)** Chile / **b)** Constitutional Tribunal / **c)** / **d)** 11.06.2015 / **e)** 2702-2014 / **f)** / **g)** / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

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

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

#### *Keywords of the alphabetical index:*

Civil action / Summary proceedings.

#### *Headnotes:*

The partial prohibition of civil claims during summary criminal procedures is not unconstitutional and can be justified on the basis of the special nature of a summary trial.

#### *Summary:*

I. The Penal Procedure Code provides that for a summary judgments a civil suit is not admissible, except where it pursues the restitution of a good or its value.

The applicant took a criminal action for fraud. He originally went to ordinary criminal trial, which allows civil suits within the procedure. However, after an intervention by the Public Prosecutor the trial was changed to a summary procedure. As a result, the applicant was unable to claim civil damages. The applicant brought an action to the Constitutional Tribunal, which challenged the criminal procedure rule excluding civil claims in summary criminal trials as unconstitutional for contravening the rights to equality and defence. The issue before the Tribunal was therefore whether it is constitutional that a

criminal procedure norm prohibits civil claims in a summary criminal trial, but allows it in an ordinary criminal trial.

II. In its judgment, the Tribunal held that there are no grounds to declare the unconstitutionality of the challenged criminal procedure rule, because that rule has in consideration the nature of a summary criminal trial, in which the Tribunal inquires, examines the evidence and judges in a brief time. Summary criminal trials are often used for cases that do not present major complexities. The brief trial period is the reason why the only civil claims admissible in such a trial are those which pursue the restitution of a good or its value.

*Languages:*

Spanish.



*Identification:* CHI-2015-2-004

**a)** Chile / **b)** Constitutional Tribunal / **c)** / **d)** 16.06.2015 / **e)** 2699-2014 / **f)** / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

3.20 General Principles – **Reasonableness**.  
5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms**.  
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

*Keywords of the alphabetical index:*

Child, best interest / Child, care and custody / Parenthood.

*Headnotes:*

A rule that accords care of a child to the parent with whom the child is living, if the parents do not reach a prior agreement regarding shared parental care, is not unconstitutional. The rule has the legitimate aim of safeguarding the child's best interests given that it provides a legal solution when there is no parental agreement on shared care of the child.

*Summary:*

I. Article 225 of the Civil Code provides regulations on the parental care of a child where the parents are separated and have not settled an agreement on shared parental care. It establishes that the child shall remain under the care of the parent with whom he or she is living.

The applicant is a parent who claimed shared parental care of his son before a family court. However, given that there was no agreement on shared parental care, the court declared the claim inadmissible, since civil law allows shared parental care only in the case that there is an agreement between both parents. The applicant appealed this decision, but it was confirmed. The case is currently pending before the Supreme Court.

Meanwhile the applicant brought an action to the Constitutional Tribunal requesting a declaration that this civil code rule is unconstitutional, mainly on the grounds that it breaches his constitutional rights to equality and his right of access to justice.

II. The Constitutional Tribunal held that there is no breach of the constitutional rights of the applicant. It declared that Article 225 of the Civil Code is reasonable, since it has a legitimate aim.

The challenged rule is justified since it provides a legal solution when there is no parental agreement on shared care of the child. This rule seeks to address a lack of agreement between both parents. The end here is to safeguard the child's best interest. The legislator may have chosen another solution to this lack of agreement, but its selection of this alternative, in which the child remains under care of the parent with whom he or she lives is not disproportionate.

Regarding the applicant's right of access to justice, the challenged norm is also in accordance with constitutional principles. The impediment to claiming shared parental care action in court is based on the reasoning that it promotes an agreement between both parents, preventing a lack of determination of the child's care while such care is being discussed in trial.

Nevertheless, here joint parental responsibility is not to be confused with childcare, since responsibility for the child's upbringing remains with both parents, even if the child does not live with one of them.

*Languages:*

Spanish.



*Identification:* CHI-2015-2-005

**a)** Chile / **b)** Constitutional Tribunal / **c)** / **d)** 25.06.2015 / **e)** 2678-2014 / **f)** / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

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

*Keywords of the alphabetical index:*

Agricultural, land / Mining and metallurgy / Property, control and use.

*Headnotes:*

The right to explore and to dig by the owner of a mining concession is limited by the right to property of the owner of the land.

*Summary:*

I. The Constitution provides that a mining concession obliges the owner to develop the activity necessary to satisfy the public interest, which justifies the granting of that concession.

The law on mining activity provides, on the other hand, that a miner might explore and dig in any land, except in land where there are trees, housing or agriculture in general on the surface of the ground. In this latter case exploration and digging is permissible solely where the owner of the surface land allows it.

The applicant is a mining company, which claimed in court the extension of its mining concession, including the underground of land whose surface is intended for agriculture. The courts denied the applicant's claim, on the ground that the law requires a grant of permission from the owner of the land for exploring and digging.

The applicant requested the Constitutional Tribunal to declare this rule unconstitutional as contravening the constitutional mandate to develop the activity necessary to satisfy the public interest, which justifies

the granting of the concession. The applicant argued that mining law inhibits it from fulfilling its constitutional obligation, since its mining activity depends on the permission of the owner of land whose surface is intended for agriculture. The applicant also claimed that this law breaches its right to freedom of enterprise and property rights.

II. The Tribunal held that the applicant cannot pretend that the constitutional provisions on mining activities imply a general duty superior to other legal obligations. Certainly, obligations are attached to mining concessions due to the constitutional mandate. However, these form part of a system of obligations which are met in accordance with the provisions of the law as a whole. In this connection, the development of the activities required to satisfy the public interest in the grant of a mining concession does not require, to the exclusion of all other considerations, exploitation of the site subject to the mining concession. *A fortiori*, it does not require exploitation of the site by force through the use of a right of way on a property located outside the boundaries of the concession. Accordingly, a ruling that requests the consent of the owner of superficial land subject to a mining surface concession, before mining can proceed, does not contravene the constitutional mandate regarding mining development and concessions.

The Tribunal also held that there is no breach of property rights because the applicant has not been deprived of the ownership of its concession. Rather, ownership of the concession is limited within the constraints applicable to the concession system. Finally, the applicant cannot pretend that its activity is the only activity worth protection, thus its economic activity may be limited in consideration of other activities, such as agriculture.

*Languages:*

Spanish.



# Croatia

## Constitutional Court

### Important decisions

*Identification:* CRO-2015-2-006

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 07.07.2015 / **e)** U-III-2551/2015, U-III-2852/2015, U-III-2853/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 75/15 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.  
3.9 General Principles – **Rule of law**.

*Keywords of the alphabetical index:*

Constitutional complaint, admissibility / Court decisions, disapproval, individual / Court decisions, obligation to respect, individual / Effect, binding / Execution, immovable property / Public order, threat / Public peace / Responsibility, individual.

*Headnotes:*

It is everyone's unconditional obligation to respect final and enforceable court decisions, including final enforceable rulings (hereinafter, "court decisions" or "decisions of the court"), and it is wholly unacceptable for any person (or group) to take "the law into their own hands" by opposing these decisions, because such conduct disrupts the public order of the country and tramples on the values of a democratic society based on the rule of law. Responsibility (of individuals, institutions, communities) is the most important guarantor of the implementation of constitutional rule in the Republic of Croatia, and freedom in a democratic society, based on the rule of law, primarily means the readiness of individuals to take responsibility for their own destiny within the constitutional framework of protected rights. These are the fundamental determinants on which the Croatian constitutional legal order depends.

In such an order, disputes among citizens are resolved before the courts, which are institutionalised state authorities whose duty is to proceed pursuant to the Constitution, international treaties, laws, and other

sources of law in force, and to decide on the basis of them in an unbiased and impartial manner. In a democratic society based on the rule of law, one does not have to be satisfied with a court decision. It does not have to be welcomed with approval, even when such a decision is upheld, or rendered, in the process of exercising legal remedies, by the court of highest instance that is competent for the case in hand. This dissatisfaction is inherent in the nature of judicial dispute resolution. However, disagreement with a decision of the court does not free the parties from the obligation to respect it and to accept its enforcement. Disagreement with such a decision frees neither those who publicly support the individuals affected by it, nor those who adversely comment on the decision, from the obligation to respect it and not to impede its enforcement.

All those who encourage the non-enforcement of court decisions, or encourage opposition to them, base their behaviour on the unacceptable and detrimental premise that court decisions must be respected only when we personally agree with them. Each person who today encourages others to hinder the enforcement of court decisions because he or she personally does not approve of them, or because those others do not approve of them, will not be able to explain on another day why someone should respect a court decision with which that person does not agree. The same is true of legislation. Such a situation leads to lawlessness.

Those who create a sense of lawlessness by influencing public opinion that decisions of courts do not have to be enforced, or that these decisions, in the light of the applicant's case, will not, in fact, be enforced if a sufficiently powerful impression is created in the public eye that injustice has been caused, introduce discord in the foundation of social peace.

The legal order in the Croatian constitutional state relies on the binding power of court decisions (*inter partes*), in conjunction with the binding power of international treaties, laws and other sources of law in force (*erga omnes*). Everyone is obliged to accept and respect this fact.

*Summary:*

The Constitutional Court conducted joint proceedings when deciding on three constitutional complaints in one ruling, since they dealt with the same enforceable matter, and partially with the same impugned rulings.

The applicant, in the capacity of enforcement debtor, filed two constitutional complaints. In one constitutional complaint he challenged the second-instance court ruling in the parts where his appeals were rejected as unfounded, and which had been lodged against the first-instance ruling in the parts where his proposals to postpone the enforcement and to stay the enforcement proceedings had been rejected as unfounded. In the second constitutional complaint he challenged the second-instance court ruling in the parts where his appeals lodged against the first-instance court ruling in which his proposals to suspend the enforcement and abolish the finality clause had been rejected.

Within the meaning of Article 62.1 of the Constitutional Act on the Constitutional Court (hereinafter, the "CACC"), only a decision by which a competent court has decided on the merits about a right or obligation or about a suspicion or accusation of a criminal act by the applicant constitutes an individual act pursuant to which the Constitutional Court, in proceedings instituted by a constitutional complaint, is competent to protect the human rights and freedoms of the applicant, as guaranteed by the Constitution.

The Constitutional Court dismissed both constitutional complaints, because it assessed that the impugned acts did not represent individual acts within the meaning of Article 62.1 of the CACC against which the Constitutional Court would be competent to provide constitutional judicial protection.

The Constitutional Court noted that the applicant had never requested the protection of his constitutional rights before the Constitutional Court against the final court ruling on enforcement on which the execution of the enforcement itself is based. It also noted that the applicant in his appeal (3 November 1999), represented in the appellate proceedings by attorneys as legal representatives, had not raised an objection against this ruling concerning the violation of his right to a home.

Furthermore, the applicant had previously been the owner of the real estate which was the object of enforcement, and which had been sold to a third person (the current owner) at a public auction, because the applicant (as the debtor) was obliged to settle a debt to the creditor from the amount received by selling it, whereby the creditor and the buyer of the real estate (the current owner) are two different persons.

In this context, the Constitutional Court emphasised in particular that this case concerns a private-law relation between the current owner and the applicant as the former owner of the real estate, who –

basically invoking his alleged right to a home – still lives in it and refuses to move out, although all the enforcement actions prescribed by Article 75 of the Enforcement Act of 1996 have already been conducted as part of the enforcement proceedings and although it is evident that the applicant, by placing a lien on this real estate, consciously disposed of his ownership over the said real estate, with all the consequences that he had personally assumed for himself and his family.

The other applicants (members of the enforcement debtor's family), in the role of third persons in the enforcement proceedings that preceded the Constitutional Court proceedings, filed a constitutional complaint challenging the second-instance court ruling in the parts in which the supplement to their appeal had been dismissed as untimely, and their appeal lodged against the first-instance ruling in the parts where their objection against the enforcement and their proposal to postpone the enforcement had been rejected as unfounded.

The Constitutional Court dismissed their constitutional complaint, because the requirements were not met for deciding on the merits in the part in which the applicant's objection against the enforcement had been rejected, and because it was not competent to decide in the part in which the rejection of the applicant's proposal to postpone the enforcement was challenged.

Considering the state of the matter in this case, and based on the past experiences concerning the unsuccessful attempts to conduct this enforcement and the wide coverage of this case in the media, the Constitutional Court, within its general supervisory authorities, based on Article 2.1 of the CACC, concerning the forthcoming implementation of the enforcement regarding this case, stressed in particular the unconditional obligation of all to respect final and enforceable court decisions.

#### *Cross-references:*

##### Constitutional Court:

- no. U-III-2559/2013, 20.06.2013;
- no. U-III-3824/2011, 08.12.2011;
- no. U-III-1148/2015, 28.04.2015;
- no. U-III-3354/2007, 29.11.2007.

#### *Languages:*

Croatian, English.





*Identification:* CRO-2015-2-007

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 24.07.2015 / **e)** U-III-4149/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 27/15 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Courts.**

3.3.3 General Principles – Democracy – **Pluralist democracy.**

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

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.**

3.18 General Principles – **General interest.**

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

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.**

*Keywords of the alphabetical index:*

Criminal Code / Crime, elements / Crime, involving dishonesty and moral turpitude / Crime, perpetrator, prime minister / Crime, qualification / Criminal law, accepting a bribe, / Criminal law, war profiteering / Criminal law, limitation period / Criminal law, retroactive / Criminal law, more lenient / Criminal liability, elements, precision / Criminal offence, essential elements / Law, retroactive effect / Statute of limitations, prosecution.

*Headnotes:*

It is a general rule of substantive criminal law that the law applied against a perpetrator is the law that was in force at the time the criminal offence was committed. It is only when, after the commission of a criminal offence, and before the issuing of a final judgment, the law is amended one or more times that the law which is more or the most lenient for the

perpetrator is applied. The statement of reasons of court sentences must include serious, sufficient and relevant grounds based on which it is possible, on a case-by-case basis, to establish with certainty whether the rule of the more lenient law was respected.

From the point of view of constitutional law, in a democratic multiparty system, it is not permitted to equate state political functions with party political functions, because doing so eliminates the distinction between state and party politics.

*Summary:*

In this decision the Constitutional Court did not examine whether the applicant is guilty of the criminal offence of war profiteering and criminal offence of accepting a bribe for which he was convicted by a final judgment, since the said issue is not within the jurisdiction of the Constitutional Court. Rather, the Constitutional Court examined whether in the applicant's case the legislative framework of the state was respected, and in particular whether the said framework was interpreted in accordance with the Constitution and the ECHR and whether, within the limits guaranteed for accused persons by the Constitution and the ECHR, the applicant was provided with all the guarantees of a fair trial and all the legal protection mechanisms provided for by the Croatian legislation currently in force.

The Constitutional Court emphasised that this decision, whereby the judgments of criminal courts (i.e. the County Court in Zagreb, along with the Supreme Court of the Republic of Croatia which confirmed that the first-instance proceedings were duly conducted and that the legal positions of the first-instance court in the cases Hypo and INA-MOL were correct) in the Hypo and INA-MOL cases were quashed, must not be taken as proof that the applicant was a victim of political persecution or judicial conformism, as claimed unfoundedly in the constitutional complaint.

Criminal courts have exclusive jurisdiction to examine whether the applicant is guilty of the criminal offences with which he is charged in the Hypo and INA-MOL cases, and they have the obligation to abide by the legal views of the Constitutional Court expressed in this decision.

Regarding both cases, the applicant lodged a constitutional complaint against the judgments of criminal courts. He believed that the judgments violated his constitutional rights guaranteed by Articles, 28, 29, 31 and 14 of the Constitution, as well as Article 6 ECHR and Article 1 Protocol 1 ECHR.

## The Hypo Case

The applicant was declared guilty by a final judgment of having committed a criminal offence against official duty – by abuse of power and authority (hereinafter, “crime/31-1”) with the features of war profiteering (hereinafter, “WP and TP crime/31-4”).

Crimes/31-1 are the criminal offences within the meaning of Article 31.1 of the Constitution that were prescribed and legally established in the 1977 Criminal Code (in force until 1 January 1998; hereinafter, “CCRC/1977-1991”) and the 1997 Criminal Code (entry into force on 1 January 1998; hereinafter, “CC/1997”) in the period from 30 May 1990 to 15 January 1998, set out in the 2011 Act on Exemption from the Statute of Limitations of Crimes of War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatisation (hereinafter, the “Act on Exemption”).

WP and TP crimes/31-4 are the criminal offences of war profiteering and crimes committed in the process of ownership transformation and privatisation within the meaning of Article 31.4 of the Constitution (WP = war profiteering; TP = transformation and privatisation).

According to the final judgment, the perpetrator committed the criminal offence in the Hypo case during the Homeland War in Croatia in Zagreb and in the Republic of Austria in the period from the end of 1994 to 22 March 1995.

The crime/31-1 consisted of the fact that the applicant as deputy foreign minister of the Republic of Croatia, further to an order issued by his superior (the minister), in a period during the preparation of a credit transaction with Austrian Hypo Bank, represented the Government of the Republic of Croatia (hereinafter, the “Government”) as negotiator concerning the terms and conditions of a loan agreement (by which Hypo Bank would grant a loan to the Government for the purchase of embassy buildings for the Republic of Croatia throughout the world). The applicant, with the intention of generating considerable financial gain during the negotiations, and taking advantage of his position as negotiator, agreed that the bank in question should pay him a commission fee in cash – in an amount equivalent to 5% of the granted loan – for taking part in the negotiations and as a return favour for its entry on the Croatian market, and the deal was carried through.

The Constitutional Court examined two questions of constitutional law: one was related to the rule of the more lenient penalty (more lenient law) and the other one related to the legal establishment of the criminal offence of war profiteering.

## 1. Rule of the more lenient penalty (more lenient law)

Article 31.1 of the Constitution prescribes that “no one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by law. If a less severe penalty is determined by law after the commission of said act, such penalty shall be imposed”.

It is a general rule of substantive criminal law that the law applied against a perpetrator is the law that was in force at the time the criminal offence was committed. It is only when, after the commission of a criminal offence, and before the issuing of a final judgment, the law is amended one or more times that the law which is more or the most lenient for the perpetrator is applied. The statement of reasons of court sentences must include serious, sufficient and relevant grounds based on which it is possible on a case-by-case basis to establish with certainty whether the rule of the more lenient law was respected.

In connection with the rule of the more lenient law, the Constitutional Court found that Articles 31.1 and 29.1 of the Constitution were breached for the following reasons.

First, the County Court in Zagreb applied CC/1997 as the applicable substantive criminal law.

Second, the Supreme Court of the Republic of Croatia, by reference to the rule of the more lenient law, applied the 2011 Criminal Code (entry into force on 1 January 2013; hereinafter, “CC/2011”) as the applicable substantive criminal law.

Third, neither of the two laws was in force at the time the crime was committed (from the end of 1994 to 22 March 1995).

At the time the crime was committed, the law in force was CCRC/1977-1991.

CCRC/1977-1991 is not mentioned in the first- or in the second-instance judgment.

The disputed first-instance judgment does not include an explanation of why CC/1997 was applied in the criminal proceeding before the County Court in Zagreb instead of CCRC/1977-1991 – which was in force at the time the criminal offence was committed.

The disputed second-instance judgment does not include an explanation of why, in the appellate proceedings, the Supreme Court, by applying the rule

of the more lenient law, put CC/2011 in correlation with CC/1997, but not (also) with CCRC/1977-1991.

Fourth, as it was consequently not possible to establish with certainty whether the rule of the more lenient law was respected in terms of the applicant, the following rights of the applicant were breached: the rules of the more lenient law together with the constitutional guarantee of the more lenient penalty in Article 31.1 of the Constitution; and the constitutional right to a court judgment that includes a statement of reasons in the part relating to the rule of the more lenient law (Article 29.1 of the Constitution).

## 2. Legal establishment of the criminal offence of war profiteering

Article 5 of the fourth change of the Constitution of the Republic of Croatia (Official Gazette 76/10), which entered into force on 16 June 2010 (hereinafter, "Change of the Constitution/2010") amends Article 31 of the Constitution by adding a new paragraph 4, which prescribes: "The statute of limitations shall not apply to the criminal offences of war profiteering, nor any criminal offences perpetrated in the course of economic transformation and privatisation and perpetrated during the period of the Homeland War and peaceful reintegration, wartime and during times of clear and present danger to the independence and territorial integrity of the state, as stipulated by law..."

The criminal offences of war profiteering relate to perpetrators who, in the period from 30 May 1990 to 15 January 1998, generated disproportionate financial gain illegally by abusing the state of war through criminal offences enumerated in the Act on Exemption (for example, by fraud, tax evasion, money laundering, embezzlement, abuse of position and authority, bribery, etc.). All such offences, enumerated in the Act on Exemption, were already prescribed in the legislation as criminal offences also in the period from 30 May 1990 to 15 January 1998 (these are referred to as: crimes/31-1)

The Act on Exemption prescribes in Article 7.1 that the crimes/31-1 become the criminal offences of war profiteering (WP and TP crimes/31-4) "if they were used to generate disproportionate financial gain by raising prices in the case of product shortages, selling state property at a price much lower than its value, or in some other way taking advantage of the state of war and the immediate danger to the independence and territorial integrity of the state". Thus, the Act normatively expresses strict condemnation of all perpetrators of such criminal offences on the grounds that they contributed to the general destruction of the national economic system, unscrupulous devastation

of national property and global impoverishment of the nation during the most sensitive period of Croatia's recent history.

Acknowledging the requirement imposed by the rule of law that states may not interfere retroactively in cases barred by the statute of limitations related to criminal prosecution, the Constitutional Court established in its decision that the new Article 31.4 of the Constitution had allowed – with *pro futuro* effect – unlimited temporal possibilities for the criminal prosecution of perpetrators of the crimes/31-1 even after they become barred by the statute of limitations related to criminal prosecution, provided that the offences in question are not barred by the statute of limitations on the day of the entry into force of the Change of the Constitution/2010 (16 June 2010) and that they meet the legal requirements prescribed in Article 7.1 of the Act on Exemption.

In view of the failure of the courts to legally establish if in the Hypo case existed the criminal offence of war profiteering, the Constitutional Court found that the constitutional rights of the applicant set out in Article 31.1 and Article 31.4 in conjunction with Article 31.1 of the Constitution were breached for the following reasons.

First, neither the County Court in Zagreb nor the Supreme Court examined whether the crime/31-1 (i.e. the criminal offence of abuse of position and authority with which the applicant was charged) was barred by the statute of limitations on the date of the entry into force of the Change of the Constitution/2010 (16 June 2010).

Thus, they actually failed to determine whether it was at all possible to conduct criminal prosecution, to try and to punish the applicant in the Hypo case. Namely, if on the date of the entry into force of the Change of the Constitution/2010 the crime/31-1 was barred by the statute of limitations, it would not be possible to pursue criminal prosecution for the criminal offence of war profiteering within the meaning of Article 7 of the Act on Exemption.

Second, neither the County Court in Zagreb nor the Supreme Court examined whether the Hypo case was marked, along with the characteristics of the crime/31-1, by other legal characteristics of the criminal act of war profiteering set out in Article 7.1 of the Act on Exemption. This primarily relates to "disproportionate" financial gain that, along with other characteristics set out in Article 7.1 of the Act on Exemption, constitutes an important characteristic of the criminal offence of war profiteering.

Third, the “disproportionality” of financial gain generated in such a manner must be the result of conscious exploitation of the state of war (it refers to a state of war or immediate danger to the independence and territorial integrity of the state); and it must also always be generated at the expense or to the detriment of the material living conditions of the population during war, the economic potential of society, or at the cost or to the detriment of state property or other financial interests or well-being of a state at war. Namely, when by legal or actual activities, ventures or actions within the meaning of Article 7.1 of the Act on Exemption the crime/31-1 is committed, resulting in considerable financial gain through exploitation of the state of war (thus making the material living conditions of the population more difficult, destroying the economic potential of society or weakening the property-related substrate of the state), then such illegally generated considerable financial gain has to (additionally) also be “disproportionate” to enable the realisation of the criminal offence of war profiteering. In relation to which values this disproportionate financial gain is measured and examined depends on the circumstances of each individual case, determined by the criminal courts in judicial proceedings.

In the Hypo case, the Criminal Court went no farther than “considerable” financial gain generated by the crime/31-1; it derived the existence of the criminal offence of war profiteering from the legal concept of financial gain (as “considerable”), which is included in criminal laws, but not in the Act on Exemption. The Criminal Court did not mention anywhere in the disputed judgment the new legal concept of financial gain (as “disproportionate”) in the case of the criminal offence of war profiteering.

Fourth, the Act on Exemption states in Article 7.1 that disproportionate financial gain can also be generated “in some other way” (other than by the ways expressly stated in the provision concerned). Thus, any incriminated legal or factual transactions, ventures or actions must be placed in correlation with the required disproportionality of the unlawfully generated gains.

The Criminal Court interpreted the provision in a way that it did not place such “other way” in any correlation with the required “disproportionality” of the generated gains (which, as previously stated, must always be the result of the conscious exploitation of the state of war at the cost or to the detriment of the material living conditions of the population, the economy, or well-being of a state at war).

### The Case of INA-MOL

The applicant was found guilty and sentenced by a final judgment for having committed a criminal offence against official duty by accepting a bribe, described and punishable under Article 347.1 of CC/1997.

According to the final court judgment, in early 2008 the applicant, as the prime minister of the Government, and Zsolt Tamás Hernádi, chairman of the board of the Hungarian oil company MOL, agreed in Zagreb that for the amount of EUR 10 million (EUR 10,000,000.00) he would use his best efforts to bring about the conclusion of an Amendment to the (2003) Shareholders’ Agreement relating to INA, by having the Republic of Croatia ensure for MOL a majority interest in INA and conclude an agreement on the exclusion of gas operation from INA in the part causing losses to INA, which would be assumed in full by the Republic of Croatia. The Criminal Court held that the Government thus adopted a decision against the interests of the Republic of Croatia, because the concluded contracts resulted in the dependence of a company of special interest for the Republic of Croatia on a foreign legal person.

The Constitutional Court examined two questions of constitutional law: one that related to the Prime Minister and President of a political party as “official persons” – persons accepting a bribe and the other one related to the proof of accepting a bribe: assessment of the Criminal Court that the contracts concluded with MOL by the Government are contrary to the interests of the Republic of Croatia.

1. The Prime Minister and President of a political party as “official persons” – persons accepting a bribe  
The criminal offence against official duty by accepting a bribe belongs to a group of *delicta propria*, i.e. special criminal offences which can be committed only by persons having a certain capacity. To commit the criminal offence against official duty by accepting a bribe, the following criteria must be fulfilled:

- a. the offence was committed in the capacity of official or responsible person;
- b. the person accepted a gift or some other financial or non-financial benefit (hereinafter, “bribe”), or accepted the promise of a bribe;
- c. the person accepted a bribe or the promise of a bribe to perform an official or other action within the limits of his authority that he should not perform.

If a person does not have the capacity of an “official or responsible person”, then all the characteristics of the criminal offence of accepting a bribe are not met as a condition for establishing other elements of the criminal offence, especially unlawfulness and guilt.

The term official person was defined in Article 89.3 CC/1997. The said provision lists exhaustively state officials who may have the capacity of “official person”. The prime minister of the Government of the Republic Croatia is not listed. Nevertheless, the Criminal Court applied Article 89.3 CC/1997 to the applicant as the prime minister, without stating any reasons.

The Constitutional Court found in the INA-MOL case with respect to the determination of the applicant as an “official person”, breach of Article 29.1 of the Constitution, in the part relating to the absence of an explanation of the application of Article 89.3 CC/1997 to the applicant as prime minister; and breach of Article 31.1 of the Constitution, in the part of the INA-MOL case relating to the activity of the applicant as the president of a political party.

Reasons for the above-mentioned violations were the following:

First, in the INA-MOL case, a person who performed the office of prime minister was indicted and sentenced for the first time in Croatian legal history. Considering this was the first such case, the Criminal Court was obliged to interpret and explain why it held that a prime minister should be covered by Article 89.3 CC/1997, even though a prime minister was not listed. Bearing in mind that this is a field of criminal law, the authority of a body of criminal prosecution and the Criminal Court to automatically apply Article 89.3 CC/1997 to state officials, although they are not listed, cannot be self-explanatory, and even less justified in terms of constitutional law, where not a single word on the matter is mentioned in the court judgment, especially because the capacity of “official or responsible person” is a constitutive element of the criminal offence of accepting a bribe as stated in Article 347 CC/1997.

Since a full court clarification of the relevant issue is missing, the constitutional right to a court decision that includes a statement of reasons was breached in the part concerning the application of Article 89.3 CC/1997 (and consequently Article 347.1 CC/1997) for the applicant in his capacity as prime minister.

Second, the Criminal Court also sentenced the applicant for actions taken in the INA-MOL case as the then president of a political party, although the president of a political party is not and cannot be an

“official person” within the meaning of Article 89.3 CC/1997, and cannot commit the incriminating official act. From the point of view of constitutional law, in a democratic multiparty system (Article 3 of the Constitution) it is not permitted to equate state political functions with party political functions, because doing so eliminates the distinction between state and party politics.

Therefore, the constitutional right of the applicant to the legal establishment of the criminal offence of accepting a bribe within the meaning of Article 31.1 of the Constitution was breached in the INA-MOL case in the part relating to the applicant’s actions as the president of a political party.

2. Proof of accepting a bribe: assessment of the Criminal Court that the contracts concluded with MOL by the Government are contrary to the interests of the Republic of Croatia

On 29 January 2009, the Government issued its approval and, on 30 January 2009, it concluded two agreements with MOL: the First Amendment to the (2003) Shareholders’ Agreement relating to INA and the Main Agreement on Gas Operation.

While hearing the evidence, the Criminal Court examined, as the first “disputable” question, whether the contracts were “contrary to the interests of the Republic of Croatia”. The Criminal Court then used its own assessment of the prejudicial nature of the contracts for the Republic of Croatia as evidence that the applicant had accepted a bribe.

Given that in the criminal proceedings the acceptance of a bribe was subject to a hearing of evidence through the preliminary assessment that the contracts concluded between the Government and MOL were contrary to the interests of the Republic of Croatia, the Constitutional Court found that the lines between the criminal responsibility of the applicant for accepting a bribe and the political responsibility of the Government for contracts concluded were blurred and that Article 29.1 of the Constitution was breached because the Criminal Court used an inadmissible method for proving the individual guilt of the accused for accepting a bribe.

Reasons for the above-mentioned violations were the following:

First, in criminal proceedings, where a prime minister is tried for an act of corruption that involves the acceptance of a bribe with the aim of influencing the conclusion of a legal transaction within the competence of the Government, the question whether the legal transaction was “contrary to the

interests of the Republic of Croatia” is not “disputable question” which needs to be proven in the criminal proceedings.

The very fact that a person performing the office of prime minister offers or accepts a bribe to influence the conclusion of a legal transaction within the competence of the Government – within the limits of his authority – makes the legal transaction concerned corruptive *a priori* in the substantive sense, and its very corruption is proven *prima facie*. Therefore, each such transaction is *per definitionem* contrary to the interests of the Republic of Croatia, regardless of whether by its effects or dominant political assessments it was (more or less) advantageous or disadvantageous for, or extremely prejudicial to the Republic of Croatia.

Therefore, in the criminal proceeding, the existence of the corruption agreement should be shown (it refers to an arrangement between the person offering and the person accepting a bribe, as established in the jurisprudence of the Supreme Court), i.e. that the prime minister accepted a bribe, or the promise of a bribe, to influence the conclusion of a particular legal transaction within the competence of the Government. In view of the constitutional position and functions of the prime minister, that would also prove that the legal transaction concerned was contrary to the interests of the Republic of Croatia.

Second, in the INA-MOL case, the Criminal Court – in order to show that the applicant was guilty of accepting a bribe in this case – set up a presentation of evidence in a way that the question of whether the contracts between the Government and MOL were contrary to the interests of the Republic of Croatia was declared “disputable”. Thus, the said question became an independent question that should be subject to proceedings where evidence is presented; and so the Criminal Court first subjected the question to a presentation of evidence in the criminal procedure.

Thus, in the criminal proceeding, in which the individual criminal responsibility of the prime minister for accepting a bribe should have been the exclusive subject matter of deliberation, the Criminal Court assumed the authority of a “democratic Croatian State” to examine whether the contracts are “prejudicial to its economic interests” (*Stran Greek Refineries and Stratis Andreadis v. Greece*, 1994, § 72). Further, the assessment of the Criminal Court was basically the result of a free judicial assessment of the evidence presented within the framework of the criminal proceedings, and not the “public interest test” built in the case-law of the European Court of Human Rights, in which the Act on the Privatisation of INA –

by which the Croatian Parliament set out the limits of the interests of the Republic of Croatia in relation to INA – would occupy the central position.

By proving, in the criminal proceedings, that the contracts concluded between the Government and MOL were contrary to the interests of the Republic of Croatia, at the same time not taking into account the protected area of the interests of the Republic of Croatia set out in the Act on the Privatisation of INA (where the courts had not even dealt with the issue of whether the activities of the Government were legal, that is, whether the disputed contracts were contrary to this Act), the courts in the INA-MOL case unnecessarily opened up questions such as: are the criminal justice bodies allowed to interfere in such a way in the constitutional tasks of the legislative and executive branches (Article 4 of the Constitution), and where does the criminal responsibility for accepting a bribe of the prime minister of the Government end, and where does the political responsibility of the Government for concluding disputable contracts begin?

Third, after it proved, in the criminal proceedings, that the contracts concluded with MOL by the Government were contrary to the interests of the Republic of Croatia, the Criminal Court used its assessment as evidence that the applicant had accepted a bribe.

Along with signifying the using of state interests for the purpose of proving the individual guilt of the accused person for accepting a bribe, the said approach created a strong external impression that the prime minister was being incriminated, along with the criminal offence he was indicted and sentenced for (acceptance of a bribe), also for a much graver crime, i.e. for deliberate actions against the interests of the Republic of Croatia. However, it should be taken into account that the applicant in the INA-MOL case was never incriminated for any other criminal offence than acceptance of a bribe. Further, the criminal prosecution authority dropped the charges that the applicant in the case of INA-MOL committed the criminal offence of abuse of office and official authority as prime minister. However, at the same time, the criminal prosecution authority kept in the indictment (which only stated the offence of accepting a bribe) the description of facts related to the offence as it was described in the order to conduct investigation (which stated two offences, that is, accepting a bribe, and abuse of office and official authority). The County Court accepted the same legal qualification of the offence as established by the criminal prosecution authority in the indictment (only accepting a bribe).

The procedure for proving the specific criminal offence of accepting a bribe (by proving that the contracts between the Government and MOL were contrary to the interests of the Republic of Croatia) was set up in a way that ultimately compromised the entire procedure of presenting evidence to an extent that must be qualified as a violation of the applicant's right to a fair trial referred to in Article 29.1 of the Constitution.

Fourth, in view of the way in which the entire procedure of presenting evidence was compromised as described above, it was not necessary in the Constitutional Court proceedings to deal with objections filed by the applicant concerning the admission and examination of certain pieces of evidence in the conducted criminal proceedings.

In terms of the arbitration procedure in the PCA Case no. 2014-15 before the Geneva Arbitral Tribunal further to the complaint filed by the Republic of Croatia against MOL of 17 January 2014, the data which were provided to the Constitutional Court by the competent ministry show that the statement of claim of the Republic of Croatia is directed at declaring null and void the Main Contract on Gas Operation of 30 January 2009 and the First Amendment to the Shareholders' Agreement INA-MOL of 30 January 2009, which was not the subject matter of the judicial criminal proceeding against the applicant or of the proceedings before the Constitutional Court.

The subject matter of this decision of the Constitutional Court was not a review of the conformity of the concluded contracts (the contract between INA and MOL of 17 July 2003, the First Amendment to the Shareholders' Agreement INA-MOL of 30 January 2009, the Main Agreement on Gas Operation of 30 January 2009, and the First Amendment to the Main Agreement on Gas Operation of 16 December 2009) with the applicable Croatian laws and other legislation, rules and benchmarks of the European Union and the European standards in the field of national and international commercial law and other related legal fields.

Decisions by national courts, including those by the Constitutional Court, cannot in general have an impact on arbitration proceedings initiated or conducted by the Republic of Croatia in the field of international commercial law. It is a general principle that arbitral tribunals are not bound by final judgments of national courts, or decisions issued by national constitutional courts, because such judgments and decisions are regarded as facts by arbitral tribunals.

Such tribunals examine matters in the case before them on their own.

*Languages:*

Croatian, English.



# Czech Republic

## Constitutional Court

### Statistical data

1 May 2015 – 31 August 2015

- Judgments of the Plenary Court: 7
- Judgments of panels: 65
- Other decisions of the Plenary Court: 2
- Other decisions of panels: 1 143
- Other procedural decisions: 34
- Total: 1 251

### Important decisions

*Identification:* CZE-2015-2-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 19.05.2015 / **e)** Pl. ÚS 14/14 / **f)** Constitutionality of the 5 % threshold clause for elections to the European Parliament / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 3.3.1 General Principles – Democracy – **Representative democracy.**
- 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**
- 4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**
- 4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament.**
- 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**
- 5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**
- 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**
- 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**
- 5.3.41.3 Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting.**

*Keywords of the alphabetical index:*

Election, European Parliament / Election, threshold, artificial / Election, threshold, natural.

*Headnotes:*

An equal share in election results, the principle of free competition among political parties, and the right to access to elective office in the European Parliament under equal conditions have their limits at the point where their unlimited application would thwart citizens' effective participation in the democratic life of the European Union and limit the possibility of connecting various particular interests in practical policy. Therefore, the immanent limit to equal voting rights is the preservation of the ability of the European Parliament to reach consensual solutions that fulfil the expectations of voters. In contrast, removing the "threshold clause" would weaken the integrative stimuli, which are a prerequisite for such solutions in the context of a plurality of opinions.

In view of the number of seats in the European Parliament assigned to voters in the Czech Republic, there is already a certain integrative element in the "natural" threshold, which reflects the factual and especially quantitative parameters of elections. However, this effect is cancelled out because the threshold level is not known in advance; the ordinary voter does not even know that it exists. The statutory threshold clause, however, is known in advance, and its psychological effect functions, because on the one hand the threshold may discourage voting for parties whose popularity has been under the threshold for some time, while on the other hand it increases the pressure on voter behaviour according to their political preferences.

*Summary:*

I. On 19 May 2015, the Constitutional Court, in Judgment file no. Pl. ÚS 14/14 ruled on a petition from the Supreme Administrative Court seeking the annulment of Article 47 of Act no. 62/2003 Coll., on Elections to the European Parliament, and on the Amendment of Certain Acts, as amended by later regulations, and in Article 48.1 of the same Act, the words "included in the scrutiny."

The Supreme Administrative Court submitted the petition in connection with proceedings seeking to have the elections of candidates Mgr. Tomáš Zdechovský and Ing. Mgr. Miroslav Poche in elections to the European Parliament, held on 23 and



24 May 2014, declared invalid. The Supreme Administrative Court considered the contested provisions of the Act on Elections to the European Parliament to be unconstitutional mainly because, from the perspective of a voter who voted for a party that was eliminated from the scrutiny due to the threshold clause, his vote was “lost”, which meant his political opinion was not represented in any way in the representative body, and absent from its decision making. All preferential votes cast are also lost due to elimination from the scrutiny. The applicant contended that these statutory provisions limited open or free competition among political forces in a democratic society, the equal voting rights of all voters and citizens’ right to equal access to elective office.

II. In reviewing the threshold clause, the Constitutional Court considered that the democratic and human rights “framework” applies equally to election laws for national representative bodies and for the Act on Elections to the European Parliament.

The Constitutional Court pointed out that the primary legal basis for the “threshold clause” in the Act on Elections to the European Parliament, which ties the progression of political entities into the scrutiny for allocation of seats to obtaining at least 5 % of the total number of valid votes cast, is not the Constitution of the Czech Republic, but European Union law. EU law accepts limitation of voting rights by national regulations on the assumption that the overall proportional nature of the electoral system will not be affected. The limit for equal voting rights is the ability of the European Parliament to reach consensual solutions that fulfil the expectations of voters, whereas fragmentation of their political representation as a result of the arrival of countless political subjects with a narrow political programme, and marginal in terms of real influence after removal of the “threshold clause”, would weaken the integrative stimuli, which are a prerequisite for such solutions in the context of a plurality of opinions. The special nature of the commitment of loyalty by Member States in relation to the ability to act of the European Parliament lies in the fact that it is a multilateral commitment *erga omnes*, aiming at joint responsibility in solidarity. This commitment is incompatible with the idea of a “free-rider” repealing domestic measures that prevent fragmentation of the European Parliament on the basis that this has a negligible effect on the entity as a whole. The Constitutional Court pointed out that the European Parliament strengthened after adoption of the Treaty of Lisbon, in its legislative powers as well as in the adoption of the European Union budget and in its creative function.

In the context of elections to the European Parliament in 2014, the Constitutional Court stated that annulling the artificial threshold clause would lead to the Czech Republic sending to the European Parliament representatives of nine parties, rather than seven, i.e. almost a third more. Apart from the effect of “overpopulation” of political parties, this situation would also weaken the position of Czech political parties in the caucuses formed in the European Parliament. Experience in the three elections thus far shows that the threshold clause did not in any way limit the variety of political representation of the citizens. In view of the number of seats in the European Parliament assigned to voters in the Czech Republic, there is already a certain integrative element in the “natural” threshold, which reflects the factual (especially quantitative) parameters of elections, but its effect is eliminated by the fact that the threshold level is not known in advance, and the ordinary voter does not know of its existence. The statutory threshold clause is, however, known in advance, and its psychological effect functions; on the one hand the threshold may discourage voting for parties whose popularity has been under the threshold for some time, on the other hand, it increases the pressure on voter behaviour according to their political preferences.

The importance of the stability of election results for public confidence in the system of representative democracy is fundamental, both at national and supra-national levels. Therefore, the Constitutional Court found the limitation of equal voting rights, the free competition among political parties, and equal access to elective office, guaranteed by the Constitution and the Charter, as a result of the minimum threshold in the Act on Elections to the European Parliament to be compatible with the principles of a democratic, constitutional state. It stated that the measure was proportional and did not run counter to the principle of proportional representation. It was capable of effectively contributing to reaching the aims pursued by these principles, i.e. the effective representation of the will of citizens in the European Parliament, and was necessary for the due exercise of powers entrusted to it based on Article 10a of the Constitution. It also respected the requirement of minimising interference in fundamental rights and affected constitutional principles.

III. The judge rapporteur in the matter was Jiří Zemánek, who replaced the original judge rapporteur Vojtěch Šimíček. The latter, together with judges Kateřina Šimáčková and Milada Tomková filed a joint dissenting opinion to the majority decision.

In their view, elections held in one electoral district without the existence of a threshold clause would represent the most thorough fulfilment of the principle of equality and the principle of proportionality. Should it be necessary to meet these criteria more closely, it would be appropriate to remove the threshold clause.

The dissenting judges also pointed out that even if the majority accepted violation of the principle of equal voting rights, no convincing explanation was offered for this inequality. A threshold clause at national level cannot significantly contribute to the integrity of the political spectrum, as the integration of national political parties in the individual caucuses within the European Parliament is done on the basis of their current political interests.

The dissenting judges also considered the natural threshold (around 3.5 %, representing a certain integrative element) to be the reason for the purposelessness of the threshold clause. In view of the developments in the national party political system, the importance of an artificial threshold clause cannot be overestimated. The integration and de-integration of political parties is caused by factors of political culture, the practical activities of political parties, and their trustworthiness rather than an artificial and purely mechanical threshold clause.

The dissenting judges concluded that interference in the equal voting rights of voters by means of an artificial threshold clause could only be justified by a strong and legitimate reason. This had not been presented either by the legislator or by the majority of the Constitutional Court. There is no reason why, if the threshold clause did not exist and two seats were allocated differently, this would pose any risk to stable voting proportions or lead to political polarisation.

#### *Languages:*

Czech, English.



#### *Identification: CZE-2015-2-006*

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 16.06.2015 / **e)** I. ÚS 3018/14 / **f)** Scope of parliamentary indemnity in connection with deputy's statements made on Facebook / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

#### *Keywords of the systematic thesaurus:*

3.3.1 General Principles – Democracy – **Representative democracy.**  
 4.5.9 Institutions – Legislative bodies – **Liability.**  
 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**  
 4.7.7 Institutions – Judicial bodies – **Supreme Court.**  
 4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts.**  
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

#### *Keywords of the alphabetical index:*

Facebook / Parliament, immunity / Parliament, democratic mandate.

#### *Headnotes:*

The rationale behind parliamentary immunity is to provide elected representatives with guarantees to allow them to exercise their democratic mandate, without fear of harassment or undue burdens from the executive, the courts or political opponents. Indemnity under Article 27.2 of the Constitution protects a statement regardless of its content, if it is in the acceptable form, if it is made in one of the “protected forums” (at a meeting of the Chamber of Deputies or the senate, their committees, sub-committees or commissions, including an investigative commission, or at a joint meeting of the Chamber of Deputies and the senate or these bodies) and directed towards at least one participant in parliamentary debate.

#### *Summary:*

I. The applicant was a former parliamentary deputy. In June 2013, in response to an attack on a married couple in Duchcov by a group of Roma, he published several texts on his Facebook profile responding to statements by Duchcov Roma leaders about the incident. On 4 March 2014, criminal proceedings were opened against him, alleging that by publishing these texts, he had committed the crime of inciting hatred against a group of persons or restricting their freedoms. An indictment was subsequently filed with

the district court. The applicant filed a petition with the Supreme Court seeking a decision exempting him from the authority of bodies acting in criminal proceedings, under Article 10.2 of the Criminal Procedure Code.

In the contested decision the Supreme Court ruled that he was not exempt from the authority of bodies acting in criminal proceedings, on the basis that none of the exceptions set out in Article 27 of the Constitution applied to him. Specifically, the texts published on his Facebook profile could not be considered as a speech made in the Chamber of Deputies or the Senate or their bodies, for which he could not be criminally prosecuted, under Article 27.2 of the Constitution. The applicant contended that the contested decision impinged on his freedom of speech and his parliamentary immunity.

II. In its review of the contested decision, the Constitutional Court focused on the immunity and indemnity of deputies and senators, in particular, criminal law indemnity enshrined in Article 27.2 of the Constitution. It stated that the fundamental idea of parliamentary immunity is to provide elected representatives with secure guarantees so that they can carry out their democratic mandate effectively, without fear of harassment or undue burden from the executive, the courts or political opponents. Parliamentary immunity has two functions – it ensures that Parliament can act and that its members can express their views freely. However, it belongs to Parliament as a whole, not its members; thereby it also contributes to preserving the separation of powers and protecting the autonomy of Parliament. Parliamentary immunity is an exception from the principle of equality before the law, one of the fundamental principles of a state based on the rule of law. It reflects the tension between the principle of a democratic state, expressed through protection of free discussion in Parliament, and the principle of a state based on the rule of law. Neither principle can fully override the other. Therefore, in the Constitutional Court's opinion, a reasonable balance needed to be struck between them.

The Constitutional Court also examined the questions of what is meant by "speech" protected by Article 27.2 of the Constitution, which forums are protected, and whether only speech made in connection with the exercise of a mandate is protected. The Constitutional Court stated that the term "speech" means the provision of information or expression of an opinion through the spoken word, in writing, by pictures, or in another manner, which includes expressive manifestations; in evaluating whether actions or conduct are an "expression" both the objective criterion (how the given conduct is

interpreted by its addressees) and the subjective criterion (the purpose or intent of the person acting) should be taken into account.

The Constitutional Court explained that forums protected under Article 27.2 of the Constitution are primarily committees and commissions of the Chamber of Deputies and the Senate, regardless of whether they meet in one of the chambers or Parliament or elsewhere (i.e. an off-site meeting) and in terms of Article 27.2 of the Constitution, only statements made during the meetings of these bodies are protected. Protected forums also include the Chamber of Deputies and the Senate. Indemnity, under Article 27.2 of the Constitution, protects only those forums where there is an open and free exchange of opinions between deputies or senators. Article 27.2 of the Constitution does not protect, for example, statements made in hallways, restaurants and at election meetings.

Finally, the Constitutional Court considered whether indemnity protects only a statement made in connection with the exercise of the mandate of a deputy or senator. It concluded that if the deputy's or senator's statement is aimed exclusively externally, outside Parliament, it is not protected by indemnity under Article 27.2 of the Constitution, even if it is made during a session of the Chamber of Deputies or the Senate. For the statement of a deputy or senator to be protected, it is also a requirement that by making it the person in question is taking part in the formation of political will in Parliament and the statement is part of the autonomous system of parliamentary discussion.

The Constitutional Court concluded that indemnity under Article 27.2 of the Constitution protects a statement regardless of its content, if it is in the acceptable form, is made in one of the "protected fora" and is directed towards at least one participant of parliamentary debate. In this case, the applicant's statement only met the first condition, and indemnity under Article 27.2 of the Constitution did not apply to it. The Supreme Court had acted correctly in ruling that the exemption from the authority of bodies acting in criminal proceedings did not apply to the applicant. The constitutional complaint was denied.

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

*Languages:*

Czech, English.



*Identification:* CZE-2015-2-007

**a)** Czech Republic / **b)** Constitutional Court / **c)** Second Panel / **d)** 23.06.2015 / **e)** II. ÚS 577/13 / **f)** Limitation of the freedom of the press arising from the principle of the presumption of innocence / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

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

3.16 General Principles – **Proportionality.**

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

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

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

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

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

*Keywords of the alphabetical index:*

Obligation to apologise / Pimping.

*Headnotes:*

If the press reports about on-going criminal proceedings, then the freedom of speech of the publisher is protected under Article 17 of the Charter of Fundamental Rights and Freedoms, and as part of that the use of simplification in the form of “journalistic abbreviation” comes into consideration. However, the principle of the presumption of innocence set forth in Article 40.2 of the Charter must also be respected, and protection must be provided for the personality rights of the person being prosecuted, so that the published information will not lead to conclusions of guilt.

*Summary:*

I. The applicant is the publisher of the national daily *Mladá fronta DNES*. In February 2010 a regional supplement published an article entitled “After Judge’s Error, Onyskiv Case May Never End” reporting on the criminal case against the secondary

party (i.e. not the principal offender), who was charged with criminal conspiracy and pimping. The secondary party, under Article 13 of the Civil Code, sought an apology for publication of the article and non-property damages of CZK 10,000, as he was repeatedly identified as a “pimp” and “member of a gang of pimps”, although his case had not been decided with legal effect. The municipal court denied the complaint. The high court changed the verdict, and ordered the applicant to print an apology to the secondary party, but confirmed the denial of non-property damages. The court stated that the applicant had a right to inform the public about the on-going criminal proceedings, but, in the interests of objectivity, should have respected the principle of the presumption of innocence and not described the secondary party as a “pimp”. The Supreme Court denied the applicant’s appeal on a point of law. The applicant argued that its right to freedom of speech was violated, as it could not report on matters of public interest.

II. The Constitutional Court stated that in cases of conflict between freedom of speech and the right to protection of personality, the question of which right should take precedence depends on the overall context in each case. However, certain starting points can be drawn from the relevant case-law of the Constitutional Court and the European Court of Human Rights, and the general courts must base their decisions in these cases on evaluation of them. In particular, they must take into account the nature of the statement, its content and form, the position of the person criticised and their conduct, and whether the statement concerns his or her private or public sphere, who made the statement, when it was made, and other specific circumstances of each case (Judgment file no. II. ÚS 2051/14, points 25 to 31).

The degree of permissibility of interference in personality rights – and thus also the determination of limits on freedom of speech – in the case in point was based on the factors mentioned above. At issue here was whether the interference in the secondary party’s personality rights occurred through failure to respect the presumption of innocence, because he was described as a perpetrator of a crime, although when the article in question was published, he had not been found guilty by a court of law.

In this matter, the Constitutional Court summarised that the purpose of the article was to report on the course of the criminal proceedings, and within that, on the continuing delays; its subject matter was not supposed to be the evaluation of guilt of the secondary party. In reviewing the question whether, by describing the secondary party in the article as a “pimp” or “member of a gang of pimps”, i.e. the

perpetrator of the crime of pimping, the applicant pre-empted the court's ruling on guilt, the Constitutional Court took as its starting point the nature of the ordinary periodical press, which is intended to provide information to the widest possible public. It agreed that the press must apply certain simplifications of the rights of affected persons (Judgment file no. I. ÚS 156/99). However, it concluded that the article gave rise to a clear statement that the secondary party was a "pimp", so readers would draw conclusions about his guilt; a denial of the principle of the presumption of innocence.

In view of the above constitutional law perspectives, the Constitutional Court agreed with the general courts' decisions to grant protection to the personality rights of the secondary party. The same reasons supported the conclusion that the applicant's freedom of speech was not violated by imposing upon it the obligation to apologise to the secondary party for publishing the article. The Constitutional Court accordingly ruled that the contested decisions did not violate the applicant's freedom of speech under Article 17.1 of the Charter and Article 10 ECHR. It denied the complaint.

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

#### *Languages:*

Czech, English.



#### *Identification:* CZE-2015-2-008

**a)** Czech Republic / **b)** Constitutional Court / **c)** Third Panel / **d)** 12.08.2015 / **e)** I. ÚS 1136/13 / **f)** Evidence of indirect discrimination in the placing of Roma Pupils in "special" schools / **g)** <http://nalus.usoud.cz/> / **h)** CODICES (Czech).

#### *Keywords of the systematic thesaurus:*

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

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

#### *Keywords of the alphabetical index:*

Education, access / Treatment, discriminatory / Discrimination, indirect / School / School, primary / Schoolchild.

#### *Headnotes:*

Indirect discrimination means the application of neutral criteria in a way that may, under certain conditions, affect members of protected groups as if "suspect" criteria were applied. It is a factual result of a certain procedure consisting of single instances in which neutral criteria were applied in the same or comparable way. The determination of relevant elements of such a procedure is the essential precondition for the assessment of the procedure. These elements involve not only the neutral criteria, but also a concrete manner of application thereof including all the related safeguards which should prevent the misuse of the neutral criteria. The conclusion that a certain procedure resulted in indirect discrimination does not necessarily mean that every member of the protected group was disadvantaged by the neutral criteria, but demonstrates that it was prevalent.

#### *Summary:*

I. In 2008 the applicant brought an action for the protection of his personality seeking an apology and compensation for non-pecuniary damage on account of his having been placed in a special school, allegedly due to his Roma origin. The discriminatory treatment resulted in a disproportionately high number of Roma pupils in schools for children with mental disabilities, where a more basic curriculum was followed. This was found to be in violation of the European Convention on Human Rights by the European Court of Human Rights in *D.H. and Others v. the Czech Republic* in 2007. The applicant's action was dismissed by the Prague Municipal Court, the High Court and the Supreme Court, on the basis that the applicant's placement in special school was justified by his intellectual capacity, not by his Roma origin. His financial claims were statute barred. The applicant could not have been a victim of psychological testing that had not taken Roma specifics into consideration as he had been brought up in a children's home, not in a Roma community.

II. The Constitutional Court considered that, had the applicant been discriminated against on account of his ethnic origin, this approach would have been in violation of the Czech constitutional order and international human rights obligations. Such discriminatory treatment would harm pupils in multiple ways, affecting

not only their future study and career prospects, but also their sense of self-worth and perception by society as a whole. Although the reasoning of the lower courts had certain flaws, the Constitutional Court dismissed the applicant's constitutional petition. Applying the standards adopted by the European Court of Human Rights, the Constitutional Court concluded that sufficient safeguards against discrimination were in place in the applicant's case. His intellectual abilities were tested on numerous occasions by different experts throughout his studies. His placement in a special school was not a result of a single, routine examination.

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

#### Cross-references:

European Court of Human Rights:

- *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13.11.2007, *Reports of Judgments and Decisions* 2007-IV.

#### Languages:

Czech, English.



## France

### Constitutional Council

#### Important decisions

*Identification:* FRA-2015-2-004

**a)** France / **b)** Constitutional Council / **c)** / **d)** 22.05.2015 / **e)** 2015-468/469/472 QPC / **f)** UBER France SAS and another (Chauffeur-driven vehicles – Prohibition of “electronic cruising” – Pricing methods – Obligation to return to base) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.05.2015, 8753 / **h)** CODICES (French, English, Spanish).

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Chauffeur-driven vehicles, electronic cruising /  
Chauffeur-driven vehicles, pricing methods /  
Chauffeur-driven vehicles, obligation to return to base.

#### *Headnotes:*

Legislative provisions relating to chauffeur-driven vehicles (VTCs) which prohibit them from informing a client of both the location and availability of a vehicle and from employing certain pricing methods (taximeter calculating fares on the basis of both time and distance), and which require them to return to base unless they can furnish proof of an advance reservation, do not constitute a manifestly disproportionate restriction of freedom of enterprise.

#### *Summary:*

I. Three priority questions of constitutionality were referred to the Constitutional Council on 13 March and 3 April 2015 by the companies UBER France SAS and UBER BV, concerning the consistency of sub-paragraph 1 of paragraph III of Article L.3120-2, Article L. 3122-2 and Article L. 3122-9 of the Transport Code with the rights and freedoms guaranteed by the Constitution.

These provisions had been adopted by Parliament for the purpose of preserving the distinction between the “cruising” market, which consists of parking at a taxi rank and circulating on public roads in search of clients, and the “advance reservation” market. The former is restricted by law on taxis for reasons of public order, in particular the policing of road traffic and parking, while the latter is a competitive market on which both taxis and VTCs, among others, operate.

II. The Constitutional Council ruled two of the impugned provisions to be constitutional and issued one censure.

The first provision challenged (sub-paragraph 1 of paragraph III of Article L. 3120-2 of the Transport Code) prohibits VTCs from informing a client of both the location and availability of a vehicle when it is on a public highway.

The applicants argued that this prohibition of “electronic cruising” violated, *inter alia*, their freedom of enterprise and the principle of equality before the law.

The Constitutional Council dismissed this argument. It noted that Parliament had sought, on public order grounds related to the policing of road traffic and parking, to guarantee the legal monopoly enjoyed by taxis. The prohibition laid down by these provisions is, however, limited: while it prevents drivers from indicating simultaneously the location and availability of a vehicle, it does not prevent them from informing clients solely of the location or solely of the availability of a vehicle. Furthermore, it does not restrict the possibility for VTCs to inform clients of the likely waiting time between advance reservation and the actual arrival of a vehicle. The Constitutional Council held, therefore, that, having regard to the public order objective pursued, the violation of VTCs’ freedom of enterprise is not manifestly disproportionate.

Applying the same logic, the Constitutional Council held that the principle of equality was not infringed by these provisions.

The Constitutional Council therefore ruled sub-paragraph 1 of paragraph III of Article L. 3120-2 of the Transport Code to be constitutional.

The second provision challenged (Article L. 3122-2 of the Transport Code) prohibits VTCs from applying certain methods of charging for services, in particular the method based on both time and distance used by taxis.

The Constitutional Council held that this prohibition on using certain pricing methods for VTCs constitutes a violation of freedom of enterprise which is not justified by any general-interest ground directly related to the aim pursued by the law. It therefore ruled Article L. 3122-2 of the Transport Code to be unconstitutional.

The third provision challenged, Article L. 3122-9 of the Transport Code, requires a driver of a VTC who has just completed a service ordered by means of an advance reservation to return to the place of business of the VTC operator or to an off-road location where parking is permitted unless he or she is able to furnish proof of another advance reservation. This is the so-called obligation to “return to base”.

This provision was challenged by the applicants on the basis, *inter alia*, of the right to free enterprise and the principle of equality.

Regarding freedom of enterprise, the Constitutional Council noted that the restriction imposed by the impugned provisions is justified by public order objectives, in particular the policing of road traffic and parking on public highways. After pointing out that the statutory obligation applies only if the VTC cannot furnish proof of an advance reservation, irrespective of the time when it was made, the Constitutional Council held that the restriction placed on freedom of enterprise by the impugned provision is not manifestly disproportionate.

Lastly, the Constitutional Council held that the distinction made in the law between VTCs and taxis was justified by public order objectives related to the policing of road traffic and parking. It therefore dismissed the complaint based on the principle of equality, but attached an interpretative reservation, holding that the obligation to “return to base” should also apply to taxis when they are outside their authorised waiting area and are thus in an identical situation to that of VTCs.

Subject to this reservation, the Constitutional Council ruled these final provisions to be constitutional.

*Languages:*

French.



*Identification:* FRA-2015-2-005

**a)** France / **b)** Constitutional Council / **c)** / **d)** 23.07.2015 / **e)** 2015-713 DC / **f)** Intelligence Law / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.07.2015, 12751 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
 4.5.2.4 Institutions – Legislative bodies – Powers – **Negative incompetence**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.  
 5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.  
 5.3.36.3 Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications**.

*Keywords of the alphabetical index:*

Intelligence, gathering / Terrorist, threat / Information gathered, use / Information gathered, storage / Information gathered, destruction / Intelligence, gathering, prior authorisation, derogation / Connection, technical data, requisition.

*Headnotes:*

The new legislative regime for intelligence gathering by the intelligence services is approved. However, the provisions relating to international surveillance measures are unconstitutional because they fail to specify the conditions governing the use, storage and destruction of information gathered and the conditions for scrutiny by the National Commission for the Control of Intelligence Techniques of the lawfulness of authorisations issued and the manner of their implementation.

*Summary:*

I. The Intelligence Law was referred to the Constitutional Council by the President of the Republic, the President of the Senate and over 60 MPs.

The Constitutional Council gave its ruling in Decision no. 2015-713 DC.

II. The Constitutional Council held that intelligence gathering by means of the techniques set out in the law was a matter solely for the administrative authorities. It can therefore serve no other purpose

than the preservation of public order and the prevention of crime. It cannot be used to establish criminal offences, gather evidence or identify the perpetrators of offences.

The Constitutional Council deemed constitutional the provisions of Article L. 811-3 of the Internal Security Code listing the purposes for which specialised intelligence agencies may have recourse to the techniques described in Articles L. 851-1 to L. 854-1 of the code. It emphasised, however, that the provisions of Article L. 811-3 should be taken together with those of Article L. 801-1, which require the decision to use intelligence gathering techniques, and the choice of techniques, to be proportionate to the aim pursued and the grounds relied on. Consequently, violations of the right to respect for private life must be proportionate to the aim pursued. The National Commission for the Control of Intelligence Techniques and the *Conseil d'État* are responsible for ensuring compliance with this proportionality requirement.

Answering one of the MPs' grounds of complaint, the Constitutional Council held that the provisions of Article L. 821-1 of the Internal Security Code, which relate to the authorisation of public order measures by the Prime Minister after consulting an independent administrative authority, do not violate individual liberty as defined in Article 66 of the Constitution.

Having regard to the safeguards provided, the Constitutional Council deemed Article L. 821-5 of the Internal Security Code, dealing with matters of "absolute urgency", to be constitutional.

On the other hand, the Constitutional Council struck down the provisions of Article L. 821-6 of the Internal Security Code, which deal with another kind of emergency, referred to as "operational emergency". It noted that this is the only procedure allowing derogations from the requirement for prior authorisation by the Prime Minister or another minister with defence security clearance to whom he has delegated this responsibility, as well as from the requirement for a prior opinion from the National Commission for the Control of Intelligence Techniques. The Constitutional Council also stated that the procedure makes no provision for the Prime Minister and the minister concerned to be informed in advance of the use of a technique in this context. It inferred from this that the provisions of Article L. 821-6 constitute a manifestly disproportionate violation of the right to respect for private life and to secrecy of correspondence.

Regarding Article L. 821-7 of the Code of Internal Security, the Constitutional Council noted that it



provides for systematic review by the National Commission for the Control of Intelligence Techniques sitting in plenary of requests for the use of an intelligence technique in respect of an MP, judge, lawyer or journalist or their vehicles, offices or homes, which is prohibited by reason of their office or profession. The emergency procedure provided for in Article L. 821-5 of the Internal Security Code is not applicable and it is for the commission, in possession of all the intelligence transcripts, to ensure, under the judicial supervision of the *Conseil d'État*, the proportionality both of any violations of the right to respect for private life and of any violations of the guarantees attached to these professions or offices. The provisions of Article L. 821-7 were accordingly deemed constitutional.

The Constitutional Council deemed constitutional the provisions of the law determining the time for which information collected may be kept according to the characteristics of the information.

It dismissed the complaint lodged by the MPs concerning the composition of the National Commission for the Control of Intelligence Techniques. The presence of MPs among the members of this commission does not violate the principle of separation of powers since Articles 226-13 and 413-10 of the Criminal Code require them to observe secrecy.

Regarding the use of intelligence gathering techniques, the Constitutional Council first noted that, except where specifically provided, their use is governed by ordinary law. They are authorised by the Prime Minister following a written request, giving reasons, by the ministers designated in the law, and following an opinion from the National Commission for the Control of Intelligence Techniques. These techniques, which can only be used by individually designated and accredited officers, are implemented under the supervision of the National Commission for the Control of Intelligence Techniques and, where appropriate, the *Conseil d'État*.

Regarding the provisions of Article L. 851-1 of the Internal Security Code, which govern the procedure for administrative requisition of connection data from operators, the Constitutional Council deemed them constitutional, pointing out that data relating to the content of correspondence exchanged or information consulted may not be requisitioned. It also deemed constitutional the provisions of Article L. 851-2 allowing real-time collection of these data on operators' networks for the sole purpose of preventing terrorism.

Under the provisions of Article L. 851-3 of the Internal Security Code, operators may be required to implement automatic processing allowing the detection, on their networks, of any connections which might disclose a terrorist threat. In view of the extensive precautions taken to regulate the use of this technique, which are reiterated in the decision, the Constitutional Council deemed Article L. 851-3 constitutional.

The provisions of Articles L. 851-4, L. 851-5 and L. 851-6 of the Internal Security Code relate, respectively, to the real-time transmission of technical data for geolocation purposes, the use of real-time location systems and the collection of technical data by means of one of the devices or systems mentioned in paragraph 1 of Article 226-3 of the Criminal Code. In view of the regulation instituted by the law, which is reiterated in the decision, the Constitutional Council declared these provisions constitutional.

Using the same reasoning, it deemed constitutional the provisions of Article L. 852-1 of the Internal Security Code governing administrative interception of correspondence sent by means of e-mail.

Regarding the installation of listening devices in certain places and vehicles and the use of image and electronic data capture techniques, the Council also ruled that, in view of the regulation instituted by the law, the provisions of Articles L. 853-1, L. 853-2 and L. 853-3 of the Internal Security Code are constitutional.

The Constitutional Council struck down Article L. 854-1 of the Internal Security Code, relating to international surveillance measures, on the grounds that, by failing to specify the conditions for the use, storage and destruction of information gathered pursuant to this article and the conditions for scrutiny by the National Commission for the Control of Intelligence Techniques of the lawfulness of authorisations issued under this article and the manner of their implementation, Parliament failed to lay down rules concerning the fundamental guarantees afforded to citizens in order to exercise public freedoms. For this reason, the Constitutional Council ruled unconstitutional the provisions of paragraph I of Article L. 854-1 and, hence, those of paragraphs II and III of the same article, which are indissociable from them.

Lastly, the Constitutional Council deemed constitutional all the provisions of the Code of Administrative Justice governing disputes relating to the use of intelligence techniques.

The Constitutional Council also raised, of its own motion, the issue of a provision of Article L. 832-4 of the Internal Security Code which belongs to the sphere of finance law. It therefore struck down the provision in question.

*Languages:*

French.



*Identification:* FRA-2015-2-006

**a)** France / **b)** Constitutional Council / **c)** / **d)** 24.07.2015 / **e)** 2015-478 QPC / **f)** Association French Data Network and others (administrative access to connection data) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.07.2015, 12798 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

*Keywords of the alphabetical index:*

Connection, data, access / Connection, data, correspondence exchanged / Connection, data, information consulted.

*Headnotes:*

The procedure governing access by the administrative authorities to connection data does not constitute a disproportionate violation of the right to respect for private life, the rights of the defence and the right to a fair trial, including where lawyers and journalists are concerned.

*Summary:*

I. A priority question of constitutionality posed by the association French Data Network and others, concerning the consistency of Articles L. 2461-1 to L. 246-5 of the Internal Security Code with the rights and freedoms guaranteed by the Constitution, was referred to the Constitutional Council by the *Conseil d'État* on 5 June 2015.

These articles lay down the rules governing access by the administrative authorities to connection data. They were amended by the Intelligence Law adopted with final effect on 24 June 2015, but will remain applicable until the regulatory measures provided for in Article 26 of that law are adopted.

The applicant associations criticised, first, the use in Article L. 246-1 of the terms “information or documents” and “electronic communications operator” which, in their view, rendered the definition of connection data too imprecise. They argued further that the use in Article L. 246-3 of the term “interrogation” of the network did not rule out direct access by the administrative authorities to connection data held by operators. The applicant associations relied on the concept of “negative incompetence” and the right to respect for private life.

The applicant associations submitted, secondly, that, by not providing specific safeguards to protect access to the connection data of lawyers and journalists, Parliament had failed to fully discharge its responsibility, opening the way to violations of the right to respect for private life, freedom of expression and communication, the rights of the defence, the right to a fair trial, the right to secrecy of lawyers’ correspondence and the right to secrecy of journalists’ sources.

II. In the light of the grounds of complaint submitted, the Constitutional Council considered that the priority question of constitutionality concerned only Articles L. 246-1 and L. 246-3 of the Internal Security Code.

Regarding the applicant associations’ first argument, the Constitutional Council, basing itself on the provisions of Article L. 34-1 of the Postal Services and Electronic Communications Code, held on the one hand that connection data may under no circumstances include the content of correspondence exchanged or information consulted in the context of electronic communications, and on the other that Parliament had defined the latter sufficiently clearly.

Regarding the concept of “interrogation” of the network, the Constitutional Council found that,

according to Article L. 246-1 of the Internal Security Code, requisitioned connection data are transmitted by operators to the competent administrative authorities and that, according to Article L. 246-3, when connection data are transmitted to the administrative authorities in real time, they can only be collected after the operator himself has interrogated the network. The Constitutional Council concluded that it follows from these provisions that the administrative authorities cannot directly access operators' networks under the procedure laid down in Articles L. 246-1 and L. 246-3. It accordingly held that Parliament had not failed in the discharge of its responsibilities in defining the terms relating to access to connection data.

Regarding the applicant associations' second argument, the Constitutional Council held first of all that, since the impugned provisions institute a procedure for administrative requisitioning of connection data which precludes access to the content of correspondence, they cannot infringe the right to secrecy of correspondence and freedom of expression.

The Constitutional Council noted that, in addition to the fact that the content of correspondence is excluded from its scope, the administrative requisitioning procedure resulting from the contested provisions is authorised solely for the purpose of gathering intelligence relevant to national security, safeguarding essential components of France's economic and scientific potential or preventing terrorism, organised crime and the re-formation and continued operation of groups that have been dissolved. It also noted in its decision, among other things, that this procedure is implemented by specially accredited officers, that it is subject to the prior agreement of a qualified senior official working under the authority of the Prime Minister, appointed by the National Commission for the Control of Security Interceptions (CNCIS), and that it is subject to scrutiny by this commission, which has permanent access to the system for collecting information or documents. The Constitutional Council inferred from this that Parliament has provided sufficient safeguards to ensure that the procedure laid down in Articles L. 246-1 and L. 246-3 of the Internal Security Code does not give rise to any disproportionate violation of the right to respect for private life, the rights of the defence and the right to a fair trial, including where lawyers and journalists are concerned. The Constitutional Council therefore dismissed the complaint to the effect that Parliament had failed in the discharge of its responsibility by not providing specific safeguards to protect the professional secrecy of lawyers and journalists.

### *Languages:*

French.



### *Identification: FRA-2015-2-007*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 05.08.2015 / **e)** 2015-715 DC / **f)** Law to promote growth, activity and equality of economic opportunities / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.08.2015, 13616 / **h)** CODICES (French).

### *Keywords of the systematic thesaurus:*

4.5.2.4 Institutions – Legislative bodies – Powers – **Negative incompetence.**

4.6.2 Institutions – Executive bodies – **Powers.**

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

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

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

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

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

### *Keywords of the alphabetical index:*

Dismissal, compensation, upper limit / Dismissal, compensation, criterion / Criterion, compensation, loss suffered / Criterion, dismissal, length of service / Criterion, dismissal, size of company's staff / Charges, setting, notaries / Fees, setting, lawyers / Regulated professions, age limit.

### *Headnotes:*

The provisions of the Law to promote growth, activity and equality of economic opportunities, which introduce a system for regulating the compensation awarded by the courts to employees dismissed without valid reason based on two criteria (the employee's length of service in the company and the

size of the company's staff) are unconstitutional for violation of the principle of equality before the law. The structural injunction procedure in the retail trade sector is unconstitutional on the grounds that it violates the right to property and freedom of enterprise in a disproportionate manner.

### Summary:

I. By Decision no. 2015-715 DC of 5 August 2015, the Constitutional Council gave a ruling on the Law to promote growth, activity and equality of economic opportunities, which had been referred to it by over sixty members of the National Assembly and over sixty members of the Senate.

#### II. 1. The provisions declared constitutional

Article 31 regulates the contractual relations between distribution networks and retail store operators. It provides for the requirement of a common termination date, lays down the rule that the termination of one of the contracts covered by the law results in the termination of all the contracts, and requires existing contracts to be brought into line with the law within a period of one year from its enactment. The Constitutional Council deemed these provisions constitutional since they do not constitute a disproportionate violation of contractual freedom and agreements legally entered into.

Regarding the provisions of Article 50, which, among other things, govern the regulated charges of notaries, bailiffs, court valuers-auctioneers and commercial court registrars, the Constitutional Council held that the manner in which these charges were set was made sufficiently clear in the law. It also ruled that the provisions allowing discounts to be given do not infringe the freedom of enterprise of the professions concerned. Lastly, the requirement for an opinion on these charges from the Competition Authority does not infringe any constitutional stipulation.

The Constitutional Council deemed constitutional the provisions of Article 51 relating to the rules on pre-trial work by lawyers and those relating to the setting of their fees. The former do not affect the conditions of access to the public justice service and violate neither the principle of equality before the justice system nor the objective of sound administration of justice. The latter, which confer new powers on officers responsible for competition and consumer affairs to ensure compliance with the lawyer's obligation to conclude a fee agreement, while respecting professional secrecy, do not violate the rights of the defence and do not constitute a disproportionate violation of the right to respect for

private life. The same applies to the provisions of Article 58, which include equivalent rules for lawyers at the *Conseil d'État* and the Court of Cassation.

The provisions of Article 52 on the conditions governing the setting up in practice of certain legal professionals, designed to improve geographical coverage by the regulated professions and gradually increase the number of practices, were deemed to violate neither guaranteed rights nor the principle of equality. The similar provisions in Articles 53, 54 and 55, which amend the texts applicable to each of the professions, were deemed constitutional for the same reasons.

The Constitutional Council deemed constitutional the introduction of an age limit of seventy years for the professions of notary, bailiff, court valuer-auctioneer and commercial court registrar in Articles 53, 54, 55 and 56. It based its decision on the fact that the intention of the law is to promote access to practices and the renewal of office-holders and that the members of these regulated professions are public officers who work together with the public justice service.

The provisions of Article 57 relate to the conditions governing the setting up in practice of lawyers attached to the *Conseil d'État* and the Court of Cassation. The introduction of a system of recommendations and opinions from the Competition Agency concerning the creation of new offices for this profession is not unconstitutional. However, no provision is made for a specific mechanism to compensate the holders of existing offices in the event of the creation of a new office, in contrast to the provision made for the other regulated professions affected by the law. The Constitutional Council noted in this regard, in line with its finding in the case of other professionals, under paragraph IV of Article 52, that a mechanism of this kind is unnecessary because an ordinary law remedy is available for claiming compensation for any undue prejudice suffered as a result of a violation of the constitutional principle of equality before public burdens.

Article 60 of the law provides, *inter alia*, for the transmission by commercial court registrars of the originals of registrations in the national register of commerce and companies and reprocessed data from those registrations. Having regard to the nature of these data, and given that the private use of any databases created is not at issue, the Constitutional Council held that these provisions do not violate the right to property, the principle of equality and guaranteed rights.

The provisions of Articles 61 and 64 empowering the Government to issue orders in respect of the rules governing certain legal professions do not infringe any constitutional requirement. The same applies to the provisions of Articles 63, 65 and 67 relating to the legal forms in which these professions are practised.

Article 238 concerns the possibility for the court dealing with a company's judicial reorganisation to order a capital increase or the sale of the shares of partners or shareholders opposed to the reorganisation plan. Having regard to the conditions and safeguards surrounding these "forced sales" and "forced dilution" of shareholdings, the complaint of a manifestly disproportionate violation of partners' and shareholders' property rights was dismissed.

## 2. The provisions declared unconstitutional

Paragraph 2 of Article 39 of the law establishes a structural injunction procedure in the retail trade sector in metropolitan France. The Constitutional Council struck down its provisions on the grounds that it constitutes a disproportionate violation of the right to property and freedom of enterprise. On the one hand, it took account of the constraints that this procedure could place on the undertakings concerned, given that it can lead to forced sale of assets even though the undertakings concerned have committed no abuse. On the other, the Constitutional Council noted that the system introduced under the law was to apply to the whole territory and the whole retail trade sector, although the legislator's intention was to remedy specific situations in the retail food trade only. It also struck down the provisions of paragraph 1 of Article 39, which were indissociable from those of paragraph 2.

The Constitutional Council struck down the provisions of paragraph III of Article 50 introducing a contribution for access to the law and to justice. It noted that these provisions empowered the regulatory authority to lay down rules concerning the base for this tax, which, according to Article 34 of the Constitution, was in principle a matter for the legislature. The Constitutional Council inferred from this that Parliament had failed in the discharge of its responsibilities.

The Constitutional Council deemed unconstitutional paragraph IV of Article 52 establishing the arrangements for compensating the holder of an office of notary, bailiff or court valuer-auctioneer when its pecuniary value is affected by the creation of a new office. It held that these arrangements could not require the holder of a new office to bear the cost of compensating for a fall in the pecuniary value of an existing office without seriously breaching the principle of equality before public burdens. The

Constitutional Council pointed out, however, that it was possible for the holder of an office suffering undue prejudice as a result of the creation of a new office to claim compensation on the basis of the constitutional principle of equality before public burdens.

The provisions of paragraph 2 of Article 216 allowed the Competition Authority to obtain connection data from electronic communications operators. The Constitutional Council struck down these provisions on the grounds that, in the absence of safeguards, the provisions of Article 216 did not ensure a balanced reconciliation between the right to respect for private life, the preservation of public order and the identification of offenders.

Article 266 instituted a system for regulating the compensation awarded by the courts to employees dismissed without valid reason, based on two criteria: the employee's length of service in the company and the size of the company's staff. The Constitutional Council held that while, in order to promote employment by removing the obstacles to recruitment, Parliament could indeed set an upper limit on the compensation payable to employees dismissed without valid reason, the criteria used for this purpose needed to be linked in some way with the loss suffered by the employee. While the length-of-service criterion was consonant with the object of the law, that was not the case with the criterion of staff size. The Constitutional Council therefore struck down Article 266 for violation of the principle of equality before the law.

### *Languages:*

French.



### *Identification:* FRA-2015-2-008

**a)** France / **b)** Constitutional Council / **c)** / **d)** 13.08.2015 / **e)** 2015-718 DC / **f)** Law on energy transition for green growth / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.08.2015, 14376 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Energy transition / Greenhouse gases / Nuclear power, operation, administrative authorisation / Nuclear power, authorisation to produce, ceiling / Operation, authorisation, limitation / Authorisation to generate, capping, compensation / Compensation, equality in the payment of public dues / Compensation, strict liability.

*Headnotes:*

Authorisation to generate electricity, and in particular nuclear power, are not assets in respect of which the owners hold property rights. If the legislature infringes the legitimate expectations of power generators, such infringement can be justified on grounds of general interest that are sufficient and proportionate to the objective pursued.

*Summary:*

I. In its decision no. 2015-718 DC of 13 August 2015, the Constitutional Council ruled on the law on energy transition for green growth, which had been submitted to it by over sixty members of parliament and over sixty senators. In particular, it examined the provisions of Article 187 concerning the need to cap the total authorised amount of nuclear power so as to reduce the share of nuclear power generated in France.

II. The Constitutional Council held the following articles to be in conformity with the Constitution:

- Article 1 on the objectives of the national energy policy; the Council took note of its programmatic nature;
- Article 73 concerning the prohibition on providing disposable plastic kitchen utensils;
- some of the provisions of Article 91, concerning the extension to press publications of the charges payable in respect of the broader responsibility of paper producers; these provisions do not infringe the principle of equality and are not “*entachées d’incompétence négative*” (there was no failure by the legislature to make full use of its powers);
- Article 139 on authorisations to operate wind turbines, which does not disregard any constitutional requirements;

- paragraph VI of Article 173, on the annual reports of certain institutions in the insurance sector, which merely stipulates the information that must appear in their annual reports and be made available to the policy-holders of the aforementioned institutions;
- a number of provisions of Article 187 concerning administrative authorisations to operate nuclear power plants, which do not disregard the guaranteed rights of the holders of authorisations relating to standard nuclear power stations. Through Article 187, the legislature does not infringe the legally conferred authorisations of EDF – which, as they currently stand, do not lead the company to exceed the ceiling of 63.2 GW – but rather the effects that might legitimately be expected of such authorisations, in other words the possibility of operating the nuclear reactors as authorised by administrative decisions for a total capacity, after the commissioning of the EPR, of 64.85 GW.

The Constitutional Council thus held that “Article L. 593-7 of the Environmental Code makes the installation of a basic nuclear power plant conditional on the issue of a permit; that pursuant to Article L. 593-11 of the same code, the commissioning of such plant is authorised by the Nuclear Safety Authority; that, under Article L. 593-13 of the same code, if the plant is not commissioned within the time-limit set in permit, and after the opinion of the Nuclear Safety Authority has been sought, the permit may be declared no longer valid; that the provisions of Article L. 311-5-5 of the Energy Code cap the total authorised production for the operation of basic nuclear power plants at 63.2 GW; that this is currently the total capacity of nuclear power production; that the total production capacity used and the capacity relating to nuclear power plants for which authorisation has already been granted but which have not yet been commissioned exceeds this capacity by 1.65 GW; and that the outcome is an infringement of the legitimately expected effects of legally acquired situations” (cons. 57).

The Constitutional Council then gave its opinion on the general interest and proportionality of the measure, stating that “taking Articles L. 311-5-5 and L. 311-5-6 together, compliance with the cap on the total authorised capacity of nuclear power production which was assessed at the date on which the installation was commissioned and not at the date at which the application for a permit to operate the installation was lodged; that, consequently, Article L. 311-5-5 does not impose the immediate repeal of a permit to operate a power plant, that it also leaves the holder of permits free to choose, depending on the prospects for the further

development of the fleet of nuclear power plants, which permits he may seek to have repealed so as to meet the new requirements fixed by the law; that it emerged from the preparatory documents for the law in question that by placing a cap on the total amount of power authorised by means of permits to operate a basic nuclear power plant, the legislature intended to foster the diversification of energy sources and the reduction of the share of nuclear power; that its objective in so doing was to serve the general interest; that the infringement of the effects that could be legitimately expected from legally acquired situations is justified by sufficient grounds of general interest and is proportionate to the objective pursued" (cons. 58).

The Constitutional Council then noted that "the impugned provisions do not prevent the holders of permits to build nuclear power plants that had already been issued when the law in question came into force, and who have been deprived of the possibility of seeking authorisation to operate a plant for which they have a building permit, or who are obliged to seek the revocation of an authorisation to operate a plant so as to comply with the cap introduced by Article L. 311-5-5, from seeking compensation for the losses suffered" (cons. 59).

In so doing, the Constitutional Council held that the legislature did not intend to rule out all forms of compensation and that, if the holders of the permits believe that they are entitled to do so, they can claim compensation on the basis of the constitutional principle of equality in the payment of public dues.

Given that such cases arise regularly in case-law, for example when the closure or removal of classified power plants is ordered pursuant to the Environmental Code, it is for the administrative courts to rule on the question of the strict liability of the State.

On the other hand, the Constitutional Council held that the following provisions were unconstitutional:

- Article 6 on the renovation of residential buildings to make them energy efficient, on the grounds that the legislature did not sufficiently specify the exact extent of the infringement of property rights constituted by the provision in question;
- Article 44 concerning the programme of actions aimed at reducing greenhouse gases generated by the mass-market retailing sector, given that the legislature disregarded the scope of its powers by handing over to the regulatory authorities the responsibility for determining which companies in the distribution sector

should be required to draw up the programme of actions;

- Article 83, modifying the rules governing the composition of the capital of eco-organisations established as companies without providing for any arrangements which would help to limit the infringement to property rights and to the guarantee of the rights of the partners or shareholders of such eco-organisations.

Finally the Constitutional Council *ex officio* examined:

- some of the provisions of Article 9: pursuant to its case-law, it censured the hearing by the standing committees of the National Assembly and the Senate of the person whose appointment as President of the Governing Board of the Scientific and Technical Centre for Building is envisaged, as the legislature had disregarded the requirements of the separation of powers;
- paragraphs II to VII of Article 103, relating to food waste, which were introduced at a further reading in disregard of the so-called "funnel" rule and had thus been adopted according to a procedure that is unconstitutional.

#### *Languages:*

French.



# Germany

## Federal Constitutional Court

### Important decisions

*Identification:* GER-2015-2-008

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 05.05.2015 / **e)** 2 BvL 17/09, 2 BvL 18/09, 2 BvL 3/12, 2 BvL 4/12, 2 BvL 5/12, 2 BvL 6/12, 2 BvL 1/14 / **f)** Judicial salaries / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Informationsdienst Öffentliches Dienstrecht* 2015, 122-132; *Europäische Grundrechte-Zeitschrift* 2015, 303-326; *Schütz Beamtenrecht des Bundes und der Länder ES/C I* no. 18; *Zeitschrift für Tarifrecht* 2015, 356-364; *Neue Juristische Wochenschrift* 2015, 1935-1947; *Deutsches Verwaltungsblatt* 2015, 834-839; *Zeitschrift für Beamtenrecht* 2015, 250-263; *Neue Zeitschrift für Verwaltungsrecht* 2015, 1047-1058; CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

*Keywords of the alphabetical index:*

Debt brake / Judge, remuneration, adequate / Judge, financial security / Judicial review, limits / Judiciary, independence.

*Headnotes:*

1. The legislator's broad discretion in implementing its duty resulting from Article 33.5 of the Basic Law to support judges and prosecutors appropriately corresponds to a limited judicial review of the relevant statutory provisions that merely determines whether decisions were based on evidently inadequate or inappropriate considerations. Whether salaries are evidently insufficient is determined by conducting an overall assessment of various criteria taking into account the specific groups that may be compared.

2. To conduct this overall assessment, parameters should be used that are derived from the principle of appropriate support and that are economically reasonable to determine a framework with specific numeric values to achieve a support structure and a level of support that are, in principle, constitutional.
3. There are five suitable parameters that are based on the Federal Constitutional Court's jurisprudence on the principle of appropriate support and that have indicative value in determining the level of support required under the Constitution (a clear discrepancy between the development of salaries of judges and prosecutors on the one hand and the developments of standard wages in public service, the money wage index as well as the consumer price index on the other; furthermore an internal comparison of salaries as well as a cross-comparison with salaries paid by the Federation or, respectively, by other federal states). If a majority of these parameters are fulfilled, the salary is presumed to be below the constitutional requirements (1<sup>st</sup> level of review). This presumption may be further corroborated or rejected by taking into account further support-relevant criteria in order to strike an overall balance (2<sup>nd</sup> level of review).
4. If the overall assessment shows that, in principle, the challenged salary is below the level of appropriate support, an assessment is needed as to whether this deficiency can be justified under the Constitution by way of exception. The principle of appropriate support is part of the institutional guarantee of a professional civil service enshrined in Article 33.5 of the Basic Law, which is linked to the traditional principles of a professional civil service. To the extent that this principle conflicts with other constitutional values or institutions, it must – in accordance with the principle of practical concordance – be reconciled with them by striking a careful balance (3<sup>rd</sup> level of review). The prohibition on taking on new debt in the first sentence of Article 109.3 of the Basic Law is of constitutional value.
5. Apart from minimum support required under the Constitution, the existing support provided for by law is protected against changes to a certain extent. Legislative cuts or other changes may be justified by relevant reasons.
6. When setting the level of salaries, the legislator must adhere to certain procedural requirements; in particular, it is under a duty to provide reasons.



### Summary:

I. The decision concerns a total of seven specific judicial reviews of whether the so-called “R” salaries of judges and prosecutors are constitutional. Two cases referred by the Higher Administrative Court of North Rhine-Westphalia concern the question of whether the salaries judges and prosecutors in salary grade R1 received in North Rhine-Westphalia in 2003 are compatible with the Basic Law (2 BvL 17/09 and 2 BvL 18/09). The four cases referred by the Administrative Court of Halle concern Saxony-Anhalt’s salary grade R1 from 2008 to 2010 (2 BvL 3/12, 2 BvL 4/12, 2 BvL 5/12 as well as 2 BvL 6/12) while the case referred by the Administrative Court of Koblenz regards the salary a managing senior prosecutor was paid in Rhineland-Palatinate’s salary grade R3 from 1 January 2012 (2 BvL 1/14).

II. The Federal Constitutional Court decided that the basic salaries of salary grade R1 paid in Saxony-Anhalt from 2008 to 2010 violate Article 33.5 of the Basic Law. The state (*Land*) legislator is required to make new arrangements that conform to the Constitution and take effect no later than 1 January 2016. The basic salaries of salary grade R1 paid in North Rhine-Westphalia in 2003 as well as the basic salaries of salary grade R3 paid in Rhineland-Palatinate from 1 January 2012, on the other hand, did not violate Article 33.5. The decision was taken unanimously.

The decision was based on the following considerations:

1. The standard for determining the constitutionality of the legal bases for the salaries of judges and prosecutors results from Article 33.5 of the Basic Law.

The traditional principles of the professional civil service under Article 33.5 of the Basic Law include the principle of appropriate support. The state is required to lend appropriate support to judges and prosecutors and their families throughout their lifetime and to provide them with subsistence that is appropriate to their rank, the responsibility they have in their respective posts and to the importance the judicial branch and the professional civil service have to the public. This subsistence must correspond to general economic and financial changes and to changes in the standard of living. The legislator’s broad discretion corresponds to limited judicial review (cf. headnotes). Material review is limited to establishing whether the salaries of judges and prosecutors are evidently deficient by taking into account various criteria (cf. headnotes) in an overall assessment that applies a three-level review (cf. headnotes).

2. In view of these standards, the basic salary rates of salary grade R1 applied in Saxony-Anhalt from 2008 to 2010 were not compatible with Article 33.5 of the Basic Law.

- a. Certain indicators suggest a clear inappropriateness of support when the adjustment of salaries is compared with the changes in wages in the civil service, with the money wage index and the consumer price index in Saxony-Anhalt. Therefore, there is a presumption that, from 2008 to 2010, the basic salaries of the salary grade R1 in Saxony-Anhalt dropped below the constitutionally required minimum for support appropriate to the office held.
- b. This presumption is corroborated when an overall balance is struck by taking into account further support-relevant parameters, i.e. the high level of qualifications required, judicial independence, noticeable cuts in the field of benefits and the salaries of reference groups outside the civil service.
- c. There are no conflicting constitutional rights, principles or values that would change the assessment that the salaries were evidently inappropriate.

3. On the other hand, R1 salaries in North Rhine-Westphalia in 2003 meet the requirements of Article 33.5 of the Basic Law. The basic salary at salary grade level 3 in Rhineland-Palatinate from 1 January 2012 onwards is also compatible with the constitutional standards.

In both states, review of the salary-relevant parameters on the first level does not suggest a salary below constitutional requirements. There are no other reasons that would indicate evidently inappropriate salaries.

### Languages:

German, English press release available on the Court’s website; English (translation is being prepared for the Court’s website).



*Identification:* GER-2015-2-009

a) Germany / b) Federal Constitutional Court / c) Third Chamber of the Second Panel / d) 19.05.2015 / e) 2 BvR 987/11 / f) / g) / h) *Europäische Grundrechte-Zeitschrift* 2015, 429-433; CODICES (German).

*Keywords of the systematic thesaurus:*

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

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

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

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

*Keywords of the alphabetical index:*

Criminal prosecution, effective, right / Investigative proceedings, end.

*Headnotes:*

Individuals have a right to an effective criminal prosecution if they are not capable of defending themselves against serious crimes against their legally protected interests – life, physical integrity, sexual self-determination and personal freedom – and where failure to effectively prosecute such crimes might undermine confidence in the state's monopoly on the legitimate use of force and result in a general atmosphere of legal uncertainty and violence.

The right to effective judicial review, under the Basic Law, prohibits handling formal requirements in a stricter sense than is required by their objectives, as effective legal protection depends on them. This also holds true for the requirements of the production of evidence under the first sentence of § 172.3 of the Code of Criminal Procedure.

Therefore, an applicant is under no duty to access the case files to gain knowledge of all the defendant's submissions and to completely submit them to the court. However, if the applicant bases his or her application for a court decision essentially on the content of the investigative files, he or she is obliged to submit the essential content of the evidence to which he or she refers or which he or she cites.

*Summary:*

I. The applicant in this matter is the father of two children who were killed by an allied air strike in Kunduz, Afghanistan, on the night of 3 September 2009. He reported the alleged criminal offence accusing a Colonel and a Master Sergeant of the *Bundeswehr* of having committed it. The Colonel, being the military commander of the Provincial Reconstruction Team (hereinafter, "PRT") in Kunduz, had ordered the air strike; the Master Sergeant was involved as a tactical air controller of the PRT Kunduz. Two petrol trucks had been hijacked by armed members of the Taliban and were stuck on a sandbank in the river Kunduz. The air strike was ordered on the assumption that the trucks could at any time be used to attack the nearby *Bundeswehr* camp by turning them into "rolling bombs" and that the persons in the vicinity of the trucks were either members or at least supporters of the Taliban. In the end, however, the air strike caused many fatalities, and mostly amongst the civilian population.

By decision of 13 October 2010, the Public Prosecutor General ended the investigative proceedings against the Colonel and the Master Sergeant that had been initiated against them for suspicion of criminal offences according to the International Criminal Code and other criminal offences, as there were no sufficient grounds for an indictment. By decision of 16 February 2011, the Düsseldorf Higher Regional Court dismissed as inadmissible an application for a court decision.

II. The Federal Constitutional Court decided that the Public Prosecutor General's decision of 13 October 2010 to end proceedings and the decision of the Düsseldorf Higher Regional Court of 16 February 2011 were in line with constitutional law, for the following reasons:

The applicant, as a father – via Article 6.1 and the first sentence of Article 6.2 in conjunction with Article 2.2 of the Basic Law and sentence 2 of Article 1.1 of the Basic Law – has a right to effective criminal prosecution. This is due to the fact that very serious crimes are at issue and that holders of public offices are under suspicion. As failure to effectively prosecute such acts may undermine confidence in the integrity of state action, the mere appearance that such acts are inadequately investigated, that investigations against holders of public office are less effective, or that, in such a context, the threshold for an indictment is higher, must be avoided.

The Public Prosecutor General's decision of 13 October 2010 satisfies these requirements. It does not fail to recognise the significance of relevant

fundamental rights in the context of the protection of life and the ensuing positive obligations incumbent upon the state, or the requirements for effective investigations into fatalities that derive from the jurisprudence of the Federal Constitutional Court and the European Court of Human Rights. This also holds true in view of the grave consequences resulting from the attack on the petrol trucks, in particular a large number of victims amongst the civilian population, including children and adolescents.

The decision describes the investigation conducted and, based on those findings, concludes that there is no probable cause. It finds that the statements of the accused, in which they argue that they had believed that the persons in the immediate vicinity of the trucks were armed insurgents, cannot be rebutted. Therefore, it finds that the *mens rea* of the criminal offence is not present. This conclusion is not arbitrary and therefore not objectionable under constitutional law.

Likewise, the Higher Regional Court's decision of 16 February 2011 does not raise constitutional concerns. Since the investigations conducted, and documented respectively, by the Public Prosecutor General meet the requirements under constitutional law, a subsequent judicial review decision cannot (no longer) violate the right to effective criminal prosecution.

Nor did it fail to recognise the significance and the scope of the fundamental right to effective judicial protection. If the applicant relies significantly on the content of the investigative file in stating the reasons for his application for a court decision, he is obliged to communicate at least the essential content of the evidence from which he submits excerpts or quotations. Reproducing statements of the accused or of witnesses only in part and selectively may create a wrong impression of the result of the investigation, which cannot be easily corrected. The applicant did not meet these requirements in this particular case.

#### *Languages:*

German, English press release available on the Court's website.



#### *Identification:* GER-2015-2-010

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 19.05.2015 / **e)** 2 BvR 1170/14 / **f)** / **g)** / **h)** *Zeitschrift für das gesamte Familienrecht* 2015, 1263-1268; CODICES (German).

#### *Keywords of the systematic thesaurus:*

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

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

#### *Keywords of the alphabetical index:*

Regular courts, interpretation of statutory law, limited review by the Federal Constitutional Court / Statutory law, interpretation, European Convention on Human Rights / European Convention on Human Rights, importance for interpretation of statutory law.

#### *Headnotes:*

1. The way regular courts apply and interpret international law is subject to stricter review by the Federal Constitutional Court.
2. It may be necessary to restrictively interpret and thereby not apply provisions of statutory law in order to observe the European Convention on Human Rights.
3. However, Article 20.3 of the Basic Law binds the courts to law and justice and thus limits their ability to develop the law.

#### *Summary:*

I. A constitutional complaint was lodged with the Federal Constitutional Court seeking an answer as to whether the Constitution requires that the effective date set out in § 35 of the Introductory Act to the Code of Civil Procedure (hereinafter, the "Act") should not be applied to cases involving child visitation rights. Under § 580.8 of the Code of Civil Procedure, an action for retrial of a case may be brought where the European Court of Human Rights has established that the European Convention on Human Rights or its Protocols have been violated, and where the judgment is based on this violation. According to § 35, however, the rule laid down in § 580.8 is not to be applied to cases finally decided before 31 December 2006.

In the initial proceedings on the case of the potential biological father of a child who wished to be granted visitation rights with his potential child against the will of its legal parents, who lived with the child in the United Kingdom, the Federal Court of Justice held that – although the European Court of Human Rights had found previous decisions denying visitation rights to violate the European Convention on Human Rights – the case could not be retried as it had been finally decided before 31 December 2006. In so deciding, it refused to restrictively interpret § 35 of the Act in a way that would preclude its application to the case at hand.

In his constitutional complaint against the decision of the Federal Court of Justice, the child's potential biological father alleged a violation of his rights under Articles 1.1, 2.1 and 6.1 in conjunction with Articles 20.3 and 3.1 of the Basic Law.

II. The Federal Constitutional Court held that the Constitution did not mandate a restrictive interpretation of § 35 of the Introductory Act to the Code of Civil Procedure, noting that in principle, the way regular courts interpret and apply statutory law is subject to only limited review by the Federal Constitutional Court. The Court merely examines whether it is arbitrary; firstly whether it demonstrates complete misjudgment of the importance and scope of a fundamental right and secondly, whether it is irreconcilable with other constitutional provisions. As a rule, the same holds true for the application and interpretation of federal law that implements international law. However, one of the competences of the Federal Constitutional Court is to prevent the regular courts from ignoring or misapplying international law and thereby with protecting Germany from international responsibility. Therefore, the Court may be required to apply stricter standards for its review of how the regular courts interpret and apply international law.

The decision was based on these reasons:

1. The Federal Court of Justice's interpretation of the relevant provisions was not arbitrary, as that Court performed a comprehensive assessment of whether a restrictive interpretation of § 35 of the Act is warranted under the Constitution.

2. Nor did the Federal Court of Justice completely misjudge the importance and scope of Article 2.1 in conjunction with 1.1 of the Basic Law.

a. The Federal Court of Justice's decision did not interfere with the applicant's fundamental right under Article 6.1 and 6.2 of the Basic Law (aa), but it did interfere with his general right of personality under Article 2.1 in conjunction with 1.1 of the Basic Law (bb).

aa. Although a father's wish for visitation rights with his child is protected by Article 6.1 and 6.2 of the Basic Law, these provisions do not apply in this particular case, since it is unclear whether the applicant is in fact the biological father of the child.

bb. However, the applicant may invoke Article 2.1 in conjunction with 1.1 of the Basic Law. These provisions secure an autonomous area of privacy for every individual encompassing the possibility of entering into social relations with others. Therefore, they protect a potential biological father's right to the determination of whether the requirements for establishing socio-familial relations are fulfilled.

b. However, the interference with the applicant's fundamental rights is justified, as § 35 of the Act violates neither the general right of equality under Article 3.1 of the Basic Law nor the prohibition on retroactivity under Article 20.3 of the Basic Law. Furthermore, the Federal Court of Justice's decision adequately takes into consideration the importance and scope of the right under Article 2.1 in conjunction with 1.1 of the Basic Law, by balancing the applicant's protected interests with the best interests of the child, which favour a new trial in the United Kingdom, the child's country of residence, rather than a retrial in Germany.

3. Lastly, the Federal Court of Justice did not misjudge the influence of the European Convention on Human Rights.

a. Although in Germany, the European Convention on Human Rights only has the status of statutory law, it must be taken into consideration when interpreting the Basic Law. Thus, regular courts are required to take into consideration the Convention as well as the case-law of the European Court of Human Rights.

b. However, such "convention-friendly" interpretation is only permissible to the extent that it does not transcend the boundaries of the established methods of interpretation. This precludes interpretations that contradict binding statutory law.

c. Thus, the type and extent of the Convention's binding effect depend on the adjudicating court's competences as well as on the leeway it has under other primarily-applicable binding law. What is decisive is whether the applicable procedural law allows the court to reach a further decision that can take into account the relevant case-law of the European Court of Human Rights.

d. The established methods of interpretation include restrictive interpretation to the point of non-application of a provision. In view of the quickly changing realities

in today's world, the legislator's limited means to react and the open-ended wording of many provisions, the judiciary is tasked with developing the law. Therefore, it is sometimes necessary to restrictively interpret (and thereby not apply) provisions of statutory law in order to observe the European Convention on Human Rights. However, Article 20.3 of the Basic Law binds the courts to law and justice and requires them to respect the intention of the legislator when developing the law. Furthermore, courts must provide sound reasons for such development. *Vice versa*, allegations that a court by refraining from developing the law violated its duties under Article 20.3 of the Basic Law must also be supported by sound reasons.

c. The Federal Court of Justice complied with its duty of convention-friendly interpretation. Since the Convention does not require any action for retrial of cases, the legislator was free to design the action in § 580.8 of the Code of Civil Procedure in a way that it applies only to cases finally decided after 31 December 2006.

#### *Languages:*

German.



#### *Identification:* GER-2015-2-011

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 02.06.2015 / **e)** 2 BvE 7/11 / **f)** Federal Police / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Die Öffentliche Verwaltung* 2015, 670; *Verwaltungs-rundschau* 2015, 287; CODICES (German).

#### *Keywords of the systematic thesaurus:*

3.3 General Principles – **Democracy.**

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

4.5.7.1 Institutions – Legislative bodies – Relations with the executive bodies – **Questions to the government.**

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

#### *Keywords of the alphabetical index:*

Accountability, democratic / Legitimacy, democratic / Interpellation, minor / Parliament, controlling function / Parliament, member, right to request information, condition / Parliament, right to be informed.

#### *Headnotes:*

1. With regard to support operations under the first sentence of Article 35.2 of the Basic Law, the Parliament's right to question the Federal Government and to be informed by it, which also applies to Members of Parliament and the parliamentary groups, only refers to circumstances that fall within the Federation's sphere of responsibility as following from the distribution of competences under the Basic Law and the more detailed provisions contained in the Federal Police Act.

2. Therefore, the Federal Government is under an obligation to reply to parliamentary questions about (federal) decisions on a state (*Land*)'s request for support from the Federal Police and to questions referring to those circumstances of a support operation for which a federal authority is responsible due to its function as employer of the respective civil servants.

3. However, in general, the Federal Government is under no obligation to comment on the concept, preparation, planning and implementation of an operation as a whole that falls within the states' sphere of responsibility. Under Articles 30, 70 and 83 of the Basic Law, the states have the competence and responsibility for executing the task of countering threats to public safety and order through police measures (cf. *Entscheidungen des Bundesverfassungsgerichts* (Official Digest – BVerfG) 97, 198 <214 *et seq.*>). The respective state bears responsibility for conduct of civil servants of the Federal Police if they act on orders and instructions of state civil servants. In these cases, the action obtains democratic legitimation via the state government's accountability *vis-à-vis* the state parliament.

4. However, the Federation bears responsibility under public employment law for illegal conduct by civil servants it deploys – irrespective of a state's authority to issue instructions, since, pursuant to Article 20.3 of the Basic Law, civil servants are bound by law and justice. Parliamentary questions about unlawful conduct in which individual Federal Police officers have engaged, in the context of support operations and which is relevant under disciplinary law, must be answered. However, the questions must make it sufficiently clear that there is probable cause to believe that there has been unlawful conduct and why this is the case.

### Summary:

I. The applicant, the parliamentary group of "THE LEFT PARTY", challenged the Federal Government's refusal to fully answer questions about support operations of the Federal Police on behalf of states. According to § 11.1 no. 1 of the Federal Police Act (hereinafter, the "Act"), states may request support through the Federal Police under certain conditions. In such cases, Federal Police staff generally acts on instructions by the respective state according to the second sentence of § 11.2 of the Act.

The applicants' minor interpellations referred to support operations of the Federal Police in 2011 in Dresden, Berlin and in other cities. In those operations, police staff of the respective state and Federal Police staff worked together. In Dresden, police staff of other German states were also involved.

The questions concerned both the performance of tasks proper to the Federal Police and of state tasks in the context of support operations. The Federal Government only replied to the questions on tasks proper to the Federal Police, arguing that the other questions fell within the sole competence of the states.

II. The Federal Constitutional Court decided that the application was partly well-founded. It held that the right to be informed is limited to circumstances pertaining to the Federation's sphere of responsibility. This includes, in particular, the decision as to the extent to which the Federal Police complies with a state's request for support. However, the Federal Government is under no duty to comment on the operational concept of a state police or its implementation. Nevertheless, under certain conditions, there is an obligation to answer parliamentary questions on the conduct of individual Federal Police officers that is relevant under disciplinary law.

The decision is based on the following considerations:

As a precondition for effective parliamentary work, the right of Members of Parliament to question the Federal Government and to be informed by it corresponds to a governmental duty under the Constitution. This serves to enable Parliament to perform its control function as envisaged by the system of checks and balances in the context of the principle of the separation of powers under the Basic Law. It forms part of the accountability of the Government *vis-à-vis* Parliament, which follows from the principle of democracy. The principle of sovereignty of the people entails, *inter alia*, that

Parliament must be able to influence governmental policies. Administrative action can only be democratically legitimised by Parliament. If administrative staff are not elected by the people, there must be a chain of legitimation with regard to their appointment and their actions gain material legitimation due to the fact that they are bound by law and follow the government's instructions, which, in turn, is accountable to Parliament. Therefore, a right to be informed by the Federal Government does not exist outside its sphere of responsibility for lack of accountability.

In the federal system under the Basic Law, democratic legitimation for decisions can only be derived from the people of the Federation or the people of the relevant state, depending on the sphere of responsibility in question. This means that the performance of tasks has to be distributed so as to allow attribution of responsibilities. Under the Basic Law, distribution of competences in the field of execution of laws is generally regulated in Articles 83 *et seq.* of the Basic Law. Taking into account the overall structure of the Basic Law, the Federation does not have any co-planning, co-administrative or co-decision rights in the field of competences of the states, unless it is also competent to decide the issue itself. This distribution of competences may not be touched upon.

It is against this backdrop that support operations of the Federal Police on behalf of the states are only permissible in exceptional cases under the strict conditions regulated in the Basic Law, as in the first sentence of Article 35.2 of the Basic Law. The ordinary law applicable to support operations of the Federal Police has to provide for a clear and consistent distribution of competences and attribution of responsibilities between the Federation and the states.

The rights to question and to be informed by the Federal Government only refer to issues within the Federation's sphere of responsibility, such as the decision to grant the request, circumstances decisive for that decision or other aspects of the operation falling within the Federation's sphere of responsibility.

### Languages:

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



*Identification:* GER-2015-2-012

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 09.06.2015 / **e)** 2 BvR 965/15 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Extradition / Extradition, concurrent request / Extradition, granting authority / Extradition, proceedings.

*Headnotes:*

The right to an effective remedy presupposes a competence on the part of judges to review the factual and the legal sides of a case so that they can put right any breaches of the law. In terms of differing levels of discretion of public authorities, different standards of review are constitutionally permissible.

Under traditional German extradition law, it is in judicial admissibility proceedings where the judge reviews whether extradition is legally admissible. A decision by the authority granting extradition will not usually be reviewed; limited review is possible in exceptional cases only.

Provided that the Court, in the admissibility proceedings, takes into account all relevant subjective rights of the person to be extradited and does not leave the decision to the authority granting extradition alone, Article 19.4 of the Basic Law is complied with.

In extradition proceedings with non-EU countries, judicial review of the decision granting extradition is only necessary if the decision goes beyond what had been reviewed in admissibility proceedings.

*Summary:*

I. The United States of America had requested the extradition of the applicant in this matter, a Turkish national, for criminal prosecution for participation in a conspiracy against computer networks of at least three financial services providers in the USA and

elsewhere between 2010 and 2013. The Turkish Republic also requested his extradition – for execution of a final judgment in which he had been found guilty of founding a criminal organisation and leading it until 21 August 2008. The applicant consented to his extradition to Turkey.

The Higher Regional Court of Frankfurt-on-Main admitted extradition to the United States of America on 5 August 2014. Following the applicant's constitutional complaint, the Federal Constitutional Court reversed this decision and remanded it to the Higher Regional Court Frankfurt-on-Main on 20 November 2014 (cf. Federal Constitutional Court, order by the Third Chamber of the Second Panel, 20 November 2014 – 2 BvR 1820/14). On 25 March 2015, the Higher Regional Court of Frankfurt-on-Main again declared the extradition to the USA admissible. A constitutional complaint challenging this decision was not granted. By verbal note, the Federal Foreign Office told the embassy of the United States of America that it had granted extradition. In addition, the Federal Foreign Office, in advance, consented to the applicant's potential re-extradition to Turkey.

The applicant challenged the decision granting his extradition to the USA and applied for extradition to Turkey. The Higher Regional Court of Frankfurt-on-Main declared the application inadmissible on the grounds that there was neither a legal remedy statutorily envisaged for such a case, nor was it necessary or possible to derive it directly from fundamental rights.

He then lodged a constitutional complaint joined by an application for a preliminary injunction that challenged the court decision refusing the review of the Federal Foreign Office's consent to extradition.

The applicant asserted violations of Articles 1, 2, 19.4, 103.2 of the Basic Law, of the European Convention on Human Rights and of the EU Charter of Fundamental Rights.

II. The Federal Constitutional Court decided that, while the Higher Regional Court should not have rejected the applicant's application as inadmissible with regard to re-extradition to Turkey, the constitutional complaint was not admitted for decision because neither was it of general constitutional significance (due to settled case-law) nor would the applicant suffer a particularly severe disadvantage (as he had relinquished his right to legal review in this specific case by asking for extradition to Turkey himself). Consequently, the preliminary injunction was not granted.

The decision is based on these considerations:

Article 19.4 of the Basic Law provides for a fundamental right to effective and, where possible, exhaustive judicial review of acts of public authority (cf. *Entscheidungen des Bundesverfassungsgerichts* (Official Digest – *BVerfGE*) 8, 274 <326>; 113, 273 <310>; established case-law). However, the standard of review may differ according to the authority's particular scope of discretion and the function it serves.

It is customary in German extradition law for admissibility proceedings to be aimed at providing preventive judicial review for the person concerned, while granting extradition is a decision addressed to the requesting state which is informed by (foreign) policy considerations and taken by the Federal Ministry for Justice, with the consent of the Federal Foreign Office, on behalf of the Federal Government. This decision forms part of the exclusive federal competence in the field of foreign relations.

Therefore, the decision granting extradition is usually not subject to constitutional judicial review. The granting authority possesses broad discretion due to foreign policy considerations.

However, in EU-extradition cases, due to the specific legal framework, the decision granting extradition is subject to judicial review (cf. *Entscheidungen des Bundesverfassungsgerichts* (Official Digest – *BVerfGE*) 113, 273 <309 et seq.> and *Kammerentscheidungen des Bundesverfassungsgerichts* (Chamber Decisions of the Federal Constitutional Court – *BVerfGK*) 16, 131 <134 and 135>; 16, 177 <190>; 16, 283 <292 and 293>; Federal Constitutional Court, order of the Second Chamber of the Second Panel of 25 November 2008 – 2 BvR 2196/08 –, *juris*, para. 10, on constitutional review). In addition, judicial review must be available for cases in which the decision granting extradition contains legal considerations that have not been reviewed in the admissibility proceedings.

While such a case was at issue, the applicant, by consenting to an extradition to Turkey, had renounced his right to judicial review in this particular case.

#### Cross-references:

- 2 BvR 1820/14, 20.11.2014, *Bulletin* 2014/3 [GER -2014-3-034].

#### Languages:

German.



#### Identification: GER-2015-2-013

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 25.06.2015 / **e)** 1 BvR 20/15, 1 BvR 37/15, 1 BvR 555/15 / **f)** Minimum Wage / **g)** / **h)** *Zeitschrift für die Anwaltspraxis* EN-Nr. 587/2015; *Arbeit und Recht* 2015, 336; *Der Arbeits-Rechts-Berater* 2015, 227; CODICES (German).

#### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Courts**.  
1.4.8.7 Constitutional Justice – Procedure – Preparation of the case for trial – **Evidence**.

#### Keywords of the alphabetical index:

Subsidiarity, constitutional proceedings / Minimum Wage.

#### Headnotes:

Constitutional complaints must be sufficiently substantiated. Those that directly challenge legislation are only admitted for decision if the applicant has met the requirements of the principle of subsidiarity. While it would be unreasonable to expect applicants to commit a regulatory offence in order to be able to challenge the resulting sanction before the regular courts, they must use any other legal remedies available, such as bringing an action for a judgment declaring that they are not legally bound by the statutory obligations the non-compliance of which constitutes a regulatory offence.

#### Summary:

I. Under the Act Regulating a Minimum Wage of 11 August 2014 (hereinafter, the “Act”), with effect from 1 January 2015, employees are entitled to a gross minimum wage of at least EUR 8.50 per



working hour (§ 1 of the Act). The Third Chamber of the First Panel of the Federal Constitutional Court did not admit for decision three constitutional complaints against the Act, as they were inadmissible.

The applicants in proceedings 1 BvR 555/15, 14 logistics and haulage companies from Austria, Poland and Hungary that also work in Germany, challenged § 16, § 17.2 and § 20 of the Act. At the same time, they applied for a preliminary injunction to suspend the application of those provisions pending proceedings. Pursuant to § 20 of the Act, employers with their registered office in Germany or abroad are under a duty to pay those employees working in Germany a wage of at least the amount of the minimum wage. §§ 16 and 17.2 of the Act contain certain obligations to inform custom authorities and to keep certain records.

In proceedings 1 BvR 37/15, the applicant, who was seventeen years of age and working in the catering sector earning an hourly wage rate of EUR 7.12, and who was to start vocational training in September 2015, challenged § 22.2 of the Act, which stipulates that children and adolescents who have not completed vocational training are not entitled to be paid minimum wages. In proceedings 1 BvR 20/15, the applicant challenged § 24.2 of the Act, which, for newspaper deliverers, provides for a staged increase in wages, and stipulates gross minimum wages of EUR 8.50 only from 1 January 2017.

II. The Federal Constitutional Court decided that the applicants in proceedings 1 BvR 555/15 must bring their case before the regular courts first.

Under the principle of subsidiarity, a constitutional complaint is inadmissible if it can be reasonably expected of an applicant to seek relief by bringing the case before the regular courts. Only in exceptional cases is there no such duty. This is particularly the case if it would be unreasonable to expect such conduct.

This was not the case in these particular proceedings. While it is not reasonable to expect someone to commit a regulatory offence sanctioned by administrative fines in order to be able to bring a case before the regular courts where the challenged legal provisions could be assessed in the course of regulatory offences proceedings, the principle of subsidiarity extends further. In the case at hand, it would have been possible to bring an action before the regular courts seeking a declaration that one was not bound by the obligations stated in §§ 16, 17.2 and 20 of the Act. Such actions for negative declarations are not inadmissible from the outset, as it is reasonable to suppose that the regular courts would

find that the applicants have a recognised legal interest in seeking a declaratory judgment.

Furthermore, the legal issues need to be dealt with firstly by the regular courts. Their decisions can be used to prepare the discussion of the ambiguities concerning the scope of application of the Act already raised in the literature; thereby, they can influence how the Act is assessed under constitutional law and under European Union law. There is a particular need to clarify whether conditions for employment in Germany are the same as those expected in social security law, and whether, without exception, any employment (even short-term) on the territory of the Federal Republic of Germany constitutes employment in Germany within the meaning of the Act, or if a certain duration or link to the German social security systems and to living expenses in Germany is required. An assessment will also be needed as to the necessity of the statutory obligation to pay minimum wages for short-term employment in order to achieve the goals pursued by the Act. In addition, the regular courts are called upon to assess the issues of European Union law raised by the applicants insofar as they are essential for their decision.

The applicants' concerns over severe disadvantages if the Act remains in force do not change the reasonable expectation that they first have recourse to the regular courts. Doubts also exist over sufficient substantiation, to the extent that the companies' risk of insolvency has been asserted but no balances of account have been submitted. In any case, to prevent disadvantages, interim relief could have been sought before the regular courts.

A decision by the Federal Constitutional Court is not warranted by the general relevance of the constitutional complaint. The disadvantages for the applicants of being referred to the regular courts in the first instance are comparatively small compared to the advantage of having the regular courts deal with the case prior to the Federal Constitutional Court.

As the constitutional complaint was not admitted, the application for a preliminary injunction became moot.

In proceedings 1 BvR 37/15, the requirements of the principle of subsidiarity were also not met. The applicant could reasonably have been expected to have sought relief before the regular courts prior to bringing the case before the Federal Constitutional Court. In addition, the applicant did not establish *prima facie* that he would suffer severe or unavoidable disadvantages if the Federal Constitutional Court did not admit his constitutional complaint.

In proceedings 1 BvR 20/15, the applicant did not substantiate that she was affected individually, presently and directly by the challenged provision. Neither did she show that she actually met the requirements of a newspaper deliverer under the third sentence of § 24.2 of the Act or that she presently earned less than the statutory gross minimum wage of EUR 8.50 per working hour.

### Supplementary information:

Legal norms referred to:

- §§ 16, 17.2, 20, 22.2 and 24.2 of the Minimum Wage Act.

### Languages:

German.



### Identification: GER-2015-2-014

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 30.06.2015 / **e)** 2 BvR 1282/11 / **f)** Jehovah's Witnesses / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** CODICES (German).

### Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**  
 3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**  
 5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

### Keywords of the alphabetical index:

Jehovah's Witnesses / Corporate body under public law, award of the status of / Religious communities, award of the status of a public body.

### Headnotes:

1. It is for the *Länder* (federal states) to determine whether religious communities fulfil the requirements for being awarded the status of a

corporate body under public law (*Körperschaft des öffentlichen Rechts*) as provided for in Articles 4.1, 4.2 and 140 of the Basic Law in conjunction with Article 137.5.2 of the Weimar Constitution. By awarding the status of public body to religious communities the *Länder* do not execute federal law in the meaning of Article 83 of the Basic Law, but law of the respective *Land*.

2. Provisions assigning the case-by-case determination of whether the requirements for the legal entitlement in Articles 4.1, 4.2 and 140 of the Basic Law in conjunction with Article 137.5.2 of the Weimar Constitution are met violate the principle of separation of powers (Article 20.2.2 of the Basic Law). This principle indirectly ensures observance of the fundamental right to effective legal recourse.

### Summary:

I. The Federal Constitutional Court had to decide on a constitutional complaint by the religious community "Jehovah's Witnesses in Germany" challenging a decision by the Bremen Parliament to reject a bill that would have awarded the applicant the status of public body in the territory of Bremen and also indirectly challenging the provision of the Bremen Constitution that assigns this decision to the Bremen Parliament. In state practice, the first award of the status of public body in one *Land* is followed by so-called secondary award proceedings in the other *Länder*. The applicant had already been awarded the status of public body in Berlin and was seeking a secondary award in Bremen.

II. The Federal Constitutional Court held that by assigning the task of performing the determination of whether a religious community fulfils the requirements for being awarded the status of public body to the Bremen parliament, the Bremen Constitution acted in breach of the principle of separation of powers. Furthermore, it held that conducting the legislative process in violation of the Basic Law violated the applicant's rights from Article 4.1 and 4.2 of the Basic Law in conjunction with Article 140 of the Basic Law and Article 137.5.2 of the Weimar Constitution.

The decision is based on these considerations:

1. Apart from the requirements expressly mentioned in Article 137.5.2 of the Weimar Constitution, religious communities, in order to be awarded the status of public body, must fulfil further, unwritten requirements. They must abide by the law, meaning that *inter alia* they need to guarantee that their future conduct will not endanger the fundamental principles of the Constitution as described in Article 79.3 of the

Basic Law, the fundamental rights of third parties, or the basic principles of the law of religion and of the state law on churches. If these requirements are fulfilled, the applicant religious community has a constitutional right to be awarded the status of public body. The duty to remain neutral in ideological and religious matters bars the state from judging a religious community's faith and its teachings *per se*; however, faith and teachings may permit predictions as to the religious community's future conduct.

2. The determination of whether the requirements are fulfilled pertains to the *Land* in which the religious community wishes to exercise the rights associated with the status of public body.

a. By awarding the status of public body to religious communities pursuant to Article 4.1 and 4.2 of the Basic Law as well as Article 140 of the Basic Law in conjunction with Article 137.5.2 of the Weimar Constitution, the *Länder* do not execute federal law in the meaning of Article 83 of the Basic Law but law of the respective *Land*.

b. Despite the previous first award of status, the Constitution does not hinder Bremen from performing secondary award proceedings concerning the applicant and from executing an independent power of review. The standard for such review is formed exclusively by the written and unwritten requirements for the constitutional right under Articles 4.1, 4.2 and 140 of the Basic Law in conjunction with Article 137.5.2 of the Weimar Constitution. The content of the decision to award the status of public body depends on whether the requirements are fulfilled and leaves the *Länder* without discretion.

3. Article 61.2 of the Bremen Constitution requiring that the status of public body be awarded by way of formal law violates the principle of separation of powers (Article 20.2.2 of the Basic Law), because it permits the Bremen parliament to pass laws that apply to individual persons. This provision also violates the applicant's right to effective legal recourse.

a. Without compelling reasons, Article 61.2 of the Bremen Constitution places a power functionally pertaining to the executive branch within the exclusive competence of the legislator. In determining whether the requirements are fulfilled, the Bremen parliament performs an isolated executive function: If the requirements are met, the application must be granted, if not, it must be denied. Contrary to what usually follows from the legislator's general political leeway, there is no room for discretion.

b. The contradiction between Article 61.2 of the Bremen Constitution and the principle of separation of powers (Article 20.2.2 of the Basic Law) makes the provision unconstitutional. Illegally denying a religious community that relies on its right under Article 4.1 and 4.2 as well as Article 140 of the Basic Law in conjunction with Article 137.5.2 of the Weimar Constitution the status of public body constitutes an infraction of interests protected by fundamental rights. At the same time, such denial indirectly limits the possibilities of legal recourse against the infraction of the freedom of religion under Article 4.1 and 4.2 of the Basic Law. While acts or omissions of the executive branch can be challenged before the respective regular courts, the only legal recourse against infractions directly brought about by laws of parliament or by their absence is a constitutional complaint.

III. Three Justices submitted a joint separate opinion expressing the view that the Constitution does not require constitutive secondary recognition of religious communities in each *Land* in order for them to be able to exercise the state powers that come with the status of public body as the right to be awarded this status is part of substantive federal law, which pursuant to Articles 30 and 83 of the Basic Law must be executed by the *Länder* as if it were their own.

#### *Languages:*

German, English (translation of the decision is being prepared by the Court); English press release available on the Court's website.



*Identification:* GER-2015-2-015

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 13.07.2015 / **e)** 1 BvR 2516/13 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Custodian, appointment / Assignment of a custodian, proceedings.

*Headnotes:*

1. A person must be heard by the competent court before being assigned a custodian.
2. This hearing may take place retrospectively if imminent danger requires immediate appointment of a custodian.

*Summary:*

I. The Federal Constitutional Court had to decide on a constitutional complaint by a woman who was assigned a custodian without first being heard by the competent court.

II. The Federal Constitutional Court held that a person must be heard by the competent court before being assigned a custodian. Should imminent danger require immediate appointment of a custodian, the court must hear the person concerned as soon as possible after the appointment. Failure to hear the person concerned violates the person's right to be heard in court under Article 103.1 of the Basic Law and retroactively renders the appointment of the custodian illegal. Even if the person concerned is heard later, this renders the appointment of the custodian lawful only for the future, not for the past. The appointment remains unlawful for the time between the earliest point in time at which the person concerned could have been heard and the point in time at which he or she was actually heard.

*Languages:*

German.

*Identification:* GER-2015-2-016

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 13.07.2015 / **e)** 1 BvR 1089/13, 1 BvR 1090/13; 1 BvR 2480/13 / **f)** Searches of media organs / **g)** / **h)** *Kommunikation & Recht* 2015, 648-65; *AfP Zeitschrift für Medien- und Kommunikationsrecht* 2015, 419-421; *Europäische Grundrechte-Zeitschrift* 2015, 615-618; *Neue Juristische Wochenschrift* 2015, 3430-3432; CODICES (German).

*Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law.**  
5.3.22 Fundamental Rights – Civil and political rights  
– **Freedom of the written press.**

*Keywords of the alphabetical index:*

Media organs, searches / Press informants, crimes, investigations / Press, informants, confidential relationship / Editorial work, confidentiality.

*Headnotes:*

Searches of media organs may not serve the primary purpose of investigating possible crimes on the part of informants; sufficient factual reasons must exist for believing that a crime has been committed which would override the protection against seizure enshrined within the Code of Criminal Procedure.

*Summary:*

I. The Chamber had to decide on two constitutional complaints lodged by a journalist and a newspaper publishing house regarding police searches that had occurred after the publishing house had paid a police detective, who was later investigated for breach of secrecy in another case, for accompanying the journalist on a research trip. The searches of the publishing house and the journalist's home were based on a suspicion of bribery, which had arisen because of the unusually large cash payment. The information the detective was suspected of having forwarded to the media in the other case, however, was published not by the publishing house but by a web platform unaffiliated with it.

II. The Chamber held that searches of offices or homes of journalists may not serve the primary purpose of investigating possible crimes of informants; there must be sufficient factual reasons to believe that the journalist concerned may have committed a crime that would eliminate the

protection against seizure enshrined in the first sentence of § 97.5 of the Code of Criminal Procedure (hereinafter, the “Code”).

The decision is based on the following considerations:

1. The protection of the freedom of the press applies (second sentence of Article 5.1 of the Basic Law). It encompasses protection against encroachment by the state on the confidentiality of editorial work and the press and their informants. This protection is indispensable, since the press cannot do without private information, which it will only receive if informants can generally rely on the secrecy of editorial work. Because they disrupt editorial work and bring with them the risk of intimidating informants and journalists, searches of press offices constitute an encroachment on the freedom of the press.

2. The encroachment by ordering the search of the editorial offices and seizing objects found there is not justified under the Constitution.

a. According to Article 5.2 of the Basic Law, the freedom of the press is limited by the general laws. The provisions of the Code of Criminal Procedure are recognised as general laws, but they must be viewed in light of the fundamental right that is the freedom of the press. The freedom granted by the second sentence of Article 5.1 of the Basic Law must be viewed in the context of the legal interest protected by the limiting provisions. The legislator made such an assessment when, on the one hand, it restricted the general obligation to testify under the fifth sentence of § 53.1 of the Code for members of the media as well as the possibility of seizing objects in the possession of journalists or in editorial offices (first sentence of § 97.5 of the Code) and, on the other hand, allowed seizures in cases where the witness or the object seized is involved in criminal acts (second sentence of § 97.5, third sentence of 97.2 of the Code). In so doing, the legislator struck a balance that is acceptable in principle, between protecting the free press on the one hand and the legitimate state interest in a functioning criminal prosecution system on the other. The Court need not decide whether or not the legislator would have been permitted to designate the protection of the press and broadcasting in a stricter or a less strict manner.

According to the jurisprudence of the Federal Constitutional Court, however, these provisions are not exhaustive. Even in cases where the first sentence of § 97.5 of the Code does not apply, because a journalist is one of the accused, the second sentence of Article 5.1 of the Basic Law remains relevant for interpreting and applying the

rules of criminal procedure on searches and seizures in editorial offices or those that affect journalists.

In 2012, the legislator decided that, subject to § 353b.3a of the Code of Criminal Law, aiding and abetting breaches of secrecy would cease to be a criminal offence. Incitement, aiding and abetting before the fact and acts of aiding and abetting that go beyond receiving and publishing the information, would remain subject to penal sanction; these exceptions would include paying money for information, obtained in an official function. Giving due regard to the second sentence of Article 5.1 of the Basic Law, however, this rule cannot apply in cases in which searches and seizures are not based on a specific suspicion against the affected member of the press, but rather serve the primary or exclusive purpose of investigating the informant. Searches require adequate factual reasons for believing that a crime has been committed which would override the protection against seizures enshrined in the first sentence of § 97.5 of the Code. General suspicions that official information might have been forwarded to the press do not satisfy the constitutional requirements.

b. In this case, the investigative authorities were primarily concerned with finding incriminating evidence against an informant within the police. The police believed that the informant had been paid for providing information on impending police measures. However, the connection made by the police between the informant and the applicants was based on mere speculation; there are no adequate factual reasons to believe that the applicants committed a crime that would eliminate the protection against seizures.

Although there are indications that the informant had forwarded official secrets to journalists, because of the informant protection enshrined in the second sentence of Article 5.1 of the Basic Law, the mere interest of the investigative authorities in learning of these facts does not justify a search in the editorial offices of a press organ, in the absence of any indication that the organ itself had committed criminal acts.

#### *Languages:*

German, English press release available on the Court’s website.



*Identification:* GER-2015-2-017

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 14.07.2015 / **e)** 1 BvR 1127/14 / **f)** / **g)** / **h)** *Europäische Grundrechte-Zeitschrift* 2015, 618-620; *Neue Juristische Woche-Spezial* 2015, 633; *Zeitschrift für die Anwaltspraxis* EN-no. 846/2015; CODICES (German).

*Keywords of the systematic thesaurus:*

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

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

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

*Keywords of the alphabetical index:*

Damage, compensation, non-economic loss / Detainee, treatment, conditions.

*Headnotes:*

Human rights violations do not always require pecuniary compensation; the nature of compensation depends on the significance and the scope of the interference, the cause, the motives of those involved and the degree of fault.

The human dignity of detainees is relevant both in allocating and designing detention cells (cf. Federal Constitutional Court, 2 BvR 2029/01, 05.02.2004).

An assessment by the Berlin Constitutional Court that holding a detainee in a solitary cell with a floor space of 5.25 m<sup>2</sup> for between fifteen and almost twenty-one hours a day for approximately three months violates his or her human dignity, does not satisfy constitutional concerns. The same applies to the court's decision not to uphold a public liability claim for the two-week transitional period, due to lack of fault on the defendant's part.

*Summary:*

I. The applicant in this matter was detained between 9 June 2009 and 23 November 2009 in a solitary cell with a floor space of 5.25 m<sup>2</sup> in which the toilet was not separate from the rest of the room. In a comparable case, in an order published on 5 November 2009, the Berlin Constitutional Court found a violation of human dignity. In the challenged judgment, the Higher Regional Court dismissed the

applicant's action for damages, resolving that in order to assess how to end the conditions of detention in the correctional facility, which violated human dignity and affected many people, a two-week transitional period until 19 November 2009 should be allowed. Exceeding that transitional period to a relatively small extent did not oblige the state to provide pecuniary compensation. By finding that the circumstances of detention violated human dignity, the court had already taken appropriate account of the applicant's recognised legal interest in bringing an action.

The applicant lodged a constitutional complaint, asserting that his human dignity (Article 1.1 of the Basic Law) in conjunction with the principle of rule of law (Article 20.3 of the Basic Law), which together formed the basis of a claim to compensation, had been violated.

II. The Federal Constitutional Court decided that the constitutional complaint was partly successful, for the reasons outlined below.

The Berlin Higher Regional Court concluded that, prior to the publication of the decision by the Berlin Constitutional Court on 5 November 2009 and, beyond that, until the two-week transitional period had expired, there was no fault on the part of the responsible office holder. This remained within the limits of the regular courts' leeway in applying the law. The Berlin Higher Regional Court's assessment was tenable to the extent that the court found that it was not easy to determine what specific size of a detention cell violated human dignity, and that particularly with regard to solitary cells, this point of law had neither been clarified by the courts nor conclusively dealt with by legal doctrine.

The Federal Constitutional Court based its own assessment on the fact that while the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter, "CPT") considered it desirable to provide solitary cells of a floor space of at least 7 m<sup>2</sup> if they were meant to be used for more than a few hours, the CPT also explicitly stated that this did not constitute a strict minimum standard, but depended on the situation at hand (CPT-Standards, CPT/Inf/E(2002)1 – Rev. 2010, paragraph 43). In addition, the Federal Constitutional Court took into account that, at the relevant time of the proceedings, the European Court of Human Rights had considered a floor space of 4 m<sup>2</sup> per detainee to be an appropriate guideline with regard to Article 3 ECHR (cf. European Court of Human Rights, *Testa v. Croatia*, no. 20877/04, 12.07.2007), a decision that the Federal Court of Justice had cited in an order to which the Berlin Higher Regional Court had referred in its decision.

However, the Berlin Higher Regional Court's judgment could not be upheld with regard to the period between 20 November 2009 and 23 November 2009, after the transitional period had expired. The Higher Regional Court's considerations, which led to the applicant's public liability claim for deprivation of liberty in breach of human dignity being denied, paid insufficient heed to human dignity as a fundamental right under Article 1.1 in conjunction with Article 20.3 of the Basic Law as a basis for compensation according to the rule of law that exists in the form of public liability claims. The Federal Constitutional Court had already decided that the state mandate of protection inherent to human dignity or, respectively, the general right of personality requires a claim for compensation for intangible damages, since otherwise the legal protection of the right of personality would wither away. While the compensation required by the rule of law does not necessarily entail granting a claim to pecuniary damages, in this case, the Berlin Higher Regional Court denied such a claim in a way that was unacceptable under constitutional law.

The Berlin Constitutional Court pointed out that, in taking into account all relevant factors, detaining a prisoner in a solitary cell with an area of 5.25 m<sup>2</sup> and locking him up for between 15 and 21 hours a day for about three months violated his human dignity. This constituted an assessment that was not objectionable under federal constitutional law. In this regard, however, the Berlin Constitutional Court also held that, in large detention facilities, it was not possible to establish conditions respecting human dignity overnight and that therefore, a transitional period of two weeks might be tolerated. Against this backdrop, it remained within the limits of the regular courts' leeway in applying the law to deny a public liability claim during the transitional period by not finding fault on the part of the responsible office holders. In contrast, continuing detention after the transitional period obviously constituted an act committed with fault, triggering public liability.

#### *Supplementary information:*

Legal norms referred to:

- Article 1.1 in conjunction with Article 20.3 of the Basic Law.

#### *Cross-references:*

- CPT-Standards, CPT/Inf/E(2002)1 – Rev. 2010, paragraph 43.

Federal Constitutional Court:

- 2 BvR 2029/01, 05.02.2004, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest – BVerfGE) 109, 133 (151), *Bulletin* 2004/1 [GER 2004-1-001].

European Court of Human Rights:

- *Testa v. Croatia*, no. 20877/04, 12.07.2007.

#### *Languages:*

German, English press release available on the Court's website.



#### *Identification:* GER-2015-2-018

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 15.07.2015 / **e)** 2 BvE 4/12 / **f)** Concealed Funding of Political Parties / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Zeitschrift für die Anwaltspraxis* EN-no. 646/2015; CODICES (German).

#### *Keywords of the systematic thesaurus:*

4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing**.  
5.2 Fundamental Rights – **Equality**.

#### *Keywords of the alphabetical index:*

Political party, equal opportunities / Political party, concealed funding / Public funds, awarded to political parties / Public funds, allocated by the budget legislator.

#### *Headnotes:*

The right of political parties to equal opportunities may be affected by the allocation of state funds. Awarding public funds directly to political parties always impacts their possibilities of engaging in the political process. The same cannot simply be assumed if the funds are awarded to third parties – even if the purpose of the award has political features. In such cases the applicant needs to show

in the *Organstreit* proceedings that the allocation of the funds leads to an interference with its right to equal opportunities.

If the allocation is based on a statutory provision, the applicant must bring proceedings within the time limit imposed by § 64.3 of the Federal Constitutional Court Act.

Should funds allocated by the budget legislator be used in violation of their purpose, one has to differentiate between approval of the funds and their use by the beneficiary. Not every use of funds in violation of their purpose means that the budget legislator, by approving them, violated the right of political parties to equal opportunities. Instead, such misuse must be attributable to the budget legislator. This is the case if the budget legislator awarded excessive funds or if it failed to take sufficient precautions for preventing the funds to be used in violation of their purpose.

#### Summary:

I. The applicant in the *Organstreit* proceedings is the Ecological-Democratic Party. It challenged the fact that the 2012 budget allocated funds to parliamentary groups in the Parliament (*Bundestag*) (EUR 80.835 million), to Members of Parliament in order to pay for employees (EUR 151.823 million) as well as to party-affiliated foundations (EUR 97.958 million). In addition, it criticised the absence of procedures for approval and oversight to prevent abuse of state grants by the beneficiaries. For these reasons, it asserted a violation of the right to equal opportunities in the political process (Article 21.1 of the Basic Law in conjunction with Article 3.1 of the Basic Law) to the detriment of the political parties not represented in the German Bundestag.

II. The Federal Constitutional Court found the application to be inadmissible, basing its decision on the following considerations:

1. An application in *Organstreit* proceedings has to meet the requirements set by law.

The applicant is entitled to claim a violation of the right to equal opportunities in the political process under Article 21.1 of the Basic Law in conjunction with Article 3.1 of the Basic Law. This right constitutes an indispensable element of the free and open process in which the people form opinions and reach decisions as envisaged by the Basic Law. It is closely related to the principles of generality and equality of elections (first sentence of Article 38.1 of the Basic Law); therefore, it must be understood in a strictly

formal sense and imposes particularly strict limitations on the legislator's discretion. In particular, the state must not distort existing competition in the political arena.

2. The applicant's submissions fail to satisfy the admissibility requirements.

a. Regarding the amount approved for parliamentary groups in Parliament by the 2012 budget law, the applicant has not sufficiently shown a violation of its right to equal opportunities.

aa. The relevant provisions of the Members of Parliament Act (hereinafter, the "Act") were enacted in 1994. The applicant would have had to challenge the provisions within the time limit imposed by § 64.3 of the Federal Constitutional Court Act. This finding is not altered by the fact that the applicant expressly does not challenge the provisions of the Act but those of the 2012 Budget Act. The respondent is obliged to award the parliamentary groups the funds they are due under the Act. The substantive existence of this obligation can thus no longer be questioned.

bb. The applicant's submissions do not show that parliamentary groups were awarded excessive amounts of funds that would have permitted their misuse as he failed to compare the amount of funds necessary for fulfilling the tasks of the parliamentary groups with the actual amount of funds awarded to them.

cc. It already appears doubtful whether, based on the applicant's submissions, one can assume that noticeable amounts of the funds awarded to the parliamentary groups in Parliament by the 2012 federal budget were misused for funding of political parties in violation of the Constitution. Furthermore, the applicant ignores the fact that the parliamentary groups, as opposed to the respondent, decide upon the use of the funds on their own.

In any event, the applicant has not shown that the respondent, by failing to exercise appropriate fore- and oversight, permitted misuse of the funds awarded to parliamentary groups. Considering the relevant statutory framework, i.e. review by the Federal Auditor's Office, there appears to be no considerable deficit concerning oversight and no structural deficit regarding execution.

b. Nor has the applicant sufficiently shown that its right to equal opportunities was violated by the allocation of funds for personal assistants of Members of Parliament by the 2012 federal budget.



aa. The first sentence of § 12.3 of the Act serves as basis for reimbursing Members of Parliament for employment expenses. This provision was introduced to the Act in 1995. Because the time limit imposed by § 64.3 of the Federal Constitutional Court Act has expired, the applicant is barred from bringing any challenges based on the existence of this legal entitlement.

bb. Yet, the first sentence of § 12.3 of the Act establishes a right to reimbursement only for mandate-related expenses, not for expenses for party work or campaign efforts. However, the applicant failed to show any misuse of funds that is attributable to the respondent in a way that justifies regarding the mere approval of the funds in the federal budget of 2012 as an interference with the applicant's right to equal opportunities in the political process.

It is doubtful whether the applicant sufficiently showed misuse of funds awarded for employees of Members of Parliament by the 2012 federal budget

In any event, the applicant has not shown that the respondent, by failing to exercise appropriate fore-and oversight, permitted such misuse of these funds. Considering the existing statutory provisions, it would have had to show that the respondent did in fact fail to exercise sufficient oversight.

c. The applicant's submissions concerning the general grants to political foundations also do not establish the possibility of a violation of the applicant's right to equal opportunities. The Federal Constitutional Court rejected the notion that approval of general grants to party-affiliated foundations can violate the right to equal opportunities under Article 21.1 of the Basic Law as early as in 1986 (cf. *Entscheidungen des Bundesverfassungsgerichts* (Official Digest – *BVerfGE*) 73, 1). The applicant's submissions provide no reasons for why the Court should deviate from this jurisprudence.

d. The second application, which aims at ordering the respondent to institute a specific procedure for approval and oversight which will prevent misuse of state funds by the beneficiaries, is also inadmissible for the sole reason that for years the applicant tolerated the current practice of approval and oversight and thereby missed the time limit imposed by § 64.3 of the Federal Constitutional Court Act.

#### Cross-references:

- 2 BvR 5/83 of 14.07.1986, *BVerfGE* 73,1.

#### Languages:

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



#### Identification: GER-2015-2-019

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 21.07.2015 / e) 1 BvF 2/13 / f) Childcare allowance / g) to be published in the Federal Constitutional Court's Official Digest / h) *Neue Juristische Wochenschrift* 2015, 2399-2405; *Zeitschrift für das gesamte Familienrecht* 2015, 1459-1465; CODICES (German).

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

Childcare allowance / Public welfare / Federal territory, equal living conditions.

#### Headnotes:

1. The concept of public welfare within the meaning of Article 74.1.7 of the Basic Law requires that a special situation of at least potential need exists, to which the legislator reacts. In this context, it is sufficient if a situation of need (one that is accompanied by extraordinary burdens) exists – even if only designated by type and not necessarily acute – and the act seeks to eliminate or ease this need.
2. As a rule, if the federal legislator wishes to install different types of public welfare benefits, each benefit must itself fulfil the prerequisites of Article 72.2 of the Basic Law. The Act on Childcare Allowance does not fulfil these prerequisites. In particular, it is not necessary for establishing equal living conditions in the federal territory. This would be the case if living conditions in the *Länder* had taken a drastic diverging development jeopardising the social

structure of the federal state, or if such a development was evidently about to occur.

3. A federal instrument of public welfare necessity within the meaning of Article 72.2 of the Basic Law only extends to such other federal funding instruments by themselves not necessary under Article 72.2 of the Basic Law with which it has an objective inseparable connection.

### Summary:

I. The Federal Constitutional Court had to decide in abstract judicial review proceedings on the compliance of certain provisions of the Federal Parental Benefit and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz*) with the Basic Law. These provisions essentially stipulate that parents, regardless of their income, are entitled to childcare allowance in the amount of 150 Euros per month from the 15<sup>th</sup> to the 36<sup>th</sup> month of their child's life, provided that they neither use publicly funded day care facilities nor child day care services for the child.

II. The Federal Constitutional Court found these particular provisions to be null and void as, although they can be attributed to the field of public welfare pursuant to Article 74.1.7 of the Basic Law to which concurrent legislative competence applies, the prerequisites of Article 72.2 of the Basic Law permitting the Federation to exercise this competence are not fulfilled.

The decision is based on the following considerations:

1. The provisions on childcare allowance are to be attributed to the field of public welfare within the meaning of Article 74.1.7 of the Basic Law. No other legal basis applies.

2. However, the prerequisites of Article 72.2 of the Basic Law are not fulfilled. According to that provision, the Federation is competent to pass legislation in the field of Article 74.1.7 of the Basic Law only if and to the extent that a federal regulation is needed to establish equal living conditions in the federal territory or to preserve legal and economic unity in the interest of the entire country.

- a. The regulations on childcare allowance are not necessary for establishing equal living conditions in the federal territory.

- aa. This would be the case if living conditions in the *Länder* had taken a drastic diverging development jeopardising the social structure of the federal state or if such a development was evidently about to occur.

- bb. The provisions on uniform childcare allowance throughout the Federal Republic do not meet these requirements. Federal childcare allowance could not achieve a nationwide equal funding standard for families with small children anyway, because there is no provision requiring that the allowance already granted by some *Länder* be considered for payment of federal childcare allowance.

Nor does a potential necessity of childcare allowance follow from the argument that there must be an alternative to childcare provided by third parties. The concept of equal living conditions seeks to compensate disadvantages suffered by residents of individual *Länder* in order to prevent the social structure of the federal state from being jeopardised; however, it does not serve to compensate other inequalities.

Because childcare allowance is not designed as compensatory benefit for cases in which small children cannot be placed in a childcare facility, the still existing considerable differences between the *Länder* regarding availability of public and private offers do not render childcare allowance necessary for establishing equal living conditions. However, most importantly, there is an enforceable right of access to publicly funded childcare facilities that is not subject to availability of slots.

- b. Childcare allowance is not necessary to preserve legal and economic unity.

- aa. The presumption that the challenged federal regulation is necessary to preserve legal unity is already precluded by the fact that it allows additional comparable benefits to exist in individual *Länder*. Nor is federal childcare allowance necessary to preserve economic unity, since differing regulations in the *Länder* or inactivity of the *Länder* in this field have not led to visible considerable disadvantages for the overall economy.

- bb. Nor can considerations stipulated in previous legislative proceedings be applied to childcare allowance. Firstly, childcare allowance does not encourage parents' participation in the labour market and is therefore, if one considers its amount, neither intended nor appropriate to finance private, not publicly funded childcare. Secondly, childcare allowance in the amount of 150 Euros per month clearly cannot have a measurable effect on parents' decisions to interrupt employment.

c. Also the argument that childcare allowance in combination with the Childcare Funding Act from the viewpoint of legal competence, could be regarded as a master plan, does not justify a necessity of the challenged provisions under Article 72.2 of the Basic Law.

aa. As a rule, if the federal legislator wishes to introduce different types of public welfare benefits, each benefit must itself fulfil the prerequisites of Article 72.2 of the Basic Law. The case at hand allows for no exception. The challenged provisions are not so inseparably connected to other federal funding instruments that the necessity of the latter would by way of exception extend to the challenged provisions.

bb. Nothing else follows from the federal legislator's prerogative concerning the prerequisites of Article 72.2 of the Basic Law. It particularly concerns estimation and evaluation of factual developments and also extends to a prerogative for conceiving and designing laws that includes linking independent welfare instruments. However, this does not completely exempt the question of whether a regulation within the scope of an overall federal regulatory concept is necessary from constitutional review.

#### *Languages:*

German, English (translation of the decision is being prepared by the Court); English press release available on the Court's website.



#### *Identification:* GER-2015-2-020

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 27.07.2015 / **e)** 1 BvR 1452/13 / **f)** / **g)** / **h)** *Europäische Grundrechte-Zeitschrift* 2015, 629-631; *Kommunikation & Recht* 2015, 794-796; CODICES (German).

#### *Keywords of the systematic thesaurus:*

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

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

#### *Keywords of the alphabetical index:*

Information, access, limits / Information, obligation to provide.

#### *Headnotes:*

For the press, access to information, which is, in principle, unrestricted, is essential to fulfil its function in a liberal democracy. Therefore, the state is subject to obligations to disclose information.

The right of the press to information, which is currently only regulated at the federal state level, does not encompass the right to have information generated and procured, but only guarantees access to available official information and thus concerns facts, the knowledge of which the authorities possess. The freedom of information only provides access to existing information.

The question of whether federal states, based on the legislative competence to regulate press law, may also create obligations to disclose information that is incumbent upon federal authorities can remain open. This also applies to the legal basis and potential scope of a right to disclosure. Freedom of the press is not violated if the regular courts accord members of the press a right to disclosure that does not fall short of the content of rights to disclosure provided under the federal state press laws.

#### *Summary:*

I. The applicant, a journalist, applied in November 2010 for access to information on the Nazi past of official employees and unofficial collaborators of the German Foreign Intelligence Service. In December 2010, the German Foreign Intelligence Service informed him that it would take longer to process the request, whereupon the applicant filed an action based on administrative inaction, asserting a right to disclosure under the Federal Archives Act, the Bavarian Press Act, the Berlin Press Act and under Article 5 of the Basic Law. The Federal Administrative Court, as court of last resort, dismissed this action on the basis that due to the delimitation of legislative competences under the Basic Law, the applicant could not base his right to disclosure *vis-à-vis* a federal authority on federal state press acts. According to that Court, the specific relief sought by the applicant did not meet the requirements of the right to information for the press derived directly from the Constitution (the second sentence of Article 5.1 of the Basic Law), which could have constituted a legal basis for the action.

The applicant challenged this decision via a constitutional complaint asserting a violation of his fundamental rights under the first and second sentence of Article 5.1 of the Basic Law.

II. The Federal Constitutional Court decided not to admit the constitutional complaint for decision, because there was no violation of fundamental rights, on the basis that the Court did not have to decide whether federal states, based on their powers to regulate press law, may also create obligations to disclose information that is incumbent upon federal authorities or whether such regulation is reserved to the federal legislator. The Court could also leave undecided the issue of whether a right to information can be derived directly from the Constitution, relying on the second sentence of Article 5.1 of the Basic Law, and how extensive such a right might be. This was due to the fact that there is no indication of a violation of the freedom of the press, provided that members of the press are accorded a right to disclosure that does not fall short of the content of rights to disclosure provided under the federal state press laws. If this enables the regular courts to successfully counter the effects the regulation of rights to disclosure *vis-à-vis* federal authorities have, that are not valid according to the Federal Administrative Court, no violation of fundamental rights has occurred and admission of the constitutional complaint for decision by the Federal Constitutional Court is not warranted.

This was the case here. The rights to information under the federal state press laws only provide access to information that the relevant public entities actually possess (European Court of Human Rights, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14.04.2009, § 36). The legal bases for disclosure of information at federal state level, against which the applicant did not raise any constitutional objections, do not encompass a right to have information and other material generated and procured. Within its scope of application, the freedom of information under the Freedom of Information Act only provides access to information actually available.

In contrast, according to the factual findings of the regular courts that are not objectionable under constitutional law, the applicant asked for information to be procured that the Federal Foreign Intelligence Office did not itself possess. The main part of the information requested was to be generated by an Independent Commission of Historians, which was specifically set up to investigate the events at issue. If the courts do not grant such an action directed at procuring information, they do not obviously fail to recognise the significance of fundamental rights in a given case.

### *Supplementary information:*

Legal norms referred to:

- Article 5.1 of the Basic Law.

### *Cross-references:*

European Court of Human Rights:

- *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14.04.2009.

### *Languages:*

German.



# Hungary

## Constitutional Court

### Important decisions

*Identification:* HUN-2015-2-001

a) Hungary / b) Constitutional Court / c) / d) 02.02.2015 / e) 2/2015 / f) On retail loan contracts / g) / h).

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**  
 3.10 General Principles – **Certainty of the law.**  
 5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection.**

*Keywords of the alphabetical index:*

Contract, loan, foreign currency.

*Headnotes:*

Legislation on retail loan contracts that allows banks to unilaterally raise interests on foreign currency-denominated loans, laid the groundwork for requiring lenders to compensate retail borrowers for making unilateral changes to contracts and for using exchange rate margins when calculating repayments for foreign currency-denominated loans.

*Summary:*

I. The Metropolitan Appeals Court had submitted a request to annul parts of Act XXXVIII of 2014 on the settlement of certain questions related to the Uniformity Ruling of the Curia on financial institutions consumer loan contracts (hereinafter, the “Settlement Act”) in connection with court cases involving four banks: K&H, KDB Bank, Porsche Bank and evoBank. The request was made based on the argument that the Settlement Act violated the principles of the separation of power and legal certainty.

The Settlement Act requires lenders (banks) to compensate retail clients for using exchange rate margins when calculating repayments for foreign currency-denominated loans and for making unilateral changes to both foreign currency-denominated and foreign loan contracts. Banks were allowed legal

recourse regarding the unilateral changes to contracts. They had to provide evidence that the disputed contractual terms were fair, but none succeeded.

II. The Constitutional Court rejected the request of the Metropolitan Appeals Court to annul some parts of the Settlement Act.

The Constitutional Court said it had rejected constitutional complaints regarding the provisions in borrowers’ relief legislation prohibiting unilateral changes to loan contracts already in its Decision no. 34/2014. It added that legal certainty requires certain standards of clarity and the predictable operation of legal institutions.

The Settlement Act laid the groundwork for requiring lenders to compensate retail borrowers for making unilateral changes to contracts and for using exchange rate margins when calculating repayments for foreign currency-denominated loans. In Decision no. 34/2014, the Constitutional Court ruled that prohibiting unilateral changes to loan contracts did not go against the Fundamental Law.

In its current decision, the Court reviewed the petition mainly from the point of view of separation of powers. It emphasised that by naming the State as a defendant in the trial, the legislator did not prefer it as a party to the trial, but only introduced special procedures in defence of consumer interest:

What happened was not that the state abused its power to create a situation whereby the opposing party is in a disadvantageous position as against the other party, but that the financial institutions had to initiate legal proceedings against the state to overturn the assumption.

Thus, according to the justification, the State did not abuse its power and did not create a situation where the other party to the trial was at a disadvantage.

III. Judges Ágnes Czine and Tamás Sulyok attached concurring opinions to the judgment, judges László Kiss, Milós Lévai, Péter Paczolay and Béla Pokol attached separate opinions to the judgment.

*Cross-references:*

Constitutional Court:

- no. 34/2014, 14.11.2014, *Bulletin* 2014/3 [HUN-2014-3-010].

*Languages:*

Hungarian.

*Identification:* HUN-2015-2-002

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 13.02.2015 / **e)** 4/2015 / **f)** On the publicity of the Foreign Ministry's personnel files / **g)** *Magyar Közlöny* (Official Gazette), 2015/15 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

File, access / File, personnel / Information, access / Judicial review, administrative act / Secrecy, administrative.

*Headnotes:*

Article VI.2 of the Fundamental Law requires a new legal framework, which will make the operations of the state bureaucracy more transparent by guaranteeing a proceeding in which the court can review the merits of an administrative decision declaring certain public information or personnel information, that should be available for public inspection, as classified.

*Summary:*

I. In the autumn of 2012 Atlatzso.hu, a watchdog NGO and online newspaper for investigative journalism had approached the Foreign Affairs Ministry to publish its personnel files, since according to Atlatzso.hu the ministry had failed to meet its legal obligations to disclose the information. The Ministry refused the request, citing diplomatic and national security reasons.

Atlatzso.hu turned to the court. The first instance court ruling stated that the Ministry's concerns were unfounded and ruled in favour of the online platform requiring to disclose data of the Hungarian Foreign Ministry's employee which cannot be considered confidential. In response to this, the Ministry declared all personnel information as classified.

After this move, the appeals court held it had no jurisdiction over a Ministry's autonomy in classifying its own data. In 2013, Atlatzto.hu took the matter to the Constitutional Court. (Today the Ministry of Foreign Affairs and Trade is the successor to the Ministry that was operating in 2012.)

II. According to the Constitutional Court's ruling, the appeals court was correct in saying that it could not investigate the legitimacy of a ministry declaring its materials as classified. However, the Court agreed with the petitioner's claim that this court practice was in breach of the right of access to public information, ensured by Article VI.2 of the Fundamental Law. The Constitutional Court held that a new legal framework is required, which will make the operations of the state bureaucracy more transparent by guaranteeing a proceeding in which the court can review the merits of an administrative decision declaring certain public information or personnel information, that should be available for public inspection (the name, the citizenship of the public servant, his or her task, promotion, etc.), as classified. The Court gave Parliament until the end of May to remedy the situation and to adopt new legislation.

*Languages:*

Hungarian.

*Identification:* HUN-2015-2-003

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 05.06.2015 / **e)** 16/2015 / **f)** On the preliminary review of the Act on Managing State Land / **g)** *Magyar Közlöny* (Official Gazette), 2015/78 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Management right, state-owned land / Environment, protected zone / Environment, protection.

*Headnotes:*

The Act on Managing State Land, which would have transferred management rights for state-owned land to the National Land Management Fund, is unconstitutional. The transfer of competences would have affected regulations reserved to cardinal Acts, meaning that a two-third majority in parliament would have been necessary to approve these parts of the Act. The transfer of property management to the National Land Management Fund would reduce the level of environmental protection, as the Fund prioritises mainly economic aspects of managing the land as opposed to ensuring they remain protected nature reserves.

*Summary:*

I. Parliament adopted the recent amendment to the Act on Managing State Land in its session on 28 April 2015. President János Áder refused to promulgate the bill; he turned to the Constitutional Court to initiate the preliminary review of conformity with the Fundamental Law. The amended land management bill on transferring asset management rights of state-owned land, including national parks, to the National Land Management Fund was passed at the end of April, in a second vote, after it failed to gather two-thirds majority support two weeks earlier.

The President found some of the provisions of the Act adopted by Parliament to be contrary to Articles B.1, 38.1, P and XXI of the Fundamental Law. The President asked three questions in his request to the Constitutional Court: first, whether any paragraph requiring two-thirds majority support was adopted with a simple majority. Second, whether guarantees for nature protection suffered any damage under the amended Act and third, whether existing contracts are vulnerable to modification under the new Act. The Constitutional Court must respond to the President's questions within 30 days.

II. The Constitutional Court examined the challenged provisions of a recent amendment to the Act on Managing State Land for the conformity with the Fundamental Law before the promulgation of the Act.

According to the decision of the Constitutional Court, the majority of the challenged provisions were declared unconstitutional, thus the adopted bill could not be promulgated. Parliament had to hold a new debate on the Act in order to eliminate the violation of the Fundamental Law.

The Constitutional Court ruled that the recent amendment to the Act on Managing State Land concerning national parks was unconstitutional. At the same time, the Court held that the part of the Act enabling the termination of lease contracts and lease rights for certain land belonging to the National Land Management Fund, was not unconstitutional.

Parliament approved, with a simple majority at the end of April, the Act under which the land rights of national parks were put into the ownership of the National Land Management Fund and leasehold rights were terminated. The Court said that changing the approval conditions of the Act from a two-thirds majority to a simple one had been unconstitutional. The Constitutional Court declared that the challenged bill would have transferred management right for state-owned land to the National Land Management Fund, which – according to the Fundamental Law – affected regulations reserved to cardinal Acts. Therefore, a two-third majority would have been necessary to approve these parts of the Act, instead of simple majority of the Members of Parliament.

The Constitutional Court also found the transfer of property management to the National Land Management Fund to be unconstitutional, as the Fund prioritises mainly economic aspects of managing the land as opposed to ensuring they remain protected nature reserves. The Constitutional Court declared that, although the organisational structure can be changed, the already achieved legal level of the environmental protection shall not be reduced. As the challenged bill would have resulted in this, it violated the Fundamental Law, so it was declared unconstitutional.

However, the Constitutional Court declared, that – contrary to the petition of the President of the Republic – those parts of the challenged bill which increase the deadline of the expropriation and change the person who requires the expropriation were not subject to the two-thirds majority requirement.

In addition, the Constitutional Court did not find unconstitutional that the bill enabled the termination of lease contracts and the ceasing of lease rights for certain lands belonging to the National Land Management Fund.

III. Judges Egon Dienes-Oehm, Imre Juhász and István Stumpf attached concurring opinion, and judges László Kiss, Miklós Lévay, László Salamon and András Varga Zs. attached dissenting opinion to the decision.

*Languages:*

Hungarian.



*Identification:* HUN-2015-2-004

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 05.06.2015 / **e)** 17/2015 / **f)** On the Agricultural-Land Committees / **g)** *Magyar Közlöny* (Official Gazette), 2015/78 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Agricultural, land / Decision, reason / Land committees, procedure / Land, transfer, lease, sale.

*Headnotes:*

The power of agricultural-land committees to prevent land sale agreements is not contrary to the right to property. However, the agricultural-land committees should provide reasoning in their decisions.

*Summary:*

I. Several judges initiated the constitutional review of some provisions of Act CXXII of 2013 on Land Transfer (hereinafter, “Land Transfer Act”). According to the Land Transfer Act, the aim of the functioning of the agricultural-land committees is to ensure the transparency and competitiveness of the transfer of local lands, and to prevent speculative land acquisition. The Land Transfer Act prescribes that the land-sale agreements shall be approved by an

authority, namely the local agricultural-land committee, which represents the interests of the local farmers. In connection with this procedure, several judges turned to the Constitutional Court requiring the examination of provisions concerning the proceedings of the agricultural-land committees, which they deemed to be unconstitutional. In the judges’ view, the provisions on the proceedings of the agricultural-land committees violate the right to a fair trial and legal remedy, since one cannot access to the court and there is no legal remedy available against the resolution of the agricultural-land committees.

II. The Constitutional Court decided – and announced in public – on the judicial initiatives concerning the provisions on agricultural-land committees. The Constitutional Court annulled some provisions concerning the resolution of agricultural-land committees and declared constitutional requirements concerning the proceeding of the agricultural-land committee.

The Constitutional Court held that the power of the agricultural-land committees to prevent land-sale agreements is not contrary to the right to property, because the Fundamental Law allows cardinal Acts to prescribe the limits and the conditions of the acquisition and utilisation of agricultural lands. However, the Constitutional Court declared – as a constitutional requirement – that the agricultural-land committee should enclose a reasoning in its decisions.

Following the decision of the Constitutional Court, the law-maker has no legislative obligation. The provisions declared unconstitutional cannot be applied in the original cases of the judicial initiatives as well as in any other cases with the same subject.

III. Judges Imre Juhász and László Salamon attached concurring opinions and Judges Ágnes Czine, László Kiss and Miklós Lévay attached a dissenting opinion to the decision.

*Languages:*

Hungarian.





# Ireland

## Supreme Court

### Important decisions

*Identification:* IRL-2015-2-003

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 22.06.2015 / **e)** SC 398/2012 / **f)** Director of Public Prosecutions v. J.C. (no. 2) / **g)** [2015] IESC 53 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.4.13 Constitutional Justice – Procedure – **Re-opening of hearing.**

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.**

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

*Keywords of the alphabetical index:*

Case, criminal, procedure / Acquittal / Evidence, exclusionary rule / Retrial / Justice interests.

*Headnotes:*

It would not be in the interests of justice to direct a retrial in a case, that: had changed the law concerning the exclusionary rule and where a retrial would be subject to new legal principles.

*Summary:*

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, arose following an appeal by the Director of Public Prosecutions under Section 23 of the Criminal Procedure Act 2010, which provides for the ordering of a retrial by the Supreme Court where the Circuit Court erroneously excludes admissible evidence. In this case police entered the home of the

respondent on foot of a search warrant issued under Section 29 of the Offences Against the State Act 1939, a provision which the Supreme Court later found to be unconstitutional. The respondent made incriminating statements while under arrest and the trial judge excluded the evidence in accordance with the exclusionary rule set out in *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 IR 110. On 15 April 2015, the Supreme Court gave its decision on (a) the scope of the appeals which may be brought to the Supreme Court by the Director of Public Prosecutions under Section 23 of the Criminal Procedure Act 2010 and (b) the exclusionary rule. A majority of the Supreme Court held that an appeal in relation to the exclusionary rule of evidence could be brought under Section 23 of the Act of 2010. The Supreme Court considered the issue of the exclusion of unconstitutionally obtained evidence from a trial relating to search warrants and decided that *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 IR 110, which represented the law in this area, was wrongly decided. The Court set out a new test and decided that the evidence in the present case could be admitted under the new test.

This decision relates to a single issue left over until the determination of the above issues, namely, the interpretation and application of Section 23.11 and 23.12 of the Criminal Procedure Act 2010 in relation to whether in the circumstances of the case, the acquittal of the respondent should be quashed and a retrial ordered. Section 23 of the Criminal Procedure Act 2010 provides that, on hearing an appeal by the Director of Public Prosecutions or the Attorney General from an acquittal under that provision, the Supreme Court may quash the acquittal or reverse the decision of the Court of Criminal Appeal and order the person to be retried for the offence if satisfied that certain requirements are met and that, having regard to certain matters, it is in all the circumstances in the interests of justice to do so. The matters to which the Supreme Court must have regard in determining whether to quash the acquittal or reverse the decision, are:

- a. whether or not it is likely that any re-trial could be conducted fairly;
- b. the amount of time that has passed since the act or omission that gave rise to the indictment;
- c. the interest of any victim of the offence concerned; and
- d. any other matter which it considers relevant.

While the Director of Public Prosecution has been successful in the appeal on the substantive issues, the Court now had to decide whether to quash the acquittal and order a retrial. A central issue was the consideration of “the interests of justice.” The

Supreme Court found that, in considering “the interests of justice”, the list of factors in Section 23.12 is not exhaustive as Section 23.12.d refers to “any other matters which [the Court] considers relevant to the appeal.” The Court stated that although Section 23 of the Criminal Procedure Act 2010 alters the rule regarding double jeopardy, such principle is a factor to be considered. In relation to first factor to be considered under Section 23.12 of the Act of 2010, the Court noted that the jurisprudence concerning the prohibition of trials due to delay was not relevant and that this was a “time” issue to be considered by the Court. The Court noted that four years had elapsed since the alleged offences and three years since the acquittal of the applicant. Regarding the interests of any victim concerned, the Supreme Court noted that, while the offence of robbery is grave, the circumstances of the offence may vary. There was nothing before the Court in relation to the impact on the victims in this case. The Court was of the view that another significant factor was that the Court had overturned a previously binding precedent, *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 IR 110, which had represented the law for over 20 years in Ireland.

The respondent contended that the procedure under Section 34 of the Criminal Procedure Act 1967, which provides for the reference of a question of law to the Supreme Court “without prejudice” to the verdict of acquittal would have been suitable for determining the issue raised in the appeal. The respondent relied on that statement of Henchy J. in *The People (DPP) v. Quilligan* (no. 2) [1989] IR 46 at page 56:

“It would be neither fair nor constitutional for the right of a person acquitted by direction to escape a retrial depended on the mode of appeal chosen by the prosecution.”

However, the Court noted that Section 23 of the Criminal Procedure enjoys a presumption of constitutionality. The respondent submitted that persons who have been acquitted at trial should not be exposed to a retrial due to the mode of appeal chosen by the prosecution. The respondent further submitted that in considering whether it is “in the interests of justice” to quash the acquittal, the appellant must demonstrate good reason, based on the circumstances, to quash the acquittal. This might include, for example, the nature of the offence, the circumstances of committal, any aggravating factors and the impact of the alleged offence of the victims.

The Court stated that it may be assumed that the respondent would receive a fair trial. However, the specific factors set out in the Criminal Procedure Act 2010 and all the circumstances of the case should be

considered by the Court when exercising its statutory discretion. The Supreme Court decided, in the interests of justice, to affirm the acquittal of the respondent and refused to order a retrial. In doing so, the Court took into account the following factors:

- i. this case had changed the law as previously stated in *The People (Director of Public Prosecutions) v. Kenny*;
- ii. if the respondent were re-tried, he would be subject to the new legal principles relating to the exclusion of evidence in search warrant cases, contrary to the situation of his earlier trial;
- iii. three years had passed since the respondent had been acquitted;
- iv. there was no specific evidence before the Court of the impact on the victims; and
- v. the fact that the appellant chose this mode of appeal should not and did not give rise automatically to a re-trial on the success of the substantive issues raised.

#### Cross-references:

Supreme Court:

- *The People (Director of Public Prosecutions) v. Kenny*, [1990] 2 IR 110.

#### Languages:

English.



#### Identification: IRL-2015-2-004

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 23.06.2015 / **e)** SC 402/2012, 403/2012 / **f)** Sivsivadze, Arabuli, Toidze (Minors suing by their mother and next friend) v. Minister for Justice and Equality, Attorney General and Ireland / **g)** [2015] IESC 53 / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

- 3.1 General Principles – **Sovereignty**.
- 3.4 General Principles – **Separation of powers**.
- 3.16 General Principles – **Proportionality**.
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

*Keywords of the alphabetical index:*

Constitution, constitutional validity / ECHR, infringement / Family life, right / Immigration / Deportation.

*Headnotes:*

The power of the Minister for Justice and Equality under Section 3.1 of the Immigration Act 1999 to make a deportation order in respect of a non-Irish national for an indefinite period of time does not breach the principle of proportionality under the Constitution or the European Convention on Human Rights.

*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 applicants against the decision of the High Court refusing their application for (a) a declaration that Section 3.1 of the Immigration Act 1999 is unconstitutional and (b) a declaration pursuant to Section 3.1 of the European Convention on Human Rights Act 2003, as amended that Section 3.1 of the Act of 1999 is incompatible with Ireland's obligations under the European Convention on Human Rights.

The first and fourth applicants, who were Georgian nationals, were wife and husband and were the parents of the second and third applicants. In 2001, the Minister for Justice had made a deportation order in respect of the fourth applicant under Section 3.1 of the Immigration Act 1999, which provides:

“Subject to the provisions of Section 5 (prohibition of refoulement) of the Refugee Act, 1996, and the subsequent provisions of this Section, the Minister may by order (in this Act referred to as “a deportation order”) require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.”

The case of the applicants was a general attack on the constitutionality of Section 3.1 of the Immigration Act 1999 (the Act of 1999) or Section 2.1 in conjunction with Section 3.11 and not any individual decision of the Minister. The applicants alleged that the requirement in Section 3.1 that a deportation order have effect for an indefinite period of time

without any limitation meant that every deportation order actually or potentially constituted a disproportionate interference with the right to family and family life under Article 41 of the Constitution. In addition or in the alternative, the applicant argued that Section 3.1 of the Act of 1999 was incompatible with Article 15 of the Constitution concerning the separation of powers as it amounted to an unlawful delegation of legislative powers without sufficient statement of principles and policies in the legislation conferring the power on the Minister. Alternatively, the applicants sought a declaration of incompatibility pursuant to Section 5 of the European Convention on Human Rights Act 2003 having regard to the right to respect for home and family life under Article 8 ECHR. The respondent argued that the applicants should be denied any reliefs due to an abuse by the first and fourth applicants of the asylum system and the court process. It was also submitted that Section 3.11 of the Act of 1999, which allows for the amendment or revocation by the Minister of a deportation order, did not save Section 3.2 of the Act of 1999 from unconstitutionality, as that provision was itself unconstitutional, amounting to a delegation of legislative powers prohibited by Article 15.2.1 of the Constitution, which was not qualified by any principles or policies.

II. The Supreme Court declined to dismiss the appeal on the grounds of abuse of process as the right to a family life under the Constitution and the European Convention on Human Rights was at issue and, objectively, it had not been disputed that they had been adversely affected. The Court also had regard to the rights of children.

The Supreme Court rejected the argument that the making of a deportation order constituted an administrative sanction. The Court noted that when the order was made against the fourth applicant, he did not have permission to be in the State. The making of the deportation order was simply an application of the law and the exercise of sovereign powers to protect the integrity of the borders of the State. The Court rejected the contention that Section 3.1 was unconstitutional due to the disproportionate effect on family rights. It observed that the order was not necessarily unlimited in duration, bearing in mind that it could be revoked under Section 3.11 of the Act of 1999. The Minister was obliged to act constitutionally in considering whether to revoke the order, having regard to all relevant factors, including family rights. The proportionality of an order would depend of the facts of each individual case. The Court noted that a deportation order did not deny a non-national the right to be in or remain in the State, as such a person did not have such a right. The Supreme Court held that

Section 3.11 of the Act of 1999 was not in breach of Article 15.2.1 of the Constitution concerning the separation of powers, as a decision by the Minister to make a deportation order to amend or revoke an order did not constitute a legislative act or the making of a regulation. Rather, it was an executive and administrative act to which Article 15 of the Constitution had no application.

For the same reason as the Supreme Court rejected the argument that the relevant provisions of the Act of 1999 were unconstitutional, it rejected the argument that it was incompatible with the obligations of the State under European Convention on Human Rights. The Court referred to *Kahn v. United Kingdom* [2010] 50 EHRR 47, where the European Court of Human Rights set out a range of criteria to be considered in this type of case. The Court noted that under the case-law of the European Court of Human Rights, the duration of a deportation order was only one factor among many which were relevant to the question of whether or not it was disproportionate. The Court found that there was no European Court of Human Rights case or principle under the European Convention on Human Rights from which it could be deduced that a deportation order of the type made under Section 3.1 of the Act of 1999, and which could be the subject of an application for revocation or amendment at any time, was incompatible with Ireland's obligations under the European Convention on Human Rights.

#### Cross-references:

European Court of Human Rights:

- *Kahn v. United Kingdom*, 35394/97, 12.05.2000, [2010] 50 EHRR 47.

#### Languages:

English.



#### Identification: IRL-2015-2-005

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 16.07.2015 / **e)** SC 166/2014 / **f)** P.O. and S.O. (An infant suing by his mother and next friend, P.O.) v. Minister for

Justice and Equality, Ireland and the Attorney General / **g)** [2015] IESC 53 / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**

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

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

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

#### Keywords of the alphabetical index:

Asylum, refusal, procedure / Immigration / Fair procedures / Deportation / ECHR, family life, right.

#### Headnotes:

The decision of the Minister for Justice and Equality to affirm a deportation order in respect of the appellants was not in breach of fair procedures or in violation of their right to respect for private and family life under Article 8 ECHR. However, the attention of the Minister should be drawn to the particular circumstances of this case in which real issues of ministerial discretion may arise.

#### 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 applicants against the decision of the High Court refusing their application for an order of judicial review quashing a decision made by the first respondent (hereinafter, the "Minister") on 25 February 2011 affirming a deportation orders made against the appellants on 17 May 2012. The appellants also sought an injunction restraining their deportation where a valid and unchallenged deportation order existed.

The appellants are Nigerian nationals, S.O. being a minor born in Ireland in 2006 to Nigerian parents. P.O. arrived in Ireland using a false passport in 2006, one month before giving birth to S.O. and claimed to have left Nigeria due to fear of persecution. After S.O. was born, the appellants sought a recommendation

from the Refugee Applications Commissioner (hereinafter, the "RAC") that they should be granted refugee status. The RAC refused the application and the appellants instituted judicial review proceedings against the decision, which were discontinued three years later. The Minister for Justice wrote to the applicants informing them of his decision to deport them. In September 2012, the appellants applied to the Minister under Section 3.11 of the Immigration Act 1999 for revocation of the deportation order. In February 2013, the Minister affirmed the order, giving reasons for the refusal to amend or revoke the order. The applicants were granted leave to bring judicial review proceedings in the High Court, which refused to quash the decision of the Minister on the grounds that the Minister gave reasonable consideration to the material submitted, most of which was available on file before the deportation order was made. Further, the High Court was of the view that deportation would not disproportionately affect the rights of the appellants under Article 8 ECHR. Although it would disrupt S.O.'s education, the Court noted that his father and extended family resided in Nigeria. The appellants appealed to the Supreme Court. They also applied for an injunction restraining their deportation pending the appeal. If the Supreme Court decided that the judgment of the High Court was correct, an issue arose as to whether the appellants were entitled to an injunction. The Supreme Court heard both matters together.

The applicants submitted that the Minister's decision ought to be quashed on the basis that it was reached in breach of fair procedures, because the official making the decision used deficient country of origin information and largely ignored material submitted on behalf of the applicants. It was contended that the procedures adopted by the first named respondent were unfair in that the applicants ought to have been made aware of the respondent's intention to rely on information other than that submitted by the applicant before making a decision. The appellants also submitted that the first named respondent failed to inform them of the principles, policies and guidelines in operation with regard to decision making under Section 3.11 of the Immigration Act 1999, and that such a failure invalidated the contested decision. The applicants further contended that their rights to private and family life under Article 8 ECHR was engaged and consequently, affirming the deportation would be unlawful and that there was a failure to provide a reason or rationale as to why it was considered that the private life rights of the applicants would not be engaged by the deportation.

II. The Supreme Court found that the High Court was correct in its decision to dismiss the claim for judicial review. In relation to the arguments concerning the country of origin information, the Supreme Court was of the view that the High Court judge was correct in finding that the country of origin information relied upon by the respondents was more recent than that submitted by the applicants. The Supreme Court held that the duty which falls on the Minister's officials was to ensure that all relevant up to date information available is considered fairly and "the onus is on the appellants to demonstrate that there has been some fundamental mistake or error in the consideration of that information". As to the submission that the Minister failed to inform them of the principles, policies and guidelines in operation with regard to decision making, the Supreme Court found that it would be incorrect to conclude that by reference to Section 3.1 and 3.11 of the Immigration Act 2011 alone, in operating under the regime, the Minister is at large in exercising her discretion. In making the decision, the Minister must have regard to the materials previously furnished and must then only consider new facts, materials or circumstances. Further, the Minister must operate in accordance with the principles of natural and constitutional justice and in accordance with international obligations. In the Supreme Court, MacMenamin J. observed that what "is involved in making decisions of this type is not a policy decision, but rather involves the exercise or a margin of appreciation relating to the facts of individual cases." Regarding the arguments raised under Article 8 ECHR, the Supreme Court found that the making of the deportation order would not effectively rupture family life and the evidence did not show that the ties in the contracting state were overwhelming. The Court agreed with the finding of the High Court that it had not been shown that there were insurmountable obstacles in the way of the family living in the country of origin.

MacMenamin J. noted that the issue of immigration control arose in this case and the appellants had no entitlement to remain in the State after 2010. The Court was of the view that considerations of "public order" under Article 8.2 ECHR weighed in favour of exclusion from the State. Further, the Court, referring to the words of the European Court of Human Rights in *Nunez v. Norway*, no. 55597/09, 28.06.2011, at paragraph 70, observed that family life arose in the State at a time when the appellant must have been aware that her immigration status was "precarious".

As to the application for an injunction, the Supreme Court held that the applicants had failed to establish either arguable or fair grounds to restrain their deportation. No grounds were upheld and no additional matters were relevant. A valid

unchallenged deportation order was before the Court. Therefore, it was unnecessary for the Court to consider all aspects of the decision of the Supreme Court.

MacMenamin J, in a concluding observation, requested that counsel draw the attention of the Minister to the particular circumstances of the case, namely, that S.O. had resided in Ireland for his entire life and was within the educational system of the State. MacMenamin J. noted at paragraph 33 that while it is the duty of the Court to uphold the law, it was “difficult to avoid the observation that real issues of ministerial discretion may arise in this case”.

#### Cross-references:

European Court of Human Rights:

- *Nunez v. Norway*, no. 55597/09, 28.06.2011; paragraph 70.

#### Languages:

English.



## Italy Constitutional Court

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### Important decisions

*Identification:* ITA-2015-2-002

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 14.05.2015 / **e)** 96/2015 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 23, 10.06.2015 / **h)**.

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 3.20 General Principles – **Reasonableness.**  
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**  
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Keywords of the alphabetical index:*

Abortion / Medically assisted procreation / Medical treatment.

*Headnotes:*

Rules confining “the use of medically assisted protection (...) solely to cases where there are no other methods of treatment capable of overcoming the causes of sterility or infertility” and restricting it to medically certified inexplicable cases of sterility or infertility and cases of sterility or infertility [stemming] from a medically verified and certified cause, violate Articles 3 and 32 of the Constitution, which protect the right to equality and the right to health respectively.

*Summary:*

I. The Rome Court held that Articles 1.1, 1.2 and 4.1 of Law no. 40 of 19 February 2004 (rules on medically assisted procreation; hereinafter “MAP”), insofar as they prohibit fertile couples with transmissible genetic diseases from having recourse to MAP, violate Articles 2, 3 and 32 of the Constitution and also Article 117.1 of the Constitution, the latter on the grounds of violation of Articles 8 and 14 ECHR.

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The question of constitutionality was raised by a court with which an application for interim measures had been lodged by two couples who had previously had recourse to abortions so as not to transmit to their children hereditary genetic diseases of which they had been found to be healthy carriers and who were seeking urgent authorisation to have recourse to MAP. As the law makes no provision for this option for fertile couples, the court referred it to the Constitutional Court, holding it to be in contradiction with:

- Article 2 of the Constitution, on the grounds of breaches of the inviolable rights of individuals, such as “the right of a couple to a ‘healthy’ child” and the right to freedom of choice in reproduction;
- Article 3 of the Constitution, as an expression of the principle of reasonableness, as the prohibition of MAP obliges couples carrying genetic diseases to try for pregnancy by natural means and possibly have recourse to abortion, which the law permits if prenatal diagnosis shows the foetus to be affected by the disease;
- Article 3 of the Constitution, as an expression of the principle of equality, as the prohibition of MAP for fertile couples carrying genetic diseases entails discrimination in relation to couples where the man has a sexually transmitted viral disease, who are granted the right to have recourse to MAP under a Ministry of Health decree;
- Article 32 of the Constitution, concerning undermining of the woman’s right to health, given that in choosing to start a natural pregnancy she may subsequently, under the terms of the abortion law, have an abortion if it transpires that the foetus has contracted the genetic disease, thereby putting both her physical and mental health at risk;
- Article 117.1 of the Constitution, in connection with the provisions of Article 8 ECHR (on the right to respect for family life) and Article 14 ECHR (on the prohibition of discrimination). In the former case, the prohibition of MAP in the case of couples carrying hereditary diseases encourages abortion and therefore amounts to interference in these couples’ family lives. In the case of Article 14, the arguments are the same as those put forward alleging violation of Article 3 of the Constitution (principle of equality).

II. The question was declared admissible insofar as the referring court had not ruled on the application for interim measures and had preserved its “*potestas iudicandi*”. Moreover, the court could not itself apply the standards of the European Convention on Human Rights rather than domestic provisions if it held them to conflict with the former, and thereby grant the application, given that this option is admissible solely in the case of conflict with the provisions of European

Community law. It is for the Constitutional Court to rule in cases of conflict between domestic law and provisions of international treaty law, as in the case of law stemming from the European Convention on Human Rights.

The question was relevant (“*rilevante*”): the referring court could not rule on the application lodged with it until the Constitutional Court had first ruled on the legitimacy of the provisions preventing the granting of the application.

The Court ruled that Articles 1.1, 1.2 and 4.1 of Law no. 40 of 19 February 2004 violate Articles 3 and 32 of the Constitution.

It is contrary to the principle of reasonableness, which is set out in Article 3 of the Constitution, to deny MAP and hence preimplantation genetic diagnosis to fertile couples affected (even as healthy carriers) by a hereditary genetic disease who may accordingly transmit serious malformations to the foetus. This is all the truer since the Italian legal order (Law no. 194 of 22 May 1978 on the voluntary termination of pregnancy) allows such couples who have started a natural pregnancy to have recourse to abortion if a prenatal diagnosis detects serious anomalies or malformations in the foetus, which may harm the woman’s physical or mental health. This contradiction was already underlined by the European Court of Human Rights in *Costa and Pavan v. Italy*.

The system in force, which prevents the woman from obtaining information about the embryo’s state of health, thereby leaving her the sole option of having an abortion if the foetus is malformed, which involves much greater risks for her health, is therefore contrary to Article 32 of the Constitution.

The impugned provisions are therefore the result of an unreasonable balancing of the various interests involved and are contrary to the principle of the consistency of the legal system. They violate the right to health of fertile women carrying (or whose male partner carries) a serious transmittable genetic disease insofar as they make no provision for couples affected by such diseases duly diagnosed by a qualified public body to have recourse to MAP. The latter is for the sole purpose of identifying embryos affected by the parent’s disease and which could develop into foetuses with malformations or serious anomalies which could be terminated under the terms of Law no. 194 of 1978.

The Constitutional Court therefore declared the impugned provisions unconstitutional. However, it made it clear that it was not within its power, but a matter for parliament, to adopt, under its discretionary

powers, measures to determine on a periodic basis and taking account of scientific advances, the diseases which may justify fertile couples being granted access to MAP and the procedures for verifying such diseases with a view to preimplantation diagnosis. Parliament may also introduce authorisation measures and effective controls over the bodies required to implement such procedures, taking account of the solutions adopted in the countries which allow medical practices of this kind.

The ruling is in line with the decision taken by the European Court of Human Rights in *Costa and Pavan v. Italy*.

#### Cross-references:

European Court of Human Rights:

- *Costa and Pavan v. Italy*, 54270/10, 28.08.2012.

#### Languages:

Italian.



## Japan Supreme Court

### Important decisions

*Identification:* JPN-2015-2-001

**a)** Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 20.11.2013 / **e)** (Gyo-Tsu) 209/2013, (Gyo-Tsu) 210/2013, (Gyo-Tsu) 211/2013 / **f)** / **g)** *Minshu*, 67-8 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers**.  
4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system**.

*Keywords of the alphabetical index:*

Election, vote, weighting / Election, electoral district, demarcation.

*Headnotes:*

When considering the constitutionality of a disparity in the value of votes in an election of members of the House of Representatives, a court must take into account whether the apportionment of seats or demarcation of electoral districts is contrary to the constitutional requirement of equality, and, if so, whether the provisions on the apportionment or demarcation are in violation of constitutional provisions due to the failure to make a correction within a reasonable period of time, as required by the Constitution.

The disparity in the value of votes in the general election of 2012 provided by the Public Offices Election Act (prior to the revision in 2012, hereinafter, the “Act”) contravened the constitutional requirement of equality.

It could not be said that corrections were not made to the Act within a reasonable period of time as required by the Constitution.

The Act could not be found to be in violation of Article 14.1 of the Constitution guaranteeing equality under the law.



*Summary:*

I. The applicants, who were voters, were seeking the invalidation of the 2012 Election. They alleged that the Act was unconstitutional, because it violated the constitutional guarantee of equality under the law. The Act, before it was amended, provided that one seat for one member of the House of Representatives would be apportioned to every prefecture first. Other seats would then be apportioned to prefectures based on population (the “reserving-one-seat-per-prefecture rule”), which would result in prefectures with small populations having more seats than prefectures with large populations in terms of the ratio of constituencies to seats.

Before the 2012 Election, the Supreme Court decided, regarding the 2009 Election, that this rule had enlarged the disparity of the value of votes, it was no longer reasonable, and the demarcation of electoral districts had been contrary to the constitutional requirement of equality at the time of the 2009 Election.

The House of Representatives was dissolved on the day the 2012 Revision Act was enacted to amend the Act. The 2012 Election was held one month later, in December. Nevertheless, there were more steps to revise the demarcation of electoral districts, which could not be taken before the 2012 Election. Therefore the 2012 Election was held based on the same demarcation as that of the 2009 Election.

The maximum disparity among constituencies was 1:2.425 in the 2012 Election. As compared with the electoral district with the smallest number of voters, the disparity ratio exceeded 1:2 in 72 electoral districts.

II. The Constitution requires equality in the substance of the right to vote, equality in the value of votes. Equality in the value of votes is not, however, the absolute criterion. The Constitution provides that the number of members, electoral districts, method of voting and other matters concerning elections shall be fixed by law (Article 43.2, 47). Thus, the Diet has the broad discretion to design the election system.

When the Diet adopts an election system of members of the House of Representatives that divides the whole country into a number of electoral districts, the Constitution requires that equality in the number of voters or population per member should be the most essential criterion for the apportionment of seats and the demarcation of electoral districts, although it does allow the Diet to consider other factors.

To determine an election system, the Diet, using municipalities or other administrative districts as basic units, must take into account various factors, including the size, population density, composition of residents, transportation and geographical situations to harmonise the proper reflection of the people’s will with equality in the value of votes. An election system fixed by the Diet should be judged to be unconstitutional only when it is considered to run counter to the above constitutional requirements and to be outside the scope of a reasonable exercise of the discretion.

In its review of the disparity of the value of votes in the Election, the Court considered whether the apportionment of seats or demarcation of electoral districts had breached the constitutional requirement of equality, and if so, whether the provisions on the apportionment or demarcation violated the constitutional provisions due to failure to make a correction within a reasonable period of time as required by the Constitution. If the provisions were in violation, consideration should be given as to whether to declare the election unlawful as opposed to null and void.

This approach is based on the constitutional relationship between the judiciary and the legislature. If the judiciary finds a constitutional problem with an election system from the perspective of equality in the value of votes, it has no authority to establish a specific election system itself; this falls within the remit of the Diet. The judiciary should present its determination on constitutionality at each stage of the framework mentioned above, and the Diet should take necessary and appropriate measures for correction while taking the court’s determination into account. This would be consistent with the spirit of the Constitution. In determining whether the Diet has failed to make a correction within a reasonable period of time, a court should consider not only the length of the time, but also various circumstances, including details of the measures to correct, matters needed to be considered, and procedural steps and operations which should be performed.

The 2012 Election in this case was held based on the same demarcation of electoral districts as that of the 2009 Election. The Supreme Court had already declared that this was contrary to the constitutional requirement of equality. Moreover the disparity had become larger than that in the 2009 Election, and the maximum disparity had reached 1:2.425. The Court should therefore say that the demarcation was contrary to the constitutional requirement of equality at the time of the 2012 Election.

However, by the time of the 2012 Election, the Act had been amended. The reserving-one-seat-per-prefecture rule had been abolished, and a framework for the reapportionment of seats and re-demarcation of electoral districts had been established so that the disparity would be below 1:2 between electoral districts nationwide. In the light of the constitutional relationship between the judiciary and the legislature, and considering the various circumstances including the gradual advances and difficulties in to correct the election system, the Court could not say that these efforts on the Diet's part could not be regarded as a reasonable exercise of the legislative discretion. The Court could not, therefore, conclude that the Diet had failed to make a correction within a reasonable period of time.

In conclusion, although the demarcation of electoral districts for the 2012 Election was contrary to the constitutional requirement of equality in the value of votes, it could not be said that corrections had not been made within a reasonable period of time. The provisions on the demarcation could not, therefore, be found to be in violation of the Constitution guaranteeing equality under the law.

III. The judgment was rendered by the unanimous consent of the Justices. However, three Justices expressed dissenting opinions respectively, and one Justice expressed an opinion.

#### *Languages:*

Japanese, English (translation by the Court).



## Korea Constitutional Court

### Important decisions

*Identification:* KOR-2015-2-001

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 28.01.2014 / **e)** 2011Hun-Ba174-282-285, 2012Hun-Ba39-64-240 (cases are consolidated) / **f)** Case on the Prior Notice of Outdoor Assembly or Demonstration / **g)** 26-1(1), *Korean Constitutional Court Report* (Official Digest), 34 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

3.16 General Principles – **Proportionality.**

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

5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs.**

*Keywords of the alphabetical index:*

Rule against excessive restriction / Punishment, excessive / Principle of prohibition against prior permit / Outdoor assembly / Prior notice requirement / Assembly, urgent.

*Headnotes:*

The Assembly and Demonstration Act (hereinafter, the “Act”) imposes on organisers of outdoor assemblies the duty to cooperate and requires them to provide prior notice (i.e., reporting requirement) so that administrative agencies can take the necessary steps for the smooth and safe running of the assemblies. The imposition of criminal penalties on organisers, who fail to report in advance pursuant to the Act, does not violate the principle of prohibition against prior permit of assembly and association under Article 21.2 of the Constitution.

Anyone who intends to organise an urgent assembly, but cannot meet the reporting requirement within the time limit set by the Act, shall notify a competent agency of the assembly as long as it is possible to file a notification. Any urgent assembly that is reported immediately will not be punished.

### Summary:

I. The applicants were indicted in the Seoul District Court for holding an unreported assembly at the Gwangwhamun Square (picketing for causes including “Freedom of Speech on the Internet”). It was alleged that they violated Articles 6.1 and 22.2 (hereinafter, the “Instant Provision”) of the Act, which imposes an administrative penalty on unreported outdoor assemblies and demonstrations. While the case was pending, the applicants filed a motion to request a constitutional review of Articles 22.2 and 6.1 of the Assembly and Demonstration Act. After the motion was dismissed, the applicants filed this constitutional complaint with the Constitutional Court to review the Instant Provision.

II. The Constitutional Court held that the Instant Provision does not violate the Constitution. The Court elaborated on the below issues:

1. Whether the Instant Provision violates the rule of clarity under the principle of *nulla poena sine lege*

It is generally understood that the term “assembly” refers to a temporary gathering of people in a specific place with specific objectives, and the “formation of inner tie” can be sufficient to be the common objectives. A reasonable person with general legal awareness would infer the meaning of “assembly” from the above-mentioned explanation; hence, the definition of “assembly” is not unclear. Therefore, the Constitutional Court held that the Instant Provision is not against the rule of clarity under the principle of *nulla poena sine lege*.

2. Whether the Instant Provision violates the principle of prohibition against prior permit under Article 21.2 of the Constitution

The prior notice requirement under the Act is a reporting requirement that underlies a duty to cooperate. The obligation enables administrative agencies (e.g., police departments) to prepare necessary steps for the smooth and safe running of assemblies. Generally, the Act, in principle, guarantees outdoor assembly and demonstration as long as it is properly reported. Therefore, the prior notice requirement does not violate the principle of prohibition against prior permit under Article 21.2 of the Constitution.

3. Whether the Instant Provision infringes on the freedom of assembly in violation of the principle against excessive restriction

The details to be reported under the Instant Provision are necessary and important information to prevent several assemblies or demonstrations from overlapping and to prepare relevant agencies to take appropriate steps in advance to ensure public safety. The reporting requirement of at least 48 hours before the assembly takes place is stipulated in order to secure sufficient time for the necessary procedures. This includes supplementing incomplete documentation after the prior report, sending notice of prohibition to applicants and filing objection to the prohibition notice in return. Therefore, the Instant Provision cannot be considered to be an excessive restriction.

Based on Article 21.1 of the Constitution, the language of the Instant Provision can be construed to mean that a so-called “urgent assembly” (i.e., an outdoor assembly that cannot be reported within the time limit stipulated in the Act although it has been planned in advance and an organiser exists) should be reported as promptly as possible once it is possible to report. Any urgent assembly reported as immediately as possible will not be punished since the Instant Provision should not be applied to such a case. Therefore, the Instant Provision does not infringe on the freedom of assembly in violation of the principle against excessive restriction.

4. Whether the Instant Provision imposes excessive punishment

It is highly possible that holding an unreported outdoor assembly can threaten public safety, which the reporting requirement was intended to prevent. Imposing an administrative penalty on such unreported outdoor assemblies does not infringe on the freedom of assembly. Neither can the statutory reporting requirement nor the penalty for non-compliance be considered excessive. Therefore, the Instant Provision does not impose excessive punishment.

III. Four justices filed dissenting opinions.

### Languages:

Korean, English (translation by the Court).



*Identification:* KOR-2015-2-002

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 28.01.2014 / **e)** 2012Hun-Ma431, 2012Hun-Ka19(consolidated) / **f)** Prohibition of Using the Name of a Political Party Whose Registration Has Been Cancelled / **g)** 26-1(1), *Korean Constitutional Court Report* (Official Digest), 155 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Freedom to form a political party / Political party, registration, cancellation / Political party, name.

*Headnotes:*

Article 8.1 of the Constitution lays down the fundamental right that every person, in principle, can form a political party without State interference. Although not stipulated in the Constitution, the freedom of political parties to continue their existence and to conduct their political activities is included in the meaning of the freedom to form a political party. Since the political party's name is a strong indicator of its political convictions and policies, the freedom to form a political party includes the freedom that individuals can use the name of their choice in establishing the political party and engaging political activities therein.

*Summary:*

I. Pursuant to Article 44.1 of the Political Parties Act, the election committee cancelled the registration of the applicants (political parties including the New Progressive Party, the Green Party and the Youth Party), as they failed to obtain more than 2% of total number of effective votes. Also, the applicants were unable to use their names, such as the New Progressive Party, the Green Party and the Youth Party, due to Article 41.4 of the Political Parties Act, which prohibits the use of the name of a political party whose registration has been cancelled for a certain period of time.

The applicants filed this constitutional complaint for the review of the constitutionality of Article 41.4 of the Political Parties Act and filed a suit to revoke the

cancellation of the political party registration. While the case was pending, the applicants filed a motion to request a constitutional review of Article 44.1.3 of the Political Parties Act.

II. The Constitutional Court reviewed Article 44.1.3 of the Political Parties Act, which allows the election commission to revoke the registration of a political party that fails to obtain a seat in the National Assembly after participating in an election of National Assembly members and fails to obtain more than 2% of total number of effective votes. It also reviewed the part related to Article 44.1.3 of Article 41.4 of the Political Parties Act, which prohibits the use of the name of a political party whose registration has been cancelled for a certain period of time. The Court ruled that these provisions violate the freedom to form a political party, running afoul of the Constitution.

1. Whether the Cancellation Provision infringes on the freedom to form a political party

No record or minutes reveal the legislative purposes of the Cancellation Provision when it had been first introduced by the Legislative Council for National Security in 1980 or the minutes of the subsequent sessions of the National Assembly in the process of amendment to the Political Parties Act. Considering the freedom to form a political party guaranteed by Article 8.1 of the Constitution and the legislative purpose of Article 8.4 of the Constitution, any legislation excluding a political party from the process of forming political opinion by the people simply because it is a small party that fails to achieve a certain level of political support should not be allowed under our Constitution.

Having said that, the legislative purpose of the Cancellation Provision can be considered legitimate to the extent that a political party that practically does not have any ability or will to participate in the process of people's forming political opinions can be excluded from such a process in order to foster the development of party democracy. Cancelling the registration of a political party that has no members of the National Assembly or fails to obtain certain number of votes is an effective means to achieve the legislative purposes.

Meanwhile, different from the dissolution of a political party by a ruling of the Constitutional Court, when a political party's registration is revoked pursuant to the Cancellation Provision, a substitute political party can be established upon the same or similar platform as the revoked political party. The name of the revoked political party can be used after a lapse of time as stipulated in the statutory provision. Even so, however, any provision that stipulates the revocation

of political party's registration should be legislated based on a strict standard within the necessary minimum scope because it deprives a political party of its existence, making it impossible for the political party to conduct any kind of political activities at all.

Moreover, it is possible to come up with less restrictive measures to achieve the legislative purposes. For example, the cancellation of registration can depend on the election result after providing a political party with several chances to participate in elections for a certain period of time. Alternatively, the cancellation of registration may be limited to political parties that fail to fulfil the statutory requirements for registration or have not participated in elections of the National Assembly members and others for a long time. In this regard, the Cancellation Provision does not satisfy the least restrictive means requirement.

Further, the aforementioned provision is unreasonable in that the registration of a political party that fails to attain a certain level of support in the elections of the National Assembly members is supposed to be cancelled no matter how it had been successful in the Presidential Election or local government elections. It is also problematic that newly established or small parties, frustrated by the Cancellation Provision, would not even venture into elections from the beginning.

For the foregoing reasons, the Cancellation Provision infringes upon the applicants' freedom to form a political party, violating the rule against excessive restriction.

2. Whether the Prohibition Provision infringes on the freedom to form a political party

The Prohibition Provision prevents the name of a political party whose registration has been cancelled under the Cancellation Provision from being used as the title of a political party from the date of such cancellation of registration until the date of election of the National Assembly members first held due to the expiration of their terms. As the Prohibition Provision is premised on the Cancellation Provision, it also infringes upon the freedom to form a political party for the same reasons as reviewed above in the constitutionality of the Cancellation Provision.

#### *Languages:*

Korean, English (translation by the Court).



#### *Identification: KOR-2015-2-003*

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 27.03.2014 / **e)** 2010Hun-Ka2, 2014Hun-Ga13(consolidated) / **f)** Case on the Prohibition of Night-time Demonstration / **g)** 26-1(1), *Korean Constitutional Court Report* (Official Digest), 324 / **h)**.

#### *Keywords of the systematic thesaurus:*

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

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

3.18 General Principles – **General interest.**

3.20 General Principles – **Reasonableness.**

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

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

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

5.5 Fundamental Rights – **Collective rights.**

#### *Keywords of the alphabetical index:*

Demonstration, night-time / Restriction, excessive, rule against.

#### *Headnotes:*

Night-time demonstration between sunset and midnight of the same day can disrupt public order or legal peace, depending on the general public's lifestyle, duration and forms of demonstrational activities, service hours of public transportation, and business hours of shops and stores. Therefore, the legislator should be granted a margin of discretion to decide whether to place limits on certain demonstrations. Their decision should include several factors, including the peaceful residence, private lives, circumstances and situation of protests unique to Korea, and legal sentiment or common values of the Korean people.

#### *Summary:*

I. Two applicants were charged with violating the Assembly and Demonstration Act by allegedly staging a demonstration between sunset and midnight.

During the criminal trials, they filed motions to request for the constitutional review of Articles 10 and 23.3 of the Assembly and Demonstration Act (hereinafter, "ADA"). The trial courts granted the motions and requested constitutional reviews on the aforementioned provisions.

The subject matter of review is the constitutionality of the part on "demonstration" of the main text of Article 10 of the ADA (hereinafter, the "instant provision") and the part on "demonstration" of the part of the "main sentence of Article 10" of Article 23.3 of the ADA.

II. The Constitutional Court held that Article 10 of the ADA that stipulates that "[n]o one may stage any demonstration either before sunrise or after sunset" and its penal provision Article 23.3 of the Act are unconstitutional. The Court reasoned that these provisions infringe on the freedom of demonstration under the principle against excessive restriction, as they apply the "demonstration from sunset to midnight of the same day".

### 1. Definition of "Demonstration" under the ADA

The term "demonstration" under the ADA means an act of persons associated under common objectives:

- i. Parading along public places available for the free movement of the general public (e.g., roads, plazas and parks) with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them; or
- ii. Displaying their will or vigorous determination with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them. It is not required to demonstrate at public places where people can freely pass or move places, such as parading. The provision of Article 10 of the ADA that grants an exception for outdoor assemblies before sunrise or after sunset does not apply to demonstrations.

### 2. Whether the Unconditional Ban on the Night-time Demonstration Infringes on the Freedom of Demonstration

Compared to an individual expressing an opinion, a demonstration may cause more conflicts with public safety and order, given that it is associated with the collective actions of many persons. At night, citizens strongly seek serenity. Compared to the daytime, at night, participants of a demonstration may be more sensitive to emotions, clouded by reasonable judgment, or lose their self-control.

In contrast to daytime demonstrations, night-time demonstrations pose the challenges of maintaining public order and responding to unexpected violent situations. The prohibition on night-time demonstrations under the instant provision is an appropriate means to achieve a legitimate purpose in that it intends to protect the safety and order of our society and maintain peace of the residence and private life of citizens, considering the nature and unique character of night-time demonstrations.

Nonetheless, the instant provision would prevent daytime workers or students from staging or participating in demonstrations held on weekdays during the winter season when daytime is short. The limitation would substantially infringe on or degenerate the freedom of demonstration. In the modern urbanised and industrialised society, the broad and variable traditional meaning of night-time, which is "before sunrise or after sunset", does not present the aforementioned nature or distinctiveness of "night time" in a clear sense.

The distinctiveness of "night-time" corresponds to the unique danger of "late night". Considering that the instant provision prohibits demonstrations "either before sunrise or after sunset", which is a broad and variable time frame, it violates the principle of least restriction beyond the reasonable necessity to achieve the legislative purpose. It also violates the principle of balance of legal interests by excessively restricting the freedom of demonstration for the public interests protected by the instant provision. Therefore, the instant provision infringes on the freedom of demonstration by violating the principle against excessive restriction.

### 3. Necessity to Limit the Unconstitutional Part

The instant provision includes the constitutional part as well as the unconstitutional part. It should be vested in the Legislature to determine the appropriate means to achieve the legislative purpose while restricting the freedom of demonstration in the least manner, among variable alternatives. Accordingly, we have rendered the incompatibility decision to apply tentatively the ADA provision that prohibited a night-time outdoor assembly in the applicants' 2008Hun-Ka25 Decision. Nonetheless, the failure of legislative revision led to the nullification of the entire provision prohibiting a night-time outdoor assembly, resulting in night-time outdoor assembly being regulated the same way as daytime outdoor assembly. Although the increase in number of illegal or violent assemblies has not been reported, we are unconvinced that night-time demonstrations do not require any stricter regulation. With the comprehensive considerations of the legal vacuum and practical issues after the

forementioned incompatibility decision, we do not agree that there is a need to tentatively apply the provision that is incompatible with the Constitution.

On the other hand, if the instant provision is deemed incompatible with the Constitution and suspended completely, practical problems would arise in that night-time outdoor assemblies and demonstrations would be regulated as daytime outdoor assemblies and demonstrations. The implications are manifold, including the challenge to address disruptions to the public order or legal peace in case of night-time outdoor assemblies or demonstrations, despite the need for stricter regulations.

Therefore, we declare the instant provision unconstitutional as long as it completely prohibits night-time demonstrations, under the ADA's current regulatory frame that employs time frame as a standard to distinguish between the constitutional part and unconstitutional part of the instant provision. The instant provision and its penal provision, Article 23.3 of the ADA, are unconstitutional when it is applied to a demonstration "from sunset to 24:00 of the same day", which belongs to the "daily living time frame".

#### *Languages:*

Korean, English (translation by the Court).



#### *Identification:* KOR-2015-2-004

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 27.03.2014 / **e)** 2012Hun-Ma652 / **f)** Case on the Permission of Photographing a Suspect under Investigation / **g)** 26-1(1), *Korean Constitutional Court Report* (Official Digest), 534 / **h)**.

#### *Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 3.20 General Principles – **Reasonableness.**  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**  
 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

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

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

#### *Keywords of the alphabetical index:*

Proceedings, pending / Right to portrait / Publication, fact, suspected crime / Criminal suspect, revealing face / Press release, distribution.

#### *Headnotes:*

A suspect's right to dignity requires investigation agencies to strictly adhere to constitutional limits when revealing the suspect's face to the press. Several factors should be considered, including the presumption of innocence, investigation agencies' duties to protect a suspect's human rights (Article 198.2 of Criminal Procedure Law), possible impact on the suspect and their families made by the investigation agencies' infringement on the right to dignity.

#### *Summary:*

I. The applicant filed a petition for the Constitutional Court to review whether his right to dignity was violated when a judicial police officer, allowed pictures of him to be taken for a press release during his arrest for fraud. At the Gang-dong police station, Seoul, the judicial police officer distributed the press release at the pressroom of the police station on 24 April 2012 (hereinafter, the "instant distribution"). After distributing the press release, the judicial police officer allowed the press to take pictures of the handcuffed applicant, corresponding to the request of coverage (hereinafter, the "instance permission"). The press released the news and articles with the applicant on 25 April 2012. The news and articles referred to the applicant as "Mr Chung (age 36)" with a picture of his face.

II. The Constitutional Court held that the applicant's right to dignity was violated when the judicial police officer permitted the press to take pictures of him when he was handcuffed at the police station during the police investigation. The Court also ruled that the publication of a press release regarding the applicant is not justiciable because proceedings were pending.

## 1. Issue of Justiciability

### A. The Requirement of Exhaustion of Prior Remedies

It should be examined whether the instant distribution (publishing facts of a suspected crime before trial) constitutes the crime of publishing facts of suspected crimes under Article 126 of the Criminal Act. If the judicial police officer's action constitutes the crime of publication of criminal facts, the applicant can accuse the investigation agency to punish the officer in charge. Alternatively, the applicant can apply for a ruling through the appeal proceeding according to the Prosecutors' Office Act, depending on the result. Because the applicant did not exhaust the aforementioned remedies, the instant distribution does not satisfy the requirement.

### B. The Requirement of Justiciable Interests

The justiciable interests of the instant permission become extinct in that the upholding of the constitutional complaint would not provide remedies for the applicant since the instant permission was already terminated. Nevertheless, the necessity to adjudicate would be admitted if there is a specific danger that revealing the face of the suspect under investigation may be repeated against his will and the conflict between the protection of the right to dignity of a suspect and the people's right to be informed demand the constitutional clarification to protect and promote the constitutional order.

## 2. Constitutionality of Permission to Take Pictures

Every individual deserves the right to refuse to be photographed, which may identify the physical characteristics (e.g., face) against their will. Therefore, the instant permission restricts the right to dignity, including the right to portrait, under Article 10 of the Constitution.

In principle, the public interest to be informed about a "suspect" is not as strong as a "suspected crime", except in the limited case of public search for a suspect. In this case, the judicial police officer permitted the press to take pictures of the handcuffed applicant at the police station. The purpose of the instant permission was not legitimate in that the publication and photographing of the applicant during the investigation would not achieve any public interest.

The principle of the "least restriction" is also violated because the judicial police officer, as the investigation agency, did not take action to minimise the possibility of revealing the applicant's identity (e.g., concealing his face with a hat or mask), considering the

seriousness of the damage arising from the publication of the suspect's face. Whereas the instant permission does not achieve any public interest, except realistic broadcasting, the applicant's right to dignity, including the right to portrait, is substantially infringed by publishing his face as a suspect and by broadcasting his portrait, which would lead to labelling effects as a criminal. Therefore, there was no balance of interests. Accordingly, the instant permission infringes the right to the applicant's dignity, violating the principle against "excessive restriction".

III. Two justices filed dissenting opinions.

### *Languages:*

Korean, English (translation by the Court).



### *Identification:* KOR-2015-2-005

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 27.11.2014 / **e)** 2014Hun-Ba224, 2014Hun-Ka11(consolidated) / **f)** Case on the Act on the Aggravated Punishment, etc. of Specific Crimes / **g)** 26-2(1), *Korean Constitutional Court Report* (Official Digest), 703 / **h)**.

### *Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.  
 3.22 General Principles – **Prohibition of arbitrariness**.  
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.  
 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:*

Punishment, aggravated / Human dignity / Penal system, legitimacy, balance.

### *Headnotes:*

In principle, a special provision should include additional aggravated elements to the criminal elements stipulated by a general provision. Article 10 of the Act on Aggravated Punishment, etc. of Specific



Crimes is a special provision and provides for an aggravated punishment; however, it stipulates the equivalent criminal elements as those in Article 207 of the Criminal Act. Hence, it violates the fundamental principles of the Constitution (e.g., human dignity and the principle of equality) and is against the legitimacy and balance of the penal system.

### *Summary:*

I. The subject matter of review is whether parts of Article 207.1 and 207.4 of the Criminal Act and Article 10 of the Act on the Aggravated Punishment, etc. of Specific Crimes (hereinafter, "AAPSC") (revised by Act no.10210 on 31 March 2010) (hereinafter, the "instant provision") violates the Constitution. The applicants, who were charged for crimes of counterfeit, during their legal proceedings, requested constitutional review of the AAPSC.

#### 1. 2014Hun-Ba224

One of the applicants was charged with a crime for using fifteen counterfeit 50,000-won bills made with a colour printer and drawing paper at convenience stores and restaurants on 6 February 2014. While his trial was pending, he filed the motion to request a constitutional review of the AAPSC, which was eventually denied on 18 April 2014. Subsequently, the applicant filed this constitutional complaint on 23 May 2014.

#### 2. 2014Hun-Ka11

The other applicant was sentenced to two years and six months in prison on 11 December 2013 for the crimes of counterfeiting six 50,000-won bills and thirty 10,000-won bills made with a laptop computer and multifunction printer to purchase tobacco and other items, together with Hwang OO, Choi OO and Choi OO. The applicant filed the motion to request a constitutional review of the AAPSC while his appellate procedure was pending on 17 April 2014. The Busan High Court requested a constitutional review of this case, accepting the aforementioned motion, on 9 July 2014.

II. The Constitutional Court reviewed a provision of the AAPSC, which stipulates that crimes prescribed by Article 207 (Crimes of Counterfeiting Currency) of the Criminal Act shall be punished by capital punishment, imprisonment for life or imprisonment for more than five years. The Court held that the instant provision violates the fundamental principles of the Constitution, such as human dignity and the principle of equality, and is against the legitimacy and balance of the penal system.

The instant provision requires the same criminal elements as stipulated in Article 207.1 and 207.4 of the Criminal Act (hereinafter, the "criminal provision"). The only differences are the addition of 'capital punishment' and the increase in the maximum period of imprisonment from two to five years. Even though the instant provision, which is a special provision, should be applied to a case, a prosecutor may indict for the violation of the Criminal Act provision, implying that the choice of applicable law may cause serious imbalances in the penal system.

In principle, a special provision should include criminal elements stipulated by a general provision in addition to other aggravated elements. The instant provision, also, should have included additional aggravated elements, in addition to the elements under the Criminal Act provision. Nonetheless, the instant provision does not stipulate such additional aggravated elements, suggesting that the choice of applicable law is solely within the discretion of a prosecutor, which may cause confusion within law enforcement. It could disadvantage the people and be abused during the investigation procedure. Accordingly, the instant provision clearly lacks the justification and balance of criminal punishment system as a special provision, thereby violating the fundamental principle of the Constitution that promotes human dignity and value and infringing the principle of equality.

### *Languages:*

Korean, English (translation by the Court).



### *Identification: KOR-2015-2-006*

**a)** Korea / **b)** Constitutional Court / **c)** / **d)** 19.12.2014 / **e)** 2013Hun-Da1 / **f)** Dissolution of Unified Progressive Party Case / **g)** 26-1(2), *Korean Constitutional Court Report* (Official Digest), 1 / **h)**.

### *Keywords of the systematic thesaurus:*

3.3.3 General Principles – Democracy – **Pluralist democracy**.  
3.16 General Principles – **Proportionality**.  
3.17 General Principles – **Weighing of interests**.

4.5.10.3 Institutions – Legislative bodies – Political parties – **Role.**

4.5.10.4 Institutions – Legislative bodies – Political parties – **Prohibition.**

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

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

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

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

5.3.30 Fundamental Rights – Civil and political rights – **Right of resistance.**

#### *Keywords of the alphabetical index:*

Political party, dissolution, jurisdiction / Basic democratic order / Democracy, progressive / Removal, seat, lawmaker / Political party, activity, objective / North Korean-style socialism, *Juche* ideology.

#### *Headnotes:*

Political activities that include meetings to discuss insurrection, as engaged by the Unified Progressive Party (hereinafter, “UPP”), a party motivated to establish the North Korean-style socialism, is against the democratic order. With no other alternative, this party should be dissolved to eliminate the concrete danger of substantial harm that it poses. Dissolving UPP does not violate the principle of proportionality. Disbanding a party for violating constitutional values shall be handled at the expense of the representative nature of lawmakers. Therefore, stripping UPP members of their seats in the National Assembly would be a legitimate and basic operative element of the political party dissolution system.

#### *Summary:*

I. The issues for the Constitutional Court in this case are whether a political party’s objectives and activities, namely that of the UPP, violate the basic democratic order. If so, the Constitutional Court shall consider whether the UPP should be disbanded and whether the lawmakers affiliated with the Party should be stripped of their seats pending the Party’s dissolution.

Headed by Chairperson Lee Jung-hee, the UPP was created on 13 December 2011 by a merger of the Democratic Labour Party (hereinafter, the “DLP”), the People’s Participation Party (hereinafter, the “PPP”), and the “Alliance for the Creation of New Progressive

Party,” whose establishment was led by the members who defected from the New Progressive Party (hereinafter, the “NPP”).

The UPP won 13 seats (seven local constituency seats, six proportional representative seats) at the 19<sup>th</sup> parliamentary election held on 11 April 2012. Immediately after, however, internal conflict occurred in a series of events, including the illegitimate proportional primary, violence at the UPP’s central committee, and the controversy over the expulsion of lawmakers Lee Seok-ki and Kim Jae-yeon. Former members of the PPP and the NPP also defected from the UPP in September 2012. Meanwhile, lawmaker Lee Seok-ki of the UPP was indicted on charges including plotting treason on 25 September 2013.

The Government (hereinafter, the “applicant”), following the Cabinet’s decision made after deliberation on 5 November 2013, filed a petition on the same day to request the dissolution of the UPP and removal of its lawmakers from office because the party’s objectives and activities violate the basic democratic order.

II. This is the first case involving the dissolution of a political party in Korean constitutional history. The Court decided to disband the UPP and strip its lawmakers of parliamentary seats, on grounds that the Party’s objectives and activities violate the basic democratic order.

1. The Constitutional Court’s jurisdiction over political party dissolution:

The third constitutional amendment authorises the Constitutional Court to review the motion requesting dissolution of political parties, which is a product of modern history where a progressive opposition party was disbanded by the Government’s unilateral administrative action. In South Korean history, this mechanism emerged as a procedure to protect political parties. Even if a party appears to be aggressively undermining the basic democratic order, the Constitution guarantees its existence and activities in forming public political opinions. Thus, the party cannot be disbanded simply by a regular Executive action, but it can be excluded from party politics only when the Constitutional Court finds it unconstitutional and decides that it must be disbanded. This jurisdiction over political party dissolution is also needed as an institutional arrangement to prevent a political party from attacking, seriously damaging, or even abolishing our democratic system and thereby rendering it meaningless.

## 2. Requirements to dissolve a political party:

Article 8.4 of the Constitution provides that “if the objectives or activities of a political party are against the basic democratic order, the government may bring an action against it in the Constitutional Court.” The issue here is precisely how to interpret the requirements of this provision to initiate the adjudication to dissolve the political parties.

### A. Meaning of “objectives and activities of a political party”

“Objectives of a political party” generally refers to the political direction or purpose, or political plans to be practically implemented by a political party. Such objectives are mostly manifested in the official party platform or constitution. Other means can be helpful in understanding the party’s objectives: official statements by a party’s main figures (the chairperson or party executives); publications such as party journals or propaganda materials; and activities of party members who are influential in the party’s decision-making process or those who are influenced by the party’s ideology. If the real objectives are hidden, they can be unveiled through means other than the party platform.

Meanwhile, “activities of a political party” refer to acts or behaviour by an organ or key officials, members, etc. of a party, which are generally attributable to the party at large.

Considering the structure of the said provision, it is interpreted that the requirement to dissolve a party is met if either the objectives or the activities of a party violate the basic democratic order.

### B. Meaning of “basic democratic order”:

The idea of the “basic democratic order” stipulated in Article 8.4 of the Constitution is founded upon the pluralistic view based on the autonomy of reason and presumes that all political opinions have relative truth and rationality. It indicates a political order composed of and operated by the democratic decision-making process accords freedom and equality to defy all sorts of violent, arbitrary control and respects the majority while caring for the minority. Specifically, the key elements of the basic democratic order specified in the current Constitution are popular sovereignty, respect for basic human rights, separation of powers, and pluralistic party system.

### C. Meaning of “are against”:

The condition for disbanding a political party set forth in Article 8.4 of the Constitution is “if the objectives or

activities of a political party are against the basic democratic order.” The “against” herein does not indicate a simple violation or infringement of the basic democratic order. Instead, it refers to a situation where the party’s objectives or activities create the concrete danger of causing a substantial threat to our basic democratic order such that restricting the party’s existence itself is necessary, notwithstanding that it is one of the indispensable elements of a democratic society.

### D. Compliance with the proportionality principle:

Since a forced dissolution of a political party amounts to a fundamental restriction on the freedom of political party activities (a fundamental, constitutional right), the Constitutional Court, before handing down a decision, has to consider several factors. The Court analysed Article 37.2 of the Constitution, the limitations of a legal state in the intrusive exercise of state powers, and the fact that the dissolution of political parties should be a measure of last resort or subsidiary means. For this reason, even if there is an express provision on the dissolution requirement as provided by Article 8.4 of the Constitution, the Constitutional Court’s decision to dissolve a political party can be justified only when there are no other alternatives to effectively remove the unconstitutionality inherent in the party at issue and where the social interests far outweigh its disadvantage. This effectively means limiting the freedom of political party activities and imposing a major restriction on the democratic society.

## 3. The need to consider inter-Korean confrontation as a particularity of the Korean society:

The Republic of Korea is proclaimed as a target of attack by its practical enemy North Korea and faces an environment where its northern neighbour constantly attempts to subvert its current system. Given the current divided state of the Korean peninsula, we are obliged to simultaneously contemplate not only the universal principles of constitutionalism, but also a number of practical aspects facing our reality, the nation’s particular historical circumstances, as well as the unique awareness and legal sentiment shared by the people.

## 4. Whether the UPP’s objectives and activities contravene the basic democratic order:

A. The values or ideological ideal held by the UPP is “progressive democracy,” which has been interpreted differently depending on the circumstances of the times and the goals corresponding to the ideological disposition and the direction of the party’s leading members. Therefore, appreciating the true meaning

of progressive democracy advocated by the Party requires looking beyond the literal sense of its platform and examining the detailed process of its adoption. The perception about the platform and the direction taken by the current leaders should also be considered.

The UPP was created through a merger among the DLP, the PPP, and the “Alliance for the Creation of New Progressive Party,” which is composed of members who defected from the NPP, and the so-called “*Jaju* (translated as self-reliance) faction,” which represents the East Kyeongi Alliance, the Busan Ulsan Alliance, and the Gwangju Jeonnam Alliance that used to be the regional chapters of the “National Alliance for Democracy and Unification of Korea,” advocated or supported the introduction of progressive democracy and even led the creation of the UPP. As the PPP and other countervailing forces defected from the UPP due to events such as the illegitimate proportional primary and the violence at the central committee, the key members of the East Kyeongi Alliance, the Gwangju Jeonnam Alliance, and the Busan Ulsan Alliance, who uphold progressive democracy, as well as those who share the same ideological ideal with them (hereinafter the “leading members of the Respondent”) have led the party by making decisions according to their policy on major issues, including the selection of party executives. Given their formation process, attitude toward the North, activities, ideological uniformity, etc., the leading members of the UPP mostly practiced *Juche*, a state-imposed system of thought created and implemented by Kim Il Sung. The thought guided the ideology within the anti-government National Democratic Revolution Party (hereinafter, the “NDRP”), the enemy-benefitting Action and Solidarity for the South-North Joint Declaration (hereinafter, the “Action and Solidarity”), and the pro-North Korean Il-sim group, are followers of North Korea.

Inferring from how they perceive and understand the progressive democracy set forth in the UPP’s platform, the leading members observe South Korea as a pariah capitalist or a colony under the control of foreign powers and argue that this contradiction is trampling sovereignty and impoverishing the lives of the people. They propose the “progressive democracy system” as a new alternative as well as an interim stage before transitioning to socialism. The leading members propose national self-reliance (*Jaju*, or self-reliance), democracy (*Minju*, or democracy), and national reconciliation (*Tongil*, or unification) as tasks to be undertaken under the platform. They view that people’s democratic transformation in South Korea is a precondition to implementing the final platform task – achieving socialism through

federalism-based unification – and that self-reliance should be first achieved in order to accomplish unification and democracy. They advocate the seizure of power through election and the right of resistance as a way to advance progressive democracy, and claim that, if necessary, the existing free democratic system can be taken over by a new progressive democratic regime through use of force. All considered, the goal of the UPP’s platform is to primarily achieve progressive democracy through violence and to finally realise socialism through unification.

B. Since Kim Jong Un came to power following the death of his father Kim Il Sung on 17 December 2011, North Korea has been increasing its threat of military provocation against South Korea since December 2012. Pyongyang launched a long-range rocket using its ballistic missile capabilities on 12 December 2012; conducted its third nuclear test on 12 February 2013; declared invalid the armistice agreement that ended the Korean War on 5 March 2013; stated that it will go on “No. 1” combat ready posture on 26 March 2013; recommended ambassadors in Pyongyang, foreigners residing in North Korea, etc. to leave North Korea by citing an imminent war on 5-9 April 2013; threatened to burn five islands in the West Sea to flames on 7 May 2013 and launched a short-range missile over the East Sea from 18-20 May 2013. Meanwhile, UPP’s Lee Seok-ki and other key members of the East Kyeongi Alliance considered the then political landscape as a state of war. Under the lead of Lee Seok-ki, there have been gatherings to plot treason on 10 and 12 May 2013 with the purpose of sympathising with North Korea in the event of war and implementing the use of force, including the destruction of state infrastructure, weapons manufacture and seizure, and disturbance of communication. More than 130 people attended the above gatherings, including three out of five lawmakers affiliated with the UPP and their advisors, central committee members or delegates of the UPP. In light of the detailed circumstances behind the meetings, the attendees’ position and status within the UPP, and the UPP’s supportive attitude toward this case, we can attribute the said gatherings to the activities of the Respondent.

In addition, the illegitimate proportional primary, the violence at the central committee, and the manipulation of opinion polls in Gwanak-B district show that members of the UPP sought to secure the election of candidates of their choice through violent means without any debate or voting process. This undermines democratic principles by distorting the democratic formation of opinions within the party, making the election system void.

C. As reviewed above, the UPP leaders aim to accomplish progressive democracy through violence and to ultimately achieve socialism through unification. They are followers of North Korea, and their idea of progressive democracy is overall the same or very similar to the North's revolutionary strategy against South Korea in almost all respects. At the same time, they defend the position of Pyongyang and deny the legitimacy of South Korea, while calling for revolution in line with the theory of People's Democracy Revolution, a tendency that is clearly shown in the insurrection case.

Given the aforementioned circumstances and the fact that the UPP leaders are taking control of the UPP, we can attribute their objectives and activities to those of the UPP. Considering all this, it can be concluded that UPP's true objectives and activities are aimed at initially implementing progressive democracy through use of force and eventually achieving North Korean-style socialism.

D. The North Korean-style socialist regime advocated by the UPP fundamentally contradicts the basic democratic order. It takes the political line proposed by the Chosun Workers Party as the absolute good and advocates a one-man dictatorship and leadership theory associated with the party line that focuses on a particular class. The UPP also contests that violence such as an *en masse* protest can be used to overthrow the existing free democratic system in order to achieve progressive democracy, which, again, is contrary to the basic democratic order. Meanwhile, the activities, such as the meetings aimed at insurrection, the illegitimate proportional primary, the violence at the central committee, and the manipulation of opinion polls in Gwanak-B district, deny the national existence, parliamentary system, and the rule of law in terms of substance. In terms of their means or nature, the activities, which actively resort to violence to serve UPP's purpose, violate the ideas of democracy.

The UPP's activities and gatherings where treason was plotted are grounded on the actual objectives of the UPP and are highly likely to be repeated in similar circumstances. Furthermore, the UPP admission of the possibility of taking over power through violence indicates that many of their activities reveal the concrete risk of inflicting substantial harm to the basic democratic order. In particular, the insurrection case, in which the leading members sympathised with North Korea and discussed specific ways to endanger the existence of South Korea, is a clear demonstration of their true objectives. This exceeds the limits of the freedom of expression and doubles the concrete risk of damage to the basic democratic order.

5. Whether disbanding the UPP is compatible with the proportionality principle:

The UPP's objectives and activities aimed at implementing the North Korean-style socialism contain seriously unconstitutional elements; South Korea is in a unique situation where it faces confrontation with North Korea, a country that strives to overthrow the government of its southern neighbour; there is no alternative other than dissolution in removing the risk of the UPP, since criminal punishment of the party's individual members will not be sufficient to eliminate the danger inherent in the entire party; the importance of social interest of safeguarding the basic democratic order and democratic pluralism far outweighs the disadvantage caused by party dissolution, namely the fundamental restraint on UPP's freedom to engage in party activities or partial restriction on pluralistic democracy. The decision to dissolve the UPP is an inevitable solution to effectively remove the risk posed to the basic democratic order, and is therefore not in violation of the principle of proportionality.

6. Whether members of a political party shall be removed from seats when the party is dissolved by the Constitutional Court:

It is not specified in law whether members of the National Assembly shall lose their seats when the Constitutional Court dissolves their party. Yet, the essence of entrusting the Constitutional Court with the power to disband parties lies in protecting the citizens by excluding the parties opposing the basic democratic order from forming political opinions. It becomes impossible to obtain substantial effectiveness of the decision to dissolve a party unless its members are stripped of their parliamentary membership. Hence, once the Constitutional Court decides to dissolve a political party, its affiliated lawmakers should be removed from their National Assembly seats regardless of how they were elected.

III. Justice Kim Yi-Su provided a dissenting opinion, claiming that UPP's objectives and activities did not give rise to a violation of the basic democratic order and the Constitutional Court's decision is inconsistent with the proportionality principle. Justices Ahn Chang-ho and Cho Yong-ho provided concurring opinions.

#### *Languages:*

Korean, English (translation by the Court).



# Kosovo

## Constitutional Court

### Important decisions

*Identification:* KOS-2015-2-008

**a)** Kosovo / **b)** Constitutional Court / **c)** / **d)** 04.08.2015 / **e)** KI 144/14, KI 156/14 / **f)** Vilijamin Hajdukovic and Stanka Tus Constitutional Review of the non-execution of two decisions of the Housing and Property Claims Commission, namely Decision nos. HPCC/REC/91/2007, 19.01.2007, and HPCC/REC/81/2006, 11.12.2006 / **g)** Official Gazette, 13.08.2015 / **h)** CODICES (Albanian, English).

*Keywords of the systematic thesaurus:*

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

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

1.6.6 Constitutional Justice – Effects – **Execution.**

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases.**

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

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:*

Constitutional complaint / Court, judgment, execution, right / Right, protection, judicial / Property, financial compensation, right / Decision, execution, right.

*Headnotes:*

The execution of a decision rendered by a court should be considered as an integral part of the right to a fair trial and competent authorities have an obligation to organize an efficient system for

implementation of decisions which are effective in law and practice, and should ensure their implementation within reasonable time, without unnecessary delays.

It is not a duty of the Constitutional Court to determine what is the most appropriate method for the competent authority to find efficient mechanisms of execution, within its competences, in the sense of completely fulfilling the obligations it has under the Law and the Constitution.

*Summary:*

I. The case originated from two referrals submitted separately, but due to the fact that the referrals were related in subject matter, the Constitutional Court decided to treat them in a joint decision in compliance with the Rules of Procedure of the Court.

Namely, both applicants challenged the non-execution of decisions of the Kosovo Housing and Property Claims Commission (established by UNMIK Regulation no. 2000/60, 31 October 2000 on residential property claims). In both cases the applicants had received final decisions in their favour.

In both cases, the applicants were the legitimate occupants of apartments owned by Socially-Owned Enterprises. Such occupancy rights were based on employment within the respective enterprise. In both cases, the respective employment relationships changed at the end of the 1980s beginning of the 1990s. In one of the two cases, the applicant lost employment and occupancy rights, while in the other case the applicant gained such rights at that time.

Due to the operation of law post-1999, both applicants were entitled to make claims on the basis of their respective occupancy rights from the past. In one of the cases, the applicant was awarded the occupancy right to the apartment, but was not currently the factual occupant, and the factual occupant was awarded compensation. In the other case, the applicant was awarded compensation for the loss of his occupancy right, but could not be evicted pending the payment of compensation.

These decisions of the Kosovo property Claims Commission could not be executed because there were no funds available to pay the required compensation. The Kosovo Property Agency is the authority responsible for the administration and execution of the decisions of the Kosovo Property Claims Commission.

II. The applicants filed referrals to the Constitutional Court complaining that the non-execution of the

decision by the competent authorities deprived them of the peaceful enjoyment of their property, resulting in a violation of Article 46 of the Constitution (Protection of Property). In addition, the lack of mechanisms within the legal system to achieve their rights violated their right to a free and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6 ECHR.

Upon examination of admissibility criteria, the Constitutional Court concluded that the applicants were direct victims of an alleged violation and that there was no legal remedy in the domestic legal system to be exhausted, therefore the Constitutional Court decided to review the merits of the case.

The Constitutional Court found that the non-execution of final decisions by competent authorities and the failure of the competent authorities of the Republic of Kosovo to provide effective mechanisms, in terms of the execution of a final decision, is contrary to the principle of the rule of law and constitutes a violation of fundamental human rights guaranteed by the Constitution. Under these circumstances, the Court concluded that the non-execution of the final decisions, constitutes a violation of the right to a fair and impartial trial. Moreover, the Court held that, because of delays and non-execution of the above-mentioned decisions, the applicants were unjustly deprived of their right to their property. In this way, the rights of the applicants to the peaceful enjoyment of their property, guaranteed by Article 46 of the Constitution and Article 1 Protocol 1 ECHR, were violated.

#### *Cross-references:*

##### Constitutional Court:

- K1187/13, *N. Jovanovic*, Constitutional review regarding non-execution of Decision no. GSK-KPA-A-001/12 of the Appellate Panel of the Supreme Court, 08.05.2012 and of Decision no. HPCC/D/A/114/2011, 22.06.2011 of Kosovo Property Claims Commission.

##### European Court of Human Rights:

- *Romashov v. Ukraine*, no. 67534/01, 27.07.2004;
- *Hornsby v. Greece*, no. 18357/91, 19.03.1997, *Reports of Judgments and Decisions 1997-II*; *Bulletin 1997/1* [ECH-1997-1-008];
- *Sovtransavto Holding v. Ukraine*, no. 48553/99, 25.07.2002, *Reports of Judgments and Decisions 2002-VII*;
- *Ryabykh v. Russia*, no. 52854/99, 24.07.2003, *Reports of Judgments and Decisions 2003-IX*; *Bulletin 2003/2* [ECH-2003-2-007];

- *Pecevi v. "The former Yugoslav Republic of Macedonia"*, no. 21839/03, 06.11.2008;
- *Martinovska v. "The former Yugoslav Republic of Macedonia"*, no. 22731/02, 25.09.2006.

#### *Languages:*

Albanian, English (translation by the Court).



# Lithuania

## Constitutional Court

### Important decisions

*Identification:* LTU-2015-2-005

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.04.2015 / **e)** KT10-N6/2015 / **f)** On the selection of the company implementing the project of a terminal of liquefied natural gas and on funding this project / **g)** TAR (Register of Legal Acts), 5147, 03.04.2015, www.tar.lt / **h)** Constitutional Court's website, www.lrkt.lt, 03.04.2015; CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Energy sources / Natural gas / Petroleum / Economic activity / Public security / General economic interest / Society needs / Taxes, compulsory / European Union, membership / Economic activity, freedom.

*Headnotes:*

The provision of the law under which a state-controlled company was identified as the developer of a liquefied natural gas terminal that was envisaged to safely and reliably supply natural gas to all Lithuanian consumers, had not denied the freedom of individual economic activity and initiative, provided by the Constitution.

*Summary:*

I. The applicants (a group of members of Parliament, the Court of Appeal and the Vilnius District Administrative Court) contested the constitutionality of the legislation on a liquefied natural gas project and that a state-controlled company (“Klaipėdos Nafta”) was identified as the developer of the project. The applicants also challenged that the Liquefied

Natural Gas Supplement shall be one of the financing sources of the project.

II. The Constitutional Court stated that economic activity in the field of energy, including the provision of consumers with energy resources (natural gas as well), is a specific activity that impacts the State economy. The security and reliability of the energy system is a constitutionally important objective, namely a public interest, which justifies specific regulation to address the activity in this field.

Special projects intended to eliminate economic dependence on a monopoly supplier of certain energy resources (including natural gas) are State priorities. The legislator may establish legal regulations regarding the financing of these projects from various sources, including incomes of energy consumers. Also, a control framework should be in place to monitor the project implementation costs in order to prevent abuse and damage to the consumers' interests if these costs were absorbed in the price of energy resources.

Although a company was selected to implement the liquefied natural gas terminal, the State created legal preconditions to effectively control the aforesaid company. The decision was strategically important to national security, in such a way that a constitutionally important objective, a public interest – the security and reliability of the energy system – would be ensured, as well as to the timely implementation of the commitments arising out of the country's membership in the European Union, which aim at guaranteeing the security of the supply of natural gas.

The Constitutional Court also concluded that the Liquefied Natural Gas Supplement, which is consolidated in the law as one of the financing sources of the project, should not be regarded as a state tax or other compulsory payment within the meaning of the Constitution. Instead, it should be viewed as a constituent part of the price, regulated by the State, of natural gas that is paid for the public services rendered by independent economic entities. That is, it is the installation and operation of the natural gas infrastructure, which aims at ensuring that natural gas is supplied to all consumers in a secure and reliable manner. The duty imposed on all the consumers who use the natural gas transmission system to pay the said part of the price of natural gas may not as such be treated as a limitation on the rights of ownership and all the more so, as taking property over for the needs of society.

The Constitutional Court referred to the jurisprudence of the Court of Justice of European Union, underlining that petroleum products, because of their exceptional



importance as an energy source in the modern economy, are of fundamental importance for a country's existence in terms of the economy, its institutions, essential public services, and even the survival of its inhabitants. An interrupted supply of petroleum products, with the resulting dangers to the country's existence, could therefore seriously affect public security.

Also based on the European jurisprudence, the Court noted that services of general economic interest are services having special characteristics in relation to those of other economic activities. Member states enjoy the right to determine the scope and the organisation of services of general economic interest, taking into account the purposes of their national politics. The authorities in member states have a large discretion in what are determining services of general economic interest.

#### Cross-references:

Court of Justice of the European Union:

- C-72/83, 10.07.1984, *Campus Oil*, [1984]; *European Court Reports* 02727;
- C-179/90, 10.12.1991, *Merci convenzionali Porto di Genova*, [1991] *European Court Reports* I-05889;
- C-266/96, 18.06.1998, *Corsica Ferries France*, [1998] *European Court Reports* I-03949;
- C-67/96, 21.09.1999, *Albany International*, [1999] *European Court Reports* I-05751;
- C-265/08, 20.04.2010, *Federutility and Others*, [2010] *European Court Reports* I-03377;
- T-17/02, 15.06.2005, *Fred Olsen, SA v. Commission of the European Communities*, [2005] *European Court Reports* II-02031;
- T-309/04, T-317/04, T-329/04 ir T-336/04, 22.10.2008, *TV 2/Danmark A/S and Others v. Commission of the European Communities*, [2008] *European Court Reports* II-02935;
- C-280/00, 24.07.2003, *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] *European Court Reports* I-7747.

#### Languages:

Lithuanian, English (translation by the Court).



#### Identification: LTU-2015-2-006

a) Lithuania / b) Constitutional Court / c) / d) 26.05.2015 / e) KT16-N10/2015 / f) On the right to social housing / g) TAR (Register of Legal Acts), 8081, 26.05.2015, www.tar.lt / h) Constitutional Court's website, www.lrkt.lt, 26.05.2015; CODICES (English, Lithuanian).

#### Keywords of the systematic thesaurus:

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

5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

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

#### Keywords of the alphabetical index:

Housing, social / Income, limits / Orientation, social / Human dignity / Needs, minimum, social / Sensitive groups.

#### Headnotes:

The State is obligated to establish a social welfare system that ensures living conditions corresponding to human dignity. The constitutional imperative of protection and defence of human dignity and the social orientation of the state combined underscore the state's priority to support social housing for people whose income or assets are not sufficient to ensure that their basic needs are met.

#### Summary:

I. This constitutional case was initiated by a regional court, which contested a legal regulation whereby a person would lose the right to social housing if their property or income exceeded the levels, even only in a minimal manner, established by the Government.

II. The Court stated that the legislator enjoys wide discretion to determine the forms of public assistance for social housing, such as regulations that set out financial support for people to acquire or rent a living place or the possibility to receive a state-owned or state-rented house. The Court underlined that the social orientation of the state presupposes the legislator's duty to create the preconditions to meet the demands of people in circumstances requiring social assistance.

Under the Constitution, the legislator must identify people who may not have access to housing due to insufficient income from work and (or) other incomes and who for that reason would benefit from the State's support for housing. If the legislator links the State support for housing to the value of property and incomes of a person (family), this value can be relative, i.e. linked to the values determined by the Government or other competent institution, taking into account appropriate economic rates. The legislator must also set a limit on the person's (family) property and incomes after which the assistance is discontinued. While determining this level, constitutional norms and principles must be respected, particularly Article 21 of Constitution protecting and defending human dignity, the constitutional principle of rule of law, constitutional requirements of justice and proportionality. These constitutional provisions determine that social housing assistance should not be interrupted or discontinued if the person (family) cannot provide for himself (itself) another housing corresponding to his minimal socially acceptable needs.

The Constitutional Court also recalled that regulations on social assistance are one of the most important guarantees of the constitutional right to social assistance. Thus, there must be regulations that define the types of social assistance, the persons who are granted social assistance, the grounds and conditions for granting and paying social assistance and the amounts thereof. Therefore, regulations on social assistance by the acts of a lower power may include only appropriate procedures, as well as a law-based legal regulation when there is a need to detail and concretise the legal regulation. This is important in order to rely on special knowledge in a certain area or special (professional) competence; the conditions of a person's right to social assistances and the limits of the scope of this right cannot be determined by the legal acts of a lower power than that of a law.

The Court noted that under the legal regulation, when social housing is lost even in cases where the government-established limits of the property and income are exceeded only minimally, the situation of a tenant of social housing may deteriorate considerably. As such, a person may essentially be brought back to the same position as before receiving social housing.

The Court also quoted the jurisprudence of the European Court of Human Rights. In this context, the Court noted that although social and economic rights do not emerge from the European Convention on Human Rights directly, in certain cases, some social rights (right to housing or social assistance) could be defended according to the provisions of the European

Convention on Human Rights. Though Article 8 ECHR cannot be construed as establishing a direct positive obligation on the state to provide housing for everyone, still in exceptional cases, the obligation of the State to ensure housing for particularly vulnerable persons can be derived from the Article 8 ECHR.

#### *Cross-references:*

European Court of Human Rights:

- *Budina v. Russia*, no. 45603/05, 18.06.2009;
- *O'Rourke v. United Kingdom*, no. 39022/97, 26.06.2001;
- *Chapman v. United Kingdom*, no. 27238/95, 18.01.2001, *Bulletin* 2001/1 [ECH-2001-1-001];
- *Yordanova and Others v. Bulgaria*, no. 25446/06, 24.04.2012;
- *Winterstein and Others v. France*, no. 27013/07, 17.10.2013.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2015-2-007

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 11.06.2015 / **e)** KT17-N11/2015 / **f)** On the transfer of a share of the personal income tax to municipal budgets / **g)** / **h)** Constitutional Court's website, [www.lrkt.lt](http://www.lrkt.lt), 11.06.2015; CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

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

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

4.8.7.2 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Arrangements for distributing the financial reSources of the State**.

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

*Keywords of the alphabetical index:*

Capital, financing / Personal income tax / Principles, distribution / Revenues, budgetary / Capabilities, financial, equalising / Functions, municipal, financing / Municipality, equality.

*Headnotes:*

The legislator has discretion to choose the priorities in funding municipalities as well as the ways and forms that it supports municipalities, such as calculating and allocating funds out of the state budget for municipalities. The legislator must heed the Constitution, *inter alia*, the imperative of ensuring the funding required for the full functioning of self-government and for the implementation of municipal functions. It must also heed the constitutional principles of responsible governance and proportionality, according to which the funding of municipal functions must be adequate to the extent of such functions.

*Summary:*

I. This applicants (a group of members of Parliament and the Vilnius Regional Administrative Court) initiated the case, contesting the provisions of the Law on the Methodology for Determining Municipal Budgetary Revenues regulating the calculation and distribution of funds allocated from personal income tax (hereinafter, the "PIT") to municipal budgets. The applicants argued that the existing legal regulation discriminates against the state capital, Vilnius. Whereas Vilnius receives only 40 percent of PIT to its budget, most of the other municipalities receive 100 percent of the collected PIT. The applicants stated that the Law does not provide any justifications for the significant difference of the allocated PIT between certain municipalities. According to them, it is impossible to evaluate whether the existing system of allocation of financial funds to the municipalities' budgets is clear and justified.

II. According to the Constitution, the legislator is obliged to establish legal regulations to calculate and allocate funds for municipal functions, including the transfer of certain taxes (a share thereof) to municipalities. The legislative undertaking entails taking into account the resources as well as material and financial capacity of the state and society, in proportion to the requirements of the municipalities' functions. Adjustments are made (either increased or reduced) not only in situations where the extent of municipal functions is changed, but also where the requirement for funds necessary for municipal functions changes due to other objective reasons, such as demographic or economic changes.

The Constitutional Court also noted that, under the Constitution, the legislator may choose a model for equalising the financial capabilities of municipalities and establish the respective mechanism for such equalisation. In doing so, the legislator must heed the constitutional principle of a state under the rule of law whereby any legal regulation must be clear, comprehensible, and coherent. It must also observe the constitutional principle of responsible governance, by which the state institutions and officials must properly exercise the powers given to them under the Constitution and laws.

The absence of any clear legal criteria for calculating the shares of the PIT allocated to municipalities made it unclear whether the financial situation of those municipalities whose share of the PIT was transferred to the State Treasury account to equalise the financial capabilities of municipalities was indeed better; and if so, how much better if compared to the municipalities receiving such support from the State Treasury account. The legislator had failed to consider the consequences of such equalisation, i.e., municipalities whose share of the PIT is transferred to the account of the State Treasury to perform the said equalisation would not deteriorate to the extent lower than that of the municipalities being supported from the said account. As such, the Constitutional Court determined that the legislative failure created preconditions for distorting the essence of the mechanism to equalise the financial capabilities of municipalities. Consequently, the Court viewed that the municipalities had not been treated in an equal manner.

In addition, there was no assurance that funding was adequately allocated to municipalities so that they could effectively discharge their functions, upon the occurrence of changes in the demographic, social or other indicators of the municipalities whose share of the PIT is allocated for the equalisation of the differences in the PIT and expenditure structure. This occurred where such indicators exert influence on objective changes in the expenditure structure of municipalities, by taking account of the resources as well as material and financial capabilities of the state and society.

The Court decided that the contested legal regulation conflicts with the Constitution, insofar as it provided that the share (in percentage terms) of the PIT specified in the Appendix to this law is transferred to the municipal budgets of all municipalities in the absence of any law-established criteria on the grounds of which such a share should be calculated.

*Supplementary information:*

In view of the fact that, in case this ruling had been officially published right after its official pronouncement, the legal regulation governing municipal funding would have become unspecified due to which the allocation of funds to municipalities would have been disturbed in essence, the Constitutional Court postponed the official publication of this ruling in the Register of Legal Acts until 2 January 2016.

*Cross-references:*

Constitutional Tribunal of Poland:

- K 14/11, 31.01.2013;
- K 13/11, 04.03.2014.

Supreme Court of Estonia:

- no. 3-4-1-8-09, 16.03.2010, *Bulletin* 2010/1 [EST-2010-1-006].

*Languages:*

Lithuanian, English (translation by the Court).

*Identification:* LTU-2015-2-008

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 09.07.2015 / **e)** KT20-N13/2015 / **f)** On the sizes of the payment to advocates for the provision of secondary legal aid / **g)** TAR (Register of Legal Acts), 11196, 09.07.2015, [www.tar.lt](http://www.tar.lt) / **h)** Constitutional Court's website, [www.lrkt.lt](http://www.lrkt.lt), 09.07.2015; CODICES (English, Lithuanian).

*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.**

5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**

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

*Keywords of the alphabetical index:*

Payment, advocates / Risk, expense / Legitimate ways, defence / Proceedings, fair legal / Legal services / Legal expectations / Legal aid, public funds.

*Headnotes:*

To ensure effective legal assistance for those in socially vulnerable situations, the Constitution upholds the right of access to the Court and to a fair trial, the imperatives of impartiality and independence of the Court and the constitutional principle of the state under the rule of law. This implies the duty of the State to protect constitutional principles.

The legislator has broad discretion in choosing a publicly funded legal aid organisation, provision and financing model. If the law provides for state-guaranteed legal aid (public service), *inter alia*, by persons engaged in an independent professional activity – the advocates – the legislator has the discretion to determine the payment system for legal services rendered by the advocates. The advocates, in assuming the obligation to render publicly-funded legal aid, must not dismiss the risk of incurring additional expenses arising from rendering the service, as they could not hold the legitimate expectation that the system of payment for services rendered by them would not be changed.

*Summary:*

I. The applicants challenged the legal regulation by which additional payment for advocates rendering secondary legal aid, where necessary, is limited to the amount of four minimum monthly salaries.

II. The Constitutional Court held that the maximum amount paid to advocates might be subject to a responsible and proportionate limitation. The state is under an obligation to responsibly provide for, accumulate, and use the funds needed for the provision of legal aid. Advocates, in assuming the obligation to render publicly-funded legal aid, must not dismiss the risk of incurring additional expenditures and expenses due to objective reasons if the rendition of the service becomes protracted. Advocates must choose such legitimate ways of defence that complies with, as much as possible, the requirements of speedy, economical, and fair legal proceedings.

The Constitutional Court also recognised that the contested provision establishing the amount of payment for advocates rendering secondary legal aid

on a permanent basis, which was not commensurate with the government-approved minimum monthly salary, does not conflict with the Constitution. The Court noted that the state may choose various systems of work pay and has no obligation to establish a uniform system of work pay of state officials or state servants or of payment for legal services rendered by advocates. Alongside, it was noted that, in light of the previously effective legal regulation, advocates could not hold the legitimate expectation that the system of payment for services rendered by them would be unchanged.

While examining this constitutional justice case, the Constitutional Court quoted the appropriate case-law of the European Court of Human Rights. The latter has recognised that the possibility to have an advocate is one of the conditions of the effective right of access to court. It was noted that this right in certain cases could mean the obligation for the state to provide for the assistance of a lawyer (the assistance free of charge included) when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain States for various types of litigation, or by reason of the complexity of the procedure or of the case.

However, the right to legal aid is not absolute. It is not provided, for example, when there is no “reasonable prospects of success” or when the petitioner abuses his or her right to legal aid. Even in cases where the legal aid is compulsory according to the provisions of European Convention on Human Rights, the member states enjoy the discretion to choose the means in order to guarantee such legal aid. The state has to undertake positive actions in order to ensure the possibility to effectively use the right to legal aid when it is provided; when the lawyer appointed to provide the legal aid doesn’t ensure the effective service he or she has to be replaced by the other one. The conditions of becoming of advocate were also analysed in the Ruling.

#### Cross-references:

European Court of Human Rights:

- *Airey v. Ireland*, no. 6289/73, 09.10.1979, Series A, no. 32; *Special Bulletin – Leading Cases ECHR* [ECH-1979-S-003];
- *Artico v. Italia*, no. 6694/74, 13.05.1980, Series A, no. 37;
- *Casado Coca v. Spain*, no. 15450/89, 24.02.1994, Series A, no. 285-A; *Bulletin* 1994/1 [ECH-1994-1-005];

- *Sujeun v. United Kingdom*, no. 27788/95, 18.01.1996;
- *John Murray v. United Kingdom*, no. 18731/91, 08.02.1996, *Reports* 1996-I; *Bulletin* 1996/1 [ECH-1996-1-001];
- *Prince Hans-Adam II of Lichtenstein v. Germany*, no. 42527/98, 12.07.2001, *Reports of Judgments and Decisions* 2001-VIII; *Bulletin* 2001/2 [ECH-2001-2-006];
- *Ezeh ir Connors v. United Kingdom*, nos. 39665/98 and 40086/98, 09.10.2003;
- *Steel and Morris v. United Kingdom*, no. 68416/01, 15.02.2005, *Reports of Judgments and Decisions* 2005-II;
- *Öcalan v. Turkey*, nos. 46221/99 and others, 12.05.2005, *Reports of Judgments and Decisions* 2005-IV;
- *Bigaeva v. Greece*, no. 26713/05, 28.05.2009.

#### Languages:

Lithuanian, English (translation by the Court).



# Mexico

## Electoral Court of the Federal Judiciary

### Important decisions

*Identification:* MEX-2015-2-004

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 08.10.2014 / **e)** SUP-JDC-525/2014 and SUP-JDC-2066/2014 / **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:*

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

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

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, right to be consulted / Customary law / Electoral system / Indigenous people.

*Headnotes:*

Where a decision is to be made with respect to changing the electoral system of a municipality from the political party system to the indigenous habits and custom system, the community affected, including both the indigenous and non-indigenous populations, has a right to be informed and to participate actively in the elaboration of consultations.

*Summary:*

I. The applicants brought an action before the High Chamber of the Electoral Tribunal of the Federal Judiciary against agreements of the General Council of the Electoral and Citizen Participation Institute of the State of Guerrero of 24 June and 14 July 2014. Those agreements had approved the guidelines and

schedule of activities for the implementation of consultations in the indigenous community of San Luis Acatlán, Guerrero, to determine if a majority of the members of that community agrees to hold elections by the customs and habits system, replacing the current electoral system organised on the basis of political parties.

The applicants called for the protection of political-electoral rights of citizens regarding the right to consultation of the members of the community of San Luis Acatlán. They noted that the guidelines for the implementation of the consultations were not produced through an inclusive process. They argued that consultation should be comprehensive in terms of the nature of the population and it should be differentiated in terms of their results. The authority must respect the participation of all citizens and ensure that the results are analysed according to the principles of constitutional regularity.

II. On the basis of project presented by Chief Justice José Alejandro Luna Ramos, the High Chamber revoked the agreements of 24 June and 14 July 2014 challenged by the applicants. The Chamber decided that it is a matter for the General Council of the National Electoral Institution (INE) to resolve if the electoral system of San Luis Acatlán is still with the party system or to choose to change the domestic regulatory system in the election of municipal authorities.

The Court held that the community has the right to be informed, as well as to participate actively in the consultation, by organising and ensuring that indigenous and non-indigenous peoples participate in the consultation's response and creation.

The Court observed that the right for the consultation is stipulated in international instruments signed by Mexico, and by the direct application of Article 1 of the Mexican Constitution. This right has its normative recognition and regulation in the following instruments:

Articles 76.I and 133 of the Mexican Constitution grant international treaties a normative status of "Supreme Law of the Union". Therefore, the fulfilment of these rights by federal and local authorities is imperative, in compliance with the international mandate to protect human rights. In addition, the state has the obligation of consulting with the indigenous communities regarding decisions that affect them, as stated in the following international instruments:

- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- International Labour Organisation Convention 169;

- International Convention on the Elimination of All Forms of Racial Discrimination;
- United Nations Declaration on the Rights of Indigenous People, where 11 out of 46 articles mention the right for consultation.

### Languages:

Spanish.



### Identification: MEX-2015-2-005

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 12.10.2014 / **e)** SUP-JDC-15/2014 and SUP-JDC-16/2014 / **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:

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

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

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:

Customary law, respect / Indigenous people / Self-determination / Self-government.

### Headnotes:

In ascertaining the true holders of elected offices, the principle of the autonomy and self-determination of indigenous communities is recognised. An obligation rests on the State to recognise the authorities selected by indigenous peoples and communities.

### Summary:

I. The applicants, Yoquivo Leyva Fidencio Enriquez and Jose Romero, brought judgments before the High

Chamber of the Electoral Tribunal of the Federal Judiciary to protect the autonomy, internal regulatory system and the recognition of the applicants as traditional governors of the Ejido Guarijíos-Burapaco and the Makurawi communities. The applicants based their claim on safeguarding of the protection of political-electoral rights regarding the safety of the autonomy of Guarijío, its domestic legal system and the recognition of their General Assembly Community as the highest authority. Also they demanded recognition of their Governor, Traditional Commissioner and his representatives by the Federal and State authorities.

The applicants argued that there is uncertainty regarding the appointments of both Governors. Therefore, this presents a serious impairment of the political-electoral rights of citizens. It is crucial to recognise the autonomy and self-determination of indigenous communities, as well to be certain of who holds the traditional authorities' positions.

The applicants contended that recognition of the designated authorities in accordance with the principle of self-organisation does not undermine the autonomy of indigenous communities, but this right implies the legitimacy of authorities, hence it is necessary that government agencies recognise the designated authorities by the community.

II. On the basis of project presented by Chief Justice José Alejandro Luna Ramos, the Tribunal recognised the autonomy and self-government of the communities of Guarijíos- Burapaco Ejido, Mesa Colorada and Makurawi Neighbourhood, San Bernardo, both in Alamos, Sonora.

The Tribunal recognised Fidencio Leyva Yoquivo as traditional governor of Ejido Guarijíos- Burapaco, Romero and Mesa Colorada, and Jose Romero Enriquez as Traditional Governor of the Makurawi community in San Bernardo.

The Tribunal required the authorities of the State of Sonora and the State Commission for the Development of Indigenous Peoples and the authorities of the City of Alamos, Sonora, to recognise the applicants in the role of Traditional Governors.

The High Chamber considered that given that in the Mexican Constitution (Article 1, which establishes that all individuals enjoy the human rights recognised in the Mexican Constitution and in all the international treaties that the Mexican government is part of; and Article 2.A.I) and in diverse international human rights instruments (International Labour Organisation Convention 169, Articles 2, 5 and 8; United Nations

Declaration on the Rights of Indigenous People, Articles 1, 3, 4, 5, 33 and 34 and International Covenant on Civil and Political Rights, Article 1), the recognition for the regulatory systems, institutions, community authorities, and the corresponding exercise of jurisdiction of indigenous people are granted, the Guarijio people, as an indigenous community, have the right to keep and develop their own characteristics and identities, the right of identifying themselves as indigenous and to be recognised as such, as well as their regulatory systems, institutions and own authorities.

Taking into account that the electoral authorities are obliged to ensure the rights of the indigenous people and communities to elect their own authorities under their own norms, practices and procedures, it results necessary to safeguard the right to autonomy, self-government and recognition of the traditional authorities of the Guarijio people.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2015-2-006

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 23.01.2015 / **e)** SUP-REP-48/2015 / **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.**

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

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

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

#### *Keywords of the alphabetical index:*

Election campaign, limitation / Election, access to media / Election, propaganda / Election, public official.

#### *Headnotes:*

Broadcasting on radio and television during the conduct of elections justifies the application of provisional measures to regulate the political-electoral propaganda of political parties and to ensure the fairness of the electoral process.

#### *Summary:*

I. On 16 January 2015, the Institutional Revolutionary Party representative to the General Council of the National Electoral Institute submitted a written complaint to the Executive Secretary of the Institute. The complaint was against the National Action Party and Rafael Moreno Valle, in his capacity as Governor of the State of Puebla, for committing irregular acts which constitute electoral offences as established by the Constitution of the Mexican United States and v the General Law on Electoral Institutions and Procedures. The Complaint and Reports Commission of the National Electoral Institute upheld this complaint, and the National Action Party subsequently challenged the Commission's decision in an application to the Electoral Tribunal of the Federal Judiciary.

II. On the basis of project presented by Justice Mariá del Carmen Alanis Figueroa, the Electoral Tribunal, with reference to the interpretation of Articles 16, 41.I and 41.III.A, 134.7 and 134.8 of the Constitution of the United Mexican States, observed that the dissemination of propaganda (voice, image, name or symbol) of any public servant is prohibited if it involves personalised promotion or if it affects the fairness of electoral competition. Therefore, the political parties that broadcast propaganda on radio and television must also obey this restriction and cannot evade this constitutional mandate, in order to prevent the misuse of the media.

The Electoral Tribunal's ruling confirmed the "Agreement of the Complaints and Reports Commission of the National Electoral Institute, on the request to adopt precautionary measures, given by the Institutional Revolutionary Party in the special sanctioning procedure measures" from the 18 January 2015, registered under the code ACQD-INE-9/2015.

The Complaint and Reports Commission of the National Electoral Institute determined to withdraw the advertising campaigns because they believed that the Governor of the State of Puebla was advertising himself in a personalised capacity. His image and name, as well as the logo of the National Action Party, were constantly appearing in association with the building of public infrastructure throughout the state.



Article 41 of the Mexican Constitution establishes the rules for the broadcast of television and radio programming for political parties and independent candidates. Further, Article 134.7 and 134.8 provides that there must be fairness in the electoral contest and forbids personalised propaganda. In this sense, even though Article 36 of the Television and Radio Regulation in Electoral Matter allows political parties to decide the content of commercials, the Constitution and the General Law of Institutions and Electoral Procedures forbid the use and the dissemination of government programs with electoral purposes by the public administration.

#### *Languages:*

Spanish.



#### *Identification: MEX-2015-2-007*

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 28.01.2015 / **e)** SUP-REC-2-2015 / **f)** Independent Candidates in Mexico / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

3.23 General Principles – **Equity**.  
 4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates**.  
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.  
 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service**.

#### *Keywords of the alphabetical index:*

Election, candidate, independent / Election, candidate, registration procedure.

#### *Headnotes:*

Independent candidates must fulfil the terms, requirements and conditions that are applicable to citizens who wish to be registered, but these

requirements must be the same as those concerning other candidates. A restrictive approach to the processing of registration is not in line with the constitutional obligation to favour the individual and strengthen the human right to participate in politics, even as an independent candidate.

#### *Summary:*

I. In an appeal to the High Chamber of the Electoral Tribunal of the Federal Judiciary, the appellant, Carlos Monroy Villalobos, sought the protection of the political-electoral rights of citizens and revocation of a decision of the Regional Chamber of the Federal District.

Mr Carlos Monroy Villalobos, an independent candidate running for a federal deputy in Mexico City, had been notified to present the requirements for registration of his candidacy. He had subsequently expressed a statement of intention of correcting the mistake although the deadline had already passed. The Regional Chamber had decided that Mr Carlos Monroy Villalobos had not submitted the required documentation in the conditions and deadlines stipulated. As a result, his candidacy registration was denied.

II. On the basis of project presented by Justice Constancio Carrasco Daza, the High Chamber revoked the earlier decision of the Regional Chamber, which had prevented the appellant from running for mayoral office as an independent candidate, and ordered the National Electoral Institute in Mexico City to extend the deadline to fulfil the requirements for registration as an electoral candidate: specifically, it ordered the National Electoral Institute to give the appellant 48 hours to submit the correct documents (that was only the contract for the opening of a bank account).

The High Chamber revoked the decision of the Regional Chamber because the interpretation of the provision was not in line with the constitutional obligation (established in Article 35.II) to favour the individual and strengthen the human right to participate in politics, even as an independent candidate.

The Chamber held that independent candidates must fulfil the terms, requirements and conditions that are applicable to citizens who wish to be registered. In this regard, Article 384 of the General Law of Electoral Procedures and Institutions states that in the case of missing documentation for the registrations of independent candidates, the applicants must be notified so that in 48 hours they can get the missing documents. In this case, Mr Carlos Monroy Villalobos did not have the same time as the other applicants to obtain the missing documentation.

*Languages:*

Spanish.

*Identification:* MEX-2015-2-008

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 05.03.2015 / **e)** SUP-REC-46-2015 / **f)** Gender Equality / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.

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

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

*Keywords of the alphabetical index:*

Election, candidate / Equality of the sexes / Equality, gender.

*Headnotes:*

Gender equality in the nomination of candidates is necessary in order to enable access to positions of power by both genders, in authentic equal conditions. The principle of parity assumes that the nomination of men and women should happen in equal conditions in all municipalities in the states.

*Summary:*

I. The Social Democratic Party (hereinafter, “PSD”) of the federal State of Morelos brought an action before the High Chamber of the Electoral Tribunal of the Federal Judiciary, seeking to appeal against a decision of the Regional Chamber of the Federal District of the Electoral Tribunal of the Federal Judiciary which had permitted Maria Isabel Rodriguez Gomez of the PSD in Morelos to run for mayor.

The PSD argued that the Regional Chamber applied in an erroneous manner the horizontal principle of gender parity in the integration of the city council, and the vertical principle in the formula for mayor, trustee and councillors.

The PSD also contended that the interpretation made by the Regional Chamber was protective and discriminatory, henceforth violating Article 41 of the Constitution, and Articles 23 and 112 of the Constitution of the State of Morelos. From the last two articles, the appellant established that the Regional Chamber did not make a functional, grammatical and systematic interpretation.

II. On the basis of project presented by Justice Constancio Carrasco Daza, the High Chamber confirmed the resolution made on 5 March 2015 by the Regional Chamber of the Federal District, which established that gender equality in the nomination of candidates is necessary for enabling access to decision-making positions by both men and women, in authentic equal conditions.

The High Chamber determined that the decision of the Regional Chamber was correct, because the arguments made by the political party were not mentioned in the ruling of the Regional Chamber. The PSD mentioned that Article 180 of the Institutions and Electoral Procedures Code of Morelos does not mention the election of governors.

According to Articles 1.4 and 4.1 of the Mexican Constitution; Article 26 of the International Covenant on Civil and Political Rights; Article 24 of the American Convention on Human Rights; and Articles 1 and 7 of the Convention on the Elimination of all Forms of Discrimination against Woman, amongst others, the implementation of affirmative action towards the assurance to gender parity in the postulation of candidacies to any office of popular election should privilege the non-discrimination principle of women in an equal level of opportunities against the men.

*Languages:*

Spanish.



# Montenegro

## Constitutional Court

### Important decisions

*Identification:* MNE-2015-2-002

**a)** Montenegro / **b)** Constitutional Court / **c)** / **d)** 24.07.2015 / **e)** U-I 13/13, 17/13, 19/13 / **f)** / **g)** *Službeni list Crne Gore* (Official Gazette) / **h)** CODICES (Montenegrin, English).

*Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.

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

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

5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.

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

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

5.3.37 Fundamental Rights – Civil and political rights – **Right of petition**.

*Keywords of the alphabetical index:*

Amnesty / Principle of equality / Principle of non-discrimination / Equality of rights and obligations / Principle of unity of legal system / Constitutionality.

*Headnotes:*

The provisions of items 2, 3 and 4 of Article 3.1 of the Law on Amnesty of Persons sentenced for Criminal Offences Prescribed by the Laws of Montenegro and Persons Sentenced by Foreign Criminal Verdict neither contain discriminatory limitations on any discriminatory ground in relation to the Constitution nor in the sense in which the European Court of Human Rights interprets limitations.

*Summary:*

I. The applicants requested the Constitutional Court to review provisions of items 2, 3 and 4 of Article 3.1

of the Law on Amnesty of Persons Sentenced for Criminal Offences Prescribed by the Laws of Montenegro and Persons Sentenced by Foreign Criminal Verdict that is served in Montenegro (Official Gazette of Montenegro, no. 39/13). The applicants challenged that the provisions are discriminatory and contrary to Article 8 of the Constitution, Article 14 ECHR and Article 1 Protocol 12 ECHR and the case-law of the European Court of Human Rights.

They asserted that the provisions allowed for the disparate treatment of persons convicted of essentially identical crimes (aggravated murder referred to in Article 144 of the effective Criminal Code and class 1 felony in items 1-6 of Article 30.2 of the previously effective Criminal Code). Furthermore, they argued that the unconstitutionality of the provisions stems from different norms and legal effects applied to persons in the same and similar situations without any objectivity and reasonability. As such, the group of convicted persons who are not granted amnesty are placed in an unfair and unequal position compared to persons who are included in the provision of Article 1 of the Law and granted amnesty.

II. In deciding the case on the merits, the Constitutional Court considered the principle of unity of the legal system defined in Article 145 of the Constitution. The reason is that the aforementioned Law was adopted conditioned on amnesty being a general institute of criminal law under the Criminal Code of Montenegro (Official Gazette, nos. 70/03, 13/04, 47/06 and nos. 40/08, 25/10, 73/10, 32/11, 64/11, 40/13, 56/13 and 14/15). The Court also took into account the case-law of the European Court of Human Rights and the Federal Constitutional Court of the Federal Republic of Germany, to wit, general legal positions of these courts relating to the regulation of the amnesty institute.

Following its review, the Court opined that an enacting authority possesses the power under the law governing the amnesty institute to define the catalogue of criminal offences for which the convicted persons will be (or not) granted amnesty. Interpreting the Constitution, the Court stipulated that the granting of amnesty is originally within the Parliament's mandate and the Constitution fully leaves that to the enacting authority.

The Court found that the manner of regulating the said matters falls within the domain of legislation policy. As the agent of legislative power, Parliament is authorised to freely determine the level of exemption from the imposed penalty of imprisonment and specify the persons to whom amnesty applies. Therefore, the Court, in accordance with Article 149 of the Constitution, is not competent to evaluate the

appropriateness of Parliament's decisions, including challenges to provisions of Articles 1 to 3 of the Law. The Court also ruled that it is not competent to establish the extent to which the natures of particular crimes are similar and/or identical and the reasons why the enacting authority exempted the persons convicted of acts cited in the challenged provisions of Article 3 of the Law from amnesty application in view of whether such legal solution is rational or appropriate.

The Court held that the challenged provisions of items 2, 3 and 4 of Article 3.1 of the Law cannot be prejudicial to the principle of general prohibition of discrimination, direct or indirect, on any ground and equality before the law. This applies regardless of any particularity or personal feature as per Articles 8.1 and 17.2 of the Constitution, Article 14 ECHR and Article 1 Protocol 12 ECHR.

The Court found that the challenged provisions of items 2, 3 and 4 of Article 3.1 of the Law neither contain discriminatory limitations on any discriminatory ground in relation to the Constitution of Montenegro nor in the sense in which the European Court of Human Rights interprets limitations. Namely, the challenged provisions of the Law do not make any distinction according to the personal features of persons to whom amnesty does not apply. The reason is that all persons (without exception), who are convicted of particular criminal offences (aggravated murder under the Criminal Code) and are convicted on the effective date of this law, of criminal offences of criminal association and creation of criminal organisation as well as of criminal offences of unauthorised production, possession and distribution of narcotics under the Criminal Code are exempted from amnesty. This fact, according to the Constitutional Court, cannot be considered "personal feature" neither in accordance with the said provisions of the Constitution nor within the meaning of the European Convention on Human Rights.

The constitutionality of the challenged provisions of items 2, 3 and 4 of Article 3.1 of the Law, according to the Constitutional Court, also cannot be prejudiced from the perspective of constitutional principle of equality before the law, regardless of any particularity or personal feature (Article 17.2 of the Constitution). They apply to all non-amnestied persons equally.

Upon hearing the content of the challenged provisions of items 2, 3 and 4 of Article 3.1 of the Law, the Constitutional Court found that they are not contrary to the Constitution.

Therefore, the Constitutional Court held that when regulating the right to amnesty in the manner

stipulated in the challenged provisions of the Law, the enacting authority did not overstep the boundaries of constitutional powers. Also, it did not violate constitutional principles on prohibition of discrimination and equality of citizens before the law as per provisions of Articles 8 and 17.2 of the Constitution. Perpetrators of those criminal offences not subject to amnesty, according to the Constitutional Court, may not file complaint of discrimination, specifically the violation of constitutionally guaranteed right to equality of all before the law. Besides, amnesty, according to the challenged provision of item 2 of Article 3.1 of the Law, does not apply, without exception, to all persons who committed an aggravated criminal offence of murder. In that sense, the Court decided to reject the petition to initiate proceedings to review the constitutionality of the provisions of items 2, 3 and 4 of Article 3.1 of the Law on Amnesty of Persons Sentenced for Criminal Offences Prescribed by the Laws of Montenegro and Persons Sentenced by Foreign Criminal Verdict which is Served in Montenegro (Official Gazette of Montenegro, no. 39/13).

#### *Cross-references:*

##### Constitutional Court:

- BVerfGE 10, 234 Platow-Amnestie, Decision of the First Senate, 15.12.1959 – 1 BvL 10/55.

##### European Court of Human Rights:

- *Tarbuk v. Croatia*, no. 31360/10, 11.12.2012.

#### *Languages:*

Montenegrin, English.



## Norway Supreme Court

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### Important decisions

*Identification:* NOR-2015-2-004

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 26.06.2015 / **e)** HR 2015-1369-A / **f)** N/A / **g)** *Norsk Retstidende* (Official Gazette), 2015, 833 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989**.

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

*Keywords of the alphabetical index:*

Child, best interest / Criminal law / Penalty.

*Headnotes:*

Where a person is convicted of a crime related to drugs, that person's position as sole carer for a minor with mental problems does not provide grounds for delivering a community sentence instead of a custodial sentence.

*Summary:*

I. The applicant had been sentenced to a period of imprisonment of three years, with one year suspended, for violation of Section 162.1 and 162.2 of the Penalty Code. Together with another person, the applicant had acquired 15,000 Rivotril tablets, around 4.6 kg hashish and around 1 kg marijuana and had transported the drugs from Oslo to Bergen. The trial court had ruled that the applicant's position as sole carer for a daughter of 16 years of age with mental problems did not provide grounds for delivering a community sentence.

II. The Supreme Court pointed out that the best interests of the child, although a primary consideration, will not always be of decisive importance. The Court cited Section 104.2 of the Constitution and Article 3 of the UN Convention on the Rights of the Child. This was a serious case and the daughter's care would be addressed by the Child Welfare Services.

*Languages:*

Norwegian.



# Poland

## Constitutional Tribunal

### Important decisions

*Identification:* POL-2015-2-002

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.03.2015 / **e)** P 4/14 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2015, text 791; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2015, no. 3A, text 31 / **h)**.

*Keywords of the systematic thesaurus:*

1.3.4.9 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the formal validity of enactments.**

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

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

*Keywords of the alphabetical index:*

Gambling / Public order / Technical regulation / Notification.

*Headnotes:*

The Gambling Act was enacted without any violation of the legislative procedure set out in the Constitution. The requirement that gaming machines should be available for use only in casinos serves an important public interest, thus justifying the restriction of freedom of trade.

*Summary:*

I. The Tribunal considered preliminary questions relating to constitutionality submitted by the Supreme Administrative Court and the District Court of Gdańsk. The applicants complained of the failure to notify the European Commission about the Gambling Act and wished to know whether this failure amounted to a violation of the legislative procedure. The Supreme Administrative Court found that, according to the case-law of the Court of Justice of the European Union, national legal rules could not, in the absence of proper notification, be applied in individual cases.

The Court did nevertheless observe that the possibility of refusing to apply a national rule must be examined taking into account the supremacy of the Constitution. In the Court's view, refusal to apply a rule which had not been notified could destabilise the legal system as the technical nature of a rule could be open to debate, the fact of notifying the European Commission was not published and this failure could be established even after several years. There was also a risk that a legal vacuum might ensue. The applicants, in other words, raised the question of the legal impact of the failure to notify the European Commission about a national provision.

In addition, the applicants argued that the requirement that gaming machines be made available only in casinos restricted freedom of trade.

II. The Tribunal held that notification of technical provisions was an EU procedure whereby Member States were required to notify the European Commission and other Member States about planned technical regulations and to consider, as far as practicable, the feedback provided by them when drafting the final text of the technical regulation. The Tribunal found that the Constitution made no reference to this issue, directly or indirectly, and concluded from this that the notification referred to in Directive 98/34/EC, incorporated into the Polish legal order by the Regulation on Notification of 23 December 2002, did not constitute an element of the constitutional legislative procedure. The Tribunal did not address the question of whether the contested provisions of the Gambling Act were technical regulations within the meaning of the directive. In the Tribunal's view, failure to comply with any obligation which there might be to notify the European Commission about planned technical regulations could not *per se* constitute an infringement of the constitutional principles of a democratic state governed by the rule of law (Article 2 of the Constitution) or of legality (Article 7 of the Constitution). Under no circumstances could an interpretation consistent with EU law lead to results that contradicted the specific wording of the Constitution. The Tribunal further observed that the Court of Justice of the European Union had no jurisdiction to give a final decision concerning the interpretation or the binding force of national legal rules. The case-law of the EU Court of Justice was only binding on national courts in matters relating to the interpretation of EU law. It was for the domestic courts to decide whether the rule in question was technical in character; and the Constitutional Tribunal had exclusive jurisdiction to find that there had been a violation of the legislative procedure and to remove from the system any law so enacted. It was unacceptable that ordinary, administrative, military

courts or even the Supreme Court should do so themselves by refusing to apply a law.

With regard to the second question, the Tribunal found that the legislator's decision not to permit the siting of gaming machines in amusement arcades, eating places or service points, i.e. outside casinos, met the constitutional requirements concerning restrictions on freedom of trade. Such restrictions were necessary in order to protect society from the negative effects of gambling and also for the purpose of improving state oversight of that sector, which posed numerous risks, such as addiction problems and organised crime. In the opinion of the Constitutional Tribunal, combating such risks certainly fulfilled the public interest requirement referred to in Article 22 of the Constitution.

Freedom of trade in the context of gambling could be subject to significant restrictions, due to the need to ensure a necessary level of protection for consumers and public order. The Tribunal referred to the case-law of the Court of Justice of the European Union and noted that, because of the specific nature of the subject, the latter granted Member States considerable regulatory freedom.

For these reasons, the Constitutional Tribunal ruled that Articles 14.1 and 89.1.2 of the Gambling Act of 19 November 2009 were in conformity with Articles 2 and 7 taken in conjunction with Article 9 of the Constitution and with Articles 20 and 22 taken in conjunction with Article 31.3 of the Constitution.

The judgment was pronounced by the Tribunal sitting in plenary session, with one dissenting opinion.

#### Cross-references:

Constitutional Tribunal:

- K 18/95, 09.01.1996, *Bulletin* 1996/1 [POL-1996-1-001];
- K 3/98, 24.06.1998, *Bulletin* 1998/2 [POL-1998-2-014];
- Order P 37/05, 19.12.2006, *Bulletin* 2007/1 [POL-2007-1-002];
- K 46/07, 08.07.2008;
- Kp 4/09, 14.10.2009;
- Kp 4/08, 16.07.2009;
- K 10/09, 13.07.2011;
- Order TW 15/11, 08.10.2012;
- K 33/12, 26.06.2013, *Bulletin* 2013/3 [POL-2013-3-006];
- K 31/12, 07.11.2013.

Supreme Court:

- Order I KZP 15/13, 28.11.2013.

Court of Justice of the European Union:

- C-275/92, 24.03.1994, *H.M. Customs and Excise v. Schindle*;
- C-317/92, 01.06.1994, *Commission of the European Communities v. Federal Republic of Germany*;
- C-194/94, 30.04.1996, *CIA Security International SA v. Signalson SA and Securiel SPRL*;
- C-124/97, 21.09.1999, *Läärä and others*;
- C-67/98, 21.10.1999, *Zenatti*;
- C-6/01, 11.09.2003, *Anomar and others*;
- C-65/05, 26.10.2006, *Commission v. Greece*;
- C-20/05, 08.11.2007, *Schwibbert*;
- C-213/11, C-214/11, C-217/11, 19.07.2012, *Fortuna and others*.

#### Languages:

Polish.



#### Identification: POL-2015-2-003

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 02.06.2015 / **e)** K 1/13 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2015, text 791 / **h)** CODICES (Polish).

#### Keywords of the systematic thesaurus :

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

#### Keywords of the alphabetical index :

Trade union, membership, exclusion / Trade union, constitution, limitation / Trade union, discrimination.

*Headnotes:*

Certain statutory provisions which lay down the principles governing the establishment and membership of trade unions are incompatible with the freedom of association and the right to organise enshrined in the Constitution.

*Summary:*

I. The All-Poland Alliance of Trade Unions (OPZZ) challenged three provisions of the Trade Unions Act of 23 May 1991: Article 2.1 which grants the right to establish and join a trade union to workers, whatever the nature of their employment contract, to members of agricultural co-operatives and to individuals performing work under agency contracts provided they are not employers; Article 2.2 which grants home workers (under a specific contract provided for in the Labour Code and the special arrangements) the right to join trade unions operating within the business establishment which signed the contract; and Article 2.5 which grants the right to establish and join trade unions to individuals who have been assigned to an establishment to perform alternative service (an option available to those who, for religious or moral reasons, refuse to perform compulsory military service).

The applicant challenged these three provisions, citing the freedom of association and right to organise enshrined in the Constitution (Article 59.1 taken in conjunction with Article 12 of the Constitution) and also the guarantee provided by ILO Convention no. 87 on Freedom of Association and Protection of the Right to Organise of 9 July 1948, which applied to all workers, irrespective of the form in which their work was performed. The applicant argued, in particular, that as things stood, individuals who performed paid work on some basis other than an employment contract, for example people on service contracts or the self-employed, were not permitted to establish and join trade unions.

II. The challenge was to determine who precisely was covered by the constitutional guarantees because while the term "worker" was used both in the Constitution and in the Labour Code, the latter defined it more narrowly as meaning an individual who had a contract of employment. The Trade Unions Act uses the same definition as the Labour Code, thus limiting the number of people entitled to establish and join trade unions.

The Tribunal ruled that the right to organise enshrined in the Constitution must be guaranteed to all self-employed persons, whatever form their work may

take. The type of relationship that exists between workers and employers cannot be a criterion for granting or denying the right to establish and join a trade union. The status of workers should be determined according to whether they perform paid work. From a constitutional standpoint, any individual who performs specific work, who has a legal relationship with an entity on whose behalf the work is performed, and who has work-related interests that can be protected collectively, should be recognised as a worker.

The Tribunal stressed that freedom of association was exercised through collective activity within the framework of an organisational structure, with a view to achieving the objectives set by the persons involved. The right to organise was part of this wider freedom of association and aimed to protect the professional interests of the workers. Trade unions possessed legal instruments for resolving any problems that might arise in dealings between their members and employers (e.g. the right to engage in collective bargaining, to conclude collective agreements, to organise strikes and other forms of opposition).

When determining the conditions governing the exercise of freedom of association in the Trade Unions Act, the legislator had an obligation to respect the meaning of the term "worker" as used in the Constitution. It could not confine itself to the category of workers as defined in the Labour Code. The guarantees adopted by the legislator in the Trade Unions Act were too narrow in relation to those provided by the Constitution and relevant treaties. The legislator had, without reason, referred to a particular form of employment and this was not acceptable from a constitutional standpoint.

The Tribunal's decision applies only to the Trade Unions Act. The Tribunal did not consider the constitutionality of the term "worker" as defined in Article 2 of the Labour Code. It merely noted that this definition could not be used in the Trade Unions Act, because it did not afford the opportunity to engage in trade union activity to all those covered by the constitutional guarantees.

The Tribunal accordingly held that Article 2.1 of the Trade Unions Act of 23 May 1991, insofar as it restricted the freedom to establish and join trade unions in the case of those who performed paid work but who were not listed in this article, and also Article 2.2 which granted persons on home-based work contracts the right to join trade unions already operating at their employer's establishment but not to establish trade unions, were in breach of Article 59.1, taken in conjunction with Article 12 of the



Constitution. The Tribunal also ruled, however, that Article 2.5 of the aforementioned Act, which guaranteed the right to establish and join trade unions in establishments to individuals who had been assigned there to perform alternative service, was in conformity with Article 59.1, taken in conjunction with Article 12 of the Constitution and with Article 2 of ILO Convention no. 87. The Tribunal held that this article confirmed the rights of the persons in question and restricted neither their previous trade union activities nor the possibility for them to exercise their trade union rights in other ways.

The Tribunal further ruled that the provisions which had been found to be unconstitutional would nevertheless remain in force but that, in order to bring them into line with the Constitution, the legislator must augment them to make them consistent with the constitutional guarantees of freedom of association and the right to organise. It was for the legislator to choose an appropriate legislative technique in order to give effect to the relevant constitutional rule.

#### Cross-references:

##### Constitutional Tribunal:

- K 26/98, 07.03.2000, *Bulletin* 2000/1 [POL-2000-1-007];
- Order K 31/01, 21.11.2001;
- SK 41/05, 24.10.2006;
- K 27/07, 28.04.2009;
- P 4/10, 12.07.2010.

##### European Court of Human Rights:

- *Swedish Engine Drivers' Union v. Sweden*, no. 5614/72, 06.02.1976, Series A, no. 20;
- *Tüm Haber Sen and Çinar v. Turkey*, no. 28602/95, 21.02.2006, *Reports of Judgments and Decisions* 2006-II;
- *Demir and Baykara v. Turkey*, no. 34503/97, 12.11.2008, *Reports of Judgments and Decisions* 2008;
- *Trade Union of the Police in the Slovak Republic and others v. Slovakia*, no. 11828/08, 25.09.2012;
- *Sindicatul «Pastorul cel Bun» v. Romania*, no. 2330/09, 09.07.2013, *Reports of Judgments and Decisions* 2013;
- *Matelly v. France*, no. 10609/10, 02.10.2014.

##### Court of Justice of the European Union:

- C 22/08 and C 23/08, 04.09.2009, *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg*, 900;

- C-345/09, 14.10.2010, *J. A. van Delft and others v. College voor zorgverzekeringen*;
- C-46/12, 21.02.2013, *L. N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*;
- C-270/13, 10.09.2014, *Iraklis Haralambidis v. Calogero Casilli*;
- C-413/13, 04.12.2014, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*.

#### Languages:

Polish.



# Portugal

## Constitutional Court

### Important decisions

*Identification:* POR-2015-2-008

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 05.05.2015 / **e)** 260/15 / **f)** / **g)** *Diário da República* (Official Gazette), 110 (Series II), 08.06.2015, 14949 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law.**
- 3.11 General Principles – **Vested and/or acquired rights.**
- 3.16 General Principles – **Proportionality.**
- 3.18 General Principles – **General interest.**
- 5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions.**

*Keywords of the alphabetical index:*

Public sector, legal regime / Enterprise, state-owned / Enterprise, State, majority shareholder / Public sector, financial self-sustainability / Enterprise, board members, applicable rules / Worker, public funds, payment / Collective bargaining, right / State, financial integrity.

*Headnotes:*

Questions had arisen over norms contained within a new legal regime governing the state business sector which subjected its staff to the regime governing labour contracts applicable to public servants, in relation to meal and travel allowances and overtime pay and pay for night-time working. These norms prevail over collective labour regulation instruments, such as agreements reached through collective bargaining. The only exception is the State Budget Law. Its provisions continue to prevail over the norms.

The norms are not unconstitutional. The imperative transposition to the state-owned business sector of the limitations on the right to contractual autonomy that apply to public servants with a public labour contract does not impinge on the area which is essential to the affirmation of the competence of trade

unions to engage in collective bargaining. It may also be linked to public-interest reasons that are sufficiently compelling to justify prohibiting any discretionary ability to determine the amount of pay supplements due to staff in the state-owned business sector.

*Summary:*

I. A new regime had been introduced, containing principles and rules for the state business sector. Two of its articles included norms that subjected members of the governing bodies, managers and staff of state business entities, enterprises in which the state is the sole or majority shareholder, and entities in the public local and regional business sectors, to certain aspects of the labour regime governing public servants (meal, expense and travel allowances for travel in Portugal and abroad; overtime pay and rates of pay applicable to working at night).

This abstract *ex post facto* review was requested by a group of Members of the Assembly of the Republic, under a constitutional norm that enables one tenth of the Assembly's Members to make such a request.

The applicants challenged the norms in the new legal regime on the basis that they were in breach of the right to collective bargaining and agreement, and encroached on the proportional equality aspect of the principle that excess is prohibited.

II. The Constitutional Court noted that these norms are imperative and prevail over any others that contradict them, including special and exceptional norms. It took the view that the fact that the legal regime applicable to staff with a public labour bond can be the object of derogation means that the only result which the imperative imposition of these norms holds for the state business sector is that the possibility of the contractual self-regulation of the matters in question is, in turn, subject to the requisites of the General Law governing Labour in the Public Service (LTFP).

In earlier jurisprudence the Constitutional Court has held that public-order reasons can justify making certain aspects of labour regimes imperative, and that in the Labour Law field this can be sufficient reason not to consider decisions which remove the parties' ability to control the details of the procedures regulated by these regimes to be constitutionally unlawful. If this also applies to regulating relations between private-law subjects, then it must also be true with regard to the modelling of certain dimensions of the status of agents with binding ties to entities which, notwithstanding their possession of legal personality under the private law and the fact

that they are generally bound by that branch of the law, are concomitantly subject to certain public-law rules, either in the public interest whose pursuit is their *raison d'être*, or as an effect of the exercise of the economic and financial prerogatives of authority which the law attributes to entities with powers of supervision and oversight over them. The former category of entities exists to pursue the public interest and help to determine the indices that measure the state's financial sustainability.

The purpose of the reform of the regime governing the state business sector undertaken by the Executive Law that includes the challenged norms was to enhance the operational and financial efficiency and efficacy of all enterprises within the sector, to control public-sector debt, and to subject the core matters affecting every business organisation directly or indirectly owned by public administrative or business entities to the same regime.

Protecting the interest in safeguarding the state's financial integrity is a sufficiently important justification not to refuse the limitations which the legal regime governing all workers paid from public funds places on collective bargaining about these aspects of the labour relationship.

The Court also rejected the argument that the norms violated the principle of the legal certainty. It noted a general and steady trend towards making the members of the governing bodies, managers and staff of state business entities, enterprises in which the state is the sole or majority shareholder and entities in the public local and regional business sectors equivalent to public servants.

The legislature's renewed affirmation that regimes which already govern public servants apply to the state business sector too cannot therefore be perceived as unexpected.

Regarding the question of whether, from the point of view of the principle of legal certainty, the expectations generated by the collective labour regulation instruments entered into in the state business sector can preclude more recent options taken by the state/legislator, the Court has gradually been establishing the position that this is not the case and that neither the previous indications given by the state/legislator itself or its behavioural precedents constitute a situation in which there is a certainty that legitimately deserves protection.

The Court also considered that the result of the challenged measures (an increase in the financial self-sustainability of the entities in question and a

consequent reduction in their actual or potential need for transfers from the State Budget to cover their economic and financial shortfalls) was not disproportionate to the burden which the measures imposed on the staff in question.

It accordingly found no unconstitutionality in the norms before it.

III. The Ruling was the object of four concurring and five dissenting opinions (not all with regard to the same norms).

#### *Cross-references:*

Constitutional Court:

- nos. 94/92, 16.03.1992; 413/14, 30.05.2014 and 794/13, 21.11.2013.

#### *Languages:*

Portuguese.



#### *Identification: POR-2015-2-009*

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 25.05.2015 / **e)** 296/15 / **f)** / **g)** *Diário da República* (Official Gazette), 114 (Series I), 15.06.2015, 3791 / **h)** CODICES (Portuguese).

#### *Keywords of the systematic thesaurus:*

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

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

#### *Keywords of the alphabetical index:*

Social insertion, income / Foreigner, social right / Equivalent rights, principle / Residence, permit.

*Headnotes:*

The Constitution requires an attitude of openness towards foreign citizens, and generally grants them the same rights and subjects them to the same duties as Portuguese citizens. The principle of equivalence is a specific imperative general principle applicable to matters linked to the status of foreigners and applicable to every foreigner, not just to those whose presence in Portugal complies with the applicable rules. The ordinary legislator can establish exceptions to this principle, subjecting the enjoyment of certain rights to possession of Portuguese nationality, provided the restriction is constitutionally legitimate. The constitutional norm that enshrines the principle of equivalence itself establishes a number of exceptions, but this legitimacy can also exist if the ordinary legislator acts in order to safeguard another constitutionally protected right or interest and the restriction is necessary to that end – i.e. if the measure is necessary, appropriate, and proportional in the strict sense of the term. In the legal regime governing the entry into, presence in and departure and removal of foreigners from Portuguese territory, the Portuguese State has created a number of requirements intended to prevent persons without adequate means of subsistence from entering and remaining in this country. The law imposes requisites which signify that a person must already possess or have access to such means before a residence permit, be it temporary or permanent, can be granted; and only those foreign citizens who hold a valid residence permit of either type can apply for the RSI.

The Administration has the opportunity to verify whether foreign citizens seeking leave to enter or remain in Portuguese territory are economically autonomous, thereby impeding any abnormal flow of foreigners without resources who might place an excessive burden on the social security system.

Imposing a requirement for three years of legal residence would necessarily undermine the possibility of timely access to a benefit the purpose of which is to ensure that citizens experiencing serious economic hardship and social and occupational “disinsertion” possess the minimum resources needed for subsistence. By subjecting the right to a welfare benefit that provides a minimally dignified standard of living – a right that results from the combination of the principle of the dignity of the human person and the right to social security in cases of hardship – the legislator would be subjecting foreigners to a sacrifice that was disproportionate in relation to the purposes of the restriction. This legislative option affected people in very vulnerable situations, who did not possess the immediate means to provide for their household’s most basic needs,

and who had been allowed to enter Portugal in compliance with the rules laid down by the legislator itself, namely with regard to the requisites in terms of sources of income or other material means. When weighed against the very limited costs of the RSI within the overall social security budget and the tiny amount spent on awarding it to beneficiaries who are not Portuguese nationals, the legislative solution was clearly disproportionate.

*Summary:*

I. A norm subjected recognition of the right to Social Insertion Income (RSI) to fulfilment of a number of requisites, one of which was that if the applicant was not a national of a European Union (EU) Member State, a European Economic Area (EEA) country, or another state with an agreement with the EU permitting the free movement of persons, he or she must have resided in Portugal legally for the last three years. The same norm also denied RSI in cases where the remaining members of the applicant’s household (except for children below the age of three) had not lived in Portugal for at least the past three years.

This abstract *ex post facto* review case was brought before the Constitutional Court by the Attorney-General. The norms under review formed part of the legal regime governing Social Insertion Income (RSI); a social benefit included in the welfare subsystem and designed to support people experiencing serious economic hardship. There are two aspects to the RSI: the benefit itself is a cash payment to provide for the most basic needs of the recipient and his or her household; and it requires beneficiaries to enter into an insertion contract intended to help with their social and occupational integration. The benefit was first developed in the wake of the 1992 Recommendation in which the Council of the European Communities urged all Member States to adopt a measure that would fight poverty and social exclusion in an integrated way.

The applicant had originally asked the Constitutional Court to consider both a part of the norm addressed in this case (which required Portuguese citizens to have resided legally in Portugal for at least a year before being eligible for RSI), and another norm which stated that the members of an RSI applicant’s household also had to have lived in the country for a year in order for the applicant to be eligible. In response to a separate petition lodged by the Ombudsman, the Court declared both norms unconstitutional with generally binding force in Ruling no. 141/15. As a result of this declaration, the unconstitutional norms ceased to be Portuguese law, rendering this part of the petition lodged by the Public

Prosecutors' Office redundant. However, these declarations of unconstitutionality only covered the segment of the first norm that affected Portuguese citizens and their family members. A second segment requires nationals of other EU Member States, EEA countries, or other states with an agreement with the EU permitting the free movement of persons to have resided legally in Portugal for at least a year before being eligible for RSI; while a third segment subjected the eligibility of nationals of states other than those to a three-year period of residence. Both of the latter segments remained in force, but in the present case the Court stated that it was restricted to reviewing the third segment only.

In abstract *ex post facto* reviews like the present one (and in concrete review cases), the Constitutional Court is competent to consider both whether a norm is unconstitutional because it is in breach of the Constitution, and whether it is unlawful because it violates a norm in a law with superior force. The Attorney-General asked the Court to review the norms from both these perspectives, arguing with regard to the question of unlawfulness that the norms contained in the Law governing the Bases of the Social Security System (LBSS) – a Law with superior force – parameterise the Law that created the RSI.

II. The Constitutional Court declared the norm unconstitutional on both counts. The Court agreed that the LBSS possesses parametric value in relation to the RSI Law. However, it noted that the former could not provide grounds for saying that the latter was invalid in relation to EU citizens (or other foreigners with equivalent status), because the LBSS only distinguishes between two categories of citizen – Portuguese and non-Portuguese, with the latter's eligibility for welfare benefits subject to certain conditions, namely minimum periods of legal residence or other equivalent situations. The Court said that in this respect it is possible to question whether EU and equivalent citizens should be included in the non-Portuguese category, inasmuch as they enjoy a special status which, in the light of both the Portuguese constitutional-law framework and primary European Union law, tends to be equivalent to that of Portuguese nationals.

The Constitutional Court was thus not in a position to consider the difference between the rules applicable to different categories of foreign citizens derived from the fact that the LBSS only distinguishes between nationals and non-nationals, whereas the RSI Law differentiates between three categories.

In the past the Constitutional Court had already concluded that there can be no doubt that EU Law tolerates regimes which differentiate between

nationals of the host Member State and other EU nationals when it comes to awarding benefits under a non-contributory regime that guarantees minimum means of subsistence.

The question therefore arose as to whether the fact that the norm before the Court restricted recognition of foreign citizens' right to RSI was a constitutionally legitimate exception to the principle of equivalence.

The Court had already characterised RSI as a positive dimension of a right to a minimally dignified standard of living – a right that possesses the configuration of an autonomous right, constructed on the basis of the conjugation of the principle of respect for human dignity and the right to social security. The Court noted that there would have to be a strong reason for there to be an exception to this aspect of the principle of equivalence, and any restriction on access to the RSI by foreigners would have to be limited to that needed in order to safeguard other rights or interests to which the Constitution also affords its protection.

The Court acknowledged the compelling nature of the interest in preventing excessive costs for the social security system, and the need to ensure a certain prior connection with this country in order to avoid both an inconstant presence and the award of unfair benefits.

The Constitutional Court considered that the preservation of the financial sustainability of the social security system would certainly appear to constitute sufficient grounds for justifying exceptions to the principle of equivalence. However, in the present case the requirement for three years of residence was a sacrifice that was disproportionate to the public-interest advantage sought by its imposition. It therefore found the norm unconstitutional.

III. The Ruling was the object of 5 extensive dissenting opinions. Their authors gave a range of reasons for their disagreements with the majority, one of which was the incongruous fact that the combination of the declaration of unconstitutionality with generally binding force in Ruling 141/15 (in which the Court only ruled on the part of the norm that required Portuguese citizens and their households to have legally lived here for a year before being eligible for RSI) and the declaration made in the present Ruling means that European citizens who apply for the RSI benefit are now subject to a requirement to have resided in Portugal legally for a period of time which is no longer applicable to nationals of non-EU or non-EEA states or countries that do not have a free movement agreement with the EU.

*Cross-references:*

## Constitutional Court:

- nos. 54/87, 10.02.1987; 340/95, 22.06.1995; 962/96, 11.07.1996; 423/01, 09.10.2001; 72/02, 20.02.2002; 345/02, 11.07.2002; 509/02, 19.12.2002; 96/13, 19.02.2013 and 141/15, 25.02.2015.

*Languages:*

Portuguese.

*Identification:* POR-2015-2-010

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 23.06.2015 / **e)** 326/15 / **f)** / **g)** *Diário da República* (Official Gazette), 146 (Series II), 29.07.2015, 20901 / **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**.

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

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

*Keywords of the alphabetical index:*

Land, property, limitation / Land, shore, public domain / Public water, domain, private use / Acquired rights, recognition / Excess, prohibited, principle.

*Headnotes:*

By establishing a rebuttable presumption that waters and the land below and immediately adjacent to them belong in the public domain, the ordinary legislator admitted the possibility that private property rights to sections of the beds, shores or banks of public waters – i.e. waters that

form part of the public water domain – can continue to exist. Constitutional jurisprudence on the distribution of the burden of proof says that the latter falls on the party in the best position to dispose of the material means or instruments with the ability to prove the facts in question.

*Summary:*

I. A legal norm provided that anyone who sought recognition of their ownership of a section of the bed, shore or bank of any maritime, navigable or floatable water had to apply for it to the ordinary courts by 1 July 2014, and had to submit documentary evidence that the land in question was private or common property held by legitimate title before 31 December 1864. The challenged segment of the norm was the one regarding the obligatory provision of proof of ownership prior to the end of 1864. This case involved a mandatory appeal by the Public Prosecutors' Office against a decision in which a court refused to apply a norm in the law governing the ownership of water resources, on the grounds that the norm was materially unconstitutional.

The court *a quo* held that the requirement to provide evidence dating from before 31 December 1864 represented what it called a “diabolical evidentiary requirement”, in that owners were subjected to a demand that was very difficult or even impossible to fulfil, and thus ran the risk of forfeiting their ownership to the state. The court's conclusion that this was unconstitutional was based on the constitutional parameter formed by the fundamental right to property and ownership.

In constitutional terms, the public domain includes both territorial waters and the contiguous marine beds and depths, and lakes, lagoons and navigable or floatable waters and their beds. This definition is based on the conviction that the public importance and use of bodies of water mean that they should not be the object of private transactions. To the extent that the public water domain is considered to be fundamentally linked to the movement of persons, goods and ideas, it concerns matters of vital importance to the community. For this reason, such waters form part of the public domain in virtually all of the world's legal systems. Constitutionally speaking, the concept of public property also includes “other property ... classified as such by law”. There are forms of property that are classified as part of the public domain by the Constitution itself, and the status thus declared cannot be revoked by the ordinary law. These assets are known as ‘domain property by nature’, while others are domain property because the ordinary law declares them to be so. In the latter case the status can be changed by the

ordinary legislator, albeit its margin for legislative manoeuvre is not absolute. Placing something in the public domain must be justified in the light of both the various interests protected by the Constitution and the principle of proportionality, inasmuch as that domain is linked to a public-law regime with the ability to remove property from private ownership. When the law subjects a given category of asset to the public domain, there must be grounds for doing so in terms of the need to fulfil a particular public interest.

The shores and banks of public bodies of water do not form part of the public domain by nature, and were first classified as belonging to it by an 1864 Royal Decree. This is why the legislator chose 31 December of that year – the date on which it ceased to be possible to legally transact them and they could no longer be acquired by adverse possession – as the historical cut-off point for securing recognition of private ownership of sections of the beds, shores or banks of any maritime, navigable or floatable waters, in the sense that self-proclaimed owners had to provide documentary proof of title prior to that date.

II. The Court found no unconstitutionality in this provision, ruling that it was not in violation of the right of access to the law and to effective jurisdictional protection. In order to analyse the question of constitutionality posed in this case, the Constitutional Court compared the normative provision which the court *a quo* refused to apply with the content of both the right to private property and ownership and the right of access to the law and to effective jurisdictional protection – both rights that are enshrined in the Constitution.

A large body of constitutional jurisprudence recognises that the nature of some of the dimensions of the right to property and ownership is analogous to that of the fundamental rights, freedoms and guarantees. One of those dimensions is the citizen's right not to be deprived of his or her property, except by means of public requisition and expropriation, which can in turn only be undertaken on the basis of a law and in return for fair compensation. The *ratio* underlying this requirement is the principle that everyone must be equal when it comes to the distribution of public costs, under which a serious, special sacrifice imposed on a private individual in the public interest must be compensated by the community. The legislator must balance the way it regulates the right to property and ownership with the relevant constitutional imperatives (such as the right to somewhere to live, the need for spatial planning, and the protection of public health). Over the years the Constitutional Court has repeatedly confirmed

that the constitutional guarantee of the right to property implies the need for legal provisions that shape the social aspects of property and ownership.

Turning to the right of access to the law and to effective jurisdictional protection, the Court noted that its own case-law establishes that not every type of effect on the right to private property has to be the object of compensation, but that any effect must always be justified in the light of the principle that excess is prohibited.

The Court took the view that it is possible for the right to property and ownership to be affected by procedural norms and norms that allocate the burden of proof, which are only unconstitutional in such cases if their effects on that right are excessive.

In the absence of private property rights, the shores and banks of public bodies of water form part of the public domain belonging to public entities. The challenged norm allocates the burden of proof and imposed a deadline on bringing legal actions to recognise such private rights – a deadline which, when the norm was considered by the court *a quo*, fell on 1 July 2014. They further require the provision of documentary evidence that the right in question existed, or that the property was in private hands, at some time prior to 31 December 1864.

The Court said that this legal regime was justified by the need to make the basis for the inclusion of given assets in the public domain a stable one, that this particular norm only affected the shores and banks of navigable or floatable waters, and that the ultimate grounds for it were to be found in the need to protect constitutional interests to which these types of waters are inextricably linked.

The Court considered that setting a deadline on bringing actions to recognise such rights is an indispensable part of the process of stabilising the definition of the property that falls within the public domain.

On the requirement to prove a right of ownership, the Court evaluated a number of relevant considerations: it noted that pre-1971 legislation did not include any presumption that property belonged in the public domain, or any requirement or burden to bring suits in order to secure recognition of the private ownership of the banks and shores of bodies of water; it also acknowledged that while the Public Administration has been under a duty to begin classifying and demarcating the country's hydro-graphic basins since 1892, that duty has never been fulfilled; and it recognised that there are other legal instruments (administrative easements and other

restrictions imposed in the public interest) which at least partly make it possible to protect the public interests which the legal regime containing the norms before the Court was designed to safeguard, but that public domain status is nonetheless the best way to guarantee them. Taking all this into account, and given that there is valid justification for affecting the right to private property and ownership in this case, the Court saw no reason to deny the constitutional conformity of the norm before it, when judged in the light of the right of access to the law and to effective jurisdictional protection.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2015-2-011

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.06.2015 / **e)** 345/15 / **f)** / **g)** *Diário da República* (Official Gazette), 147 (Series II), 30.07.2015, 21020 / **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.**

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

#### *Keywords of the alphabetical index:*

Sanction, imposition, proceedings / Act, administrative, appeal / Sanction, criminal / Sanction, administrative / Two levels of jurisdiction.

#### *Headnotes:*

A provision of a norm in the Statute governing Judges under which the Litigation Chamber of the Supreme Court of Justice (STJ) is the only jurisdictional instance with the competence to decide appeals against administrative acts of the Supreme Judicial Council (hereinafter, “CSM”), including those that impose sanctions is constitutional.

The Constitution of the Portuguese Republic (hereinafter, “CRP”) expressly enshrines the right to appeal to another court in criminal proceedings, but not in administrative or civil ones. In disciplinary cases, the constitutional norm under which accused persons have the right to a hearing and a defence in any proceedings in which sanctions can be imposed does not extend the guarantee of the right to appeal to the extent of making it a constant dimension of the guarantees available to the defence. The CRP does not require the ordinary legislator to include the right of appeal in non-criminal proceedings or in situations in which no jurisdictional decision violates a fundamental right, thus leaving the legislator with a broad margin within which it is free to determine whether or not it is possible to appeal against judicial decisions in other situations (constant case-law).

#### *Summary:*

I. This concrete review case entailed an appeal by a judge who was sentenced to compulsory retirement in disciplinary proceedings, whose appeal to the Litigation Chamber of the Supreme Court of Justice (STJ) was denied, and who wanted to appeal to another instance, but was unable to do so. The question before the Constitutional Court was whether it is constitutionally admissible for the Litigation Chamber’s decisions in disciplinary matters not to be open to appeal.

II. The Constitution provides accused persons in proceedings that can result in the imposition of sanctions with a number of guarantees. One of them is that it is unconstitutional to impose any kind of sanction – be it administrative (including an administrative fine), fiscal, labour-related, disciplinary, or any other type – unless the accused has first been heard (right to a hearing) and can defend him or herself against the accusations (right to a defence), including by presenting evidence and requiring the authorities to take certain steps to determine the truth. When these kinds of proceedings enter the jurisdictional phase – i.e. when the initial non-judicial decision has been challenged before the courts – the accused enjoys the same generic guarantees applicable to all judicial proceedings.

The right to appeal consists of the ability to challenge a decision by submitting the judgment to another, hierarchically superior, organ in the judicial structure. The general rule in the Portuguese procedural system is that judicial decisions can be appealed to higher instances. However, the CRP does not expressly and generically enshrine a right to two levels of jurisdiction, except in the case of decisions involving criminal convictions and decisions in



criminal proceedings in which the accused person's freedom or any other fundamental right is restricted or taken away. Protocol 7 ECHR also distinguishes penal situations, expressly stating that anybody convicted of a criminal offence by a tribunal has the right to have his conviction or sentence reviewed by a higher tribunal.

There are various constitutional precepts from which one can deduce an implicit general right to appeal. This means the ordinary legislator cannot do away with the ability to appeal in all and any circumstances; this would empty the competence of higher courts of any practical significance and would leave the constitutional provision for it without any useful content. However, as long as it respects this limitation, the ordinary legislator enjoys a broad margin within which it is free to shape the right to appeal.

Outside criminal proceedings, it has been argued that the right to appeal against decisions that affect rights, freedoms and guarantees to which the CRP affords its protection is included in the principle of a democratic state based on the rule of law. Legal doctrine has gradually accepted that when a court's actions directly affect citizens' fundamental rights, even outside the penal area, they must be recognised to possess a right to have their situation considered by another court. However, when the origins of the effect on the fundamental right lie in an action taken by the Administration and that action has already been jurisdictionally controlled, the CRP does not always require the control decision itself to be the object of judicial review.

The Constitutional Court considered the question of whether the fact that there are two possible levels of appeal against decisions of the Supreme Council of the Administrative and Fiscal Courts (CSTAF), but only one against decisions of the CSM, violates the principle of equality. It took the view that these are not situations that constitutionally call for the same legal treatment, nor does this inequality appear arbitrary, in that it is derived from the existence of different structures and organisations within the Supreme Administrative Court and the Supreme Court of Justice.

The constitutional guarantee of the right to appeal is not limited to the dimension that requires the ordinary legislator to provide for a level of appeal in certain cases, nor does it allow the legislator to adopt arbitrary or disproportionate solutions, even in the case of appeals that are only provided for in the ordinary law and are not imposed by the Constitution.

The Court said that from this perspective it can only reprimand the legislator for making unreasonable choices which either differentiate between persons or situations that deserve equal treatment, or handle them in the same way when they warrant different treatments.

Other than in these circumstances – and namely when what is at issue is whether one legal system is simply “less rational” than another – the Constitutional Court is not able to issue findings of unconstitutionality. This was its conclusion in relation to the present case.

III. The Ruling was the object of 4 concurring and 5 dissenting opinions (not all with regard to the same norms).

#### *Cross-references:*

Constitutional Court:

- nos. 210/86, 18.06.1986; 8/87, 13.01.1987; 31/87, 28.01.1987; 65/88, 23.03.1988; 163/90, 23.05.1990; 202/90, 19.06.1990; 336/95, 22.06.1995; 373/99, 22.06.1999; 33/02, 22.01.2002; 659/06, 28.11.2006; 135/09, 18.03.2009; 546/11, 16.11.2011 and 774/14, 12.11.2014.

#### *Languages:*

Portuguese.



#### *Identification: POR-2015-2-012*

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 23.06.2015 / **e)** 346/15 / **f)** / **g)** *Diário da República* (Official Gazette), 147 (Series II), 30.07.2015, 21033 / **h)** CODICES (Portuguese).

#### *Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.

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

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

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

*Keywords of the alphabetical index:*

Paternity, judicial recognition / Biological parentage, identity, right to know.

*Headnotes:*

Allowing paternity to be legally determined and recognised without the father's consent, while legally enabling mothers to decide to terminate pregnancy in the first ten weeks, is not a violation of the aspect of the constitutional principle of equality that prohibits gender-based discrimination.

The fundamental right to personal identity includes the right to know from whom one is descended in a way that reveals the identity of the persons who biologically contributed to the formation of the new person. Under current Portuguese law, when a supposed father refuses to collaborate in establishing a paternity that is not yet legally determined, a paternity investigation action is the only legal means designed to implement the child's fundamental right to establish a legal bond of biological paternity with him.

This is not an absolute right – conflicting values may make it necessary to harmonise or even restrict the opposing interests – but the Court did not recognise the existence of any right to self-determination on the part of the biological father that would give him space in which to unilaterally refuse to accept his paternity. The child's right to establish a legal filial bond that corresponds to the biological truth superimposes itself on any recognition of the parent's right to self-determination in this domain.

There is no perspective from which the two situations – the refusal to recognise paternity and the decision not to become a mother – possess the same value. It is therefore impossible to find a point of comparison that would enable the principle of equality to operate.

*Summary:*

I. This concrete review case arose from an appeal that questioned the constitutionality of both judicial paternity recognition actions, and the process that necessarily precedes them, in which the Public Prosecutors' Office takes the initiative to determine paternity which, if confirmed, can be submitted to a court for recognition. Both the actions and the process are provided for in the Civil Code and regulated in the Law governing the Organisation of the Custody, Protection and Re-education of Minors.

Determination by the Public Prosecutors' Office (hereinafter, "MP") is a pre-judicial process with a view to enabling the MP to bring a viable paternity recognition action. In the action itself the MP pursues the public interest in overcoming doubts as to the filiation of citizens whose parents' identities are not on record. The pre-judicial nature of this type of process is designed to avoid the possibility of bringing unfounded actions before the courts, which could result in situations in which the parties' privacy or dignity could be unnecessarily undermined.

This appeal was lodged against an appeal court ruling upholding a decision by the court of first instance in favour of a paternity recognition action, which the MP had brought after first confirming the action's viability in proceedings undertaken at the MP's initiative.

The Constitutional Court took the position that if any unconstitutionality had arisen in the process in question, it would have no repercussions for the decision challenged in the appeal; the process is a preliminary pre-judicial phase. Given that an appeal on the grounds of unconstitutionality plays an instrumental role in relation to the proceedings that give rise to the appeal, the Court said it could only hear the questions that applied to those proceedings, in this case the constitutionality of the action to secure the judicial recognition of paternity, and specifically the interpretation of the norms which make it possible for a court to recognise paternity against the will of the supposed biological father.

The regime for establishing biological and legal paternity within the legal system is a differentiated one. If the mother is married, there is a rebuttable presumption that the father is the mother's husband. Outside wedlock, paternity is established either by a process known as 'voluntary recognition', or as a result of a successful paternity investigation action. The latter can be brought either freely by the child, or by the MP in the wake of a positive paternity determination process undertaken at the MP's initiative.

The appellant argued that the reasons which justified recognising women's rights to parental self-determination and thus to choose to have an abortion up until the tenth week of pregnancy also apply to men's parental self-determination; men should be free to decide whether to legally be a father.

The Court considered that the constellation of interests and values in play when the legislator decided to make it permissible under the criminal law for a woman to have an abortion differs substantially from that applicable to the way in which men

participate in the process of establishing a legal paternal bond with a child who has already been born.

The legislator preferred to leave it to women in the initial phase of pregnancy to decide whether to preserve the potential for life, instead of opting to punish them under the criminal law.

However, the legislator did not recognise women's autonomy to decide whether to proceed with a pregnancy (when exercised in certain circumstances that are defined by law) because it considered that the mother's right to self-determination ranked higher than the father's right; that recognition serves rather as an alternative way to protect the newly-conceived unborn child. The grounds for that legislative decision cannot therefore be used to substantiate a man's would-be right to reject paternity of his child after the latter's birth.

The consent of the biological father is not required in order for a woman to have an abortion, but this is the result of the legislator's understanding that subjecting the possibility of an abortion to the agreement of both biological parents would be the equivalent of giving the man a right of veto.

As the legislator considered it justified to treat the biological parents differently in terms of the decision whether to abort during the first ten weeks of pregnancy, it would not make sense to invoke the principle of equality in order to pursue some kind of desire to compensate the parent who was not given a part in the decision by releasing him from the duty to assume the paternity of the child who has now been born. Such a solution is not required by the principle of equality, which is based on the assumption that the situations in question can be classified as equal. It would also lead to an unjustified sacrifice of the fundamental right of a person who has already been born to see his/her legal filial bond with his/her biological father established.

The fact that men can be obliged both to recognise unwanted paternities and to see mothers have an abortion when they themselves would have wished the pregnancy to reach its natural term is conditioned by the biological reality of human gestation.

The Constitutional Court accordingly denied the appeal, finding no unconstitutionality in the norms challenged by the applicant. .

III. One Justice concurred with the decision, but not the grounds for it. His position was based on the fact that in Portugal the situations of men and women when it comes to investigating and establishing

biological filiation in cases where the identity of a person's father or mother is unknown are the same, as is the way in which the law treats those situations; Portuguese law also permits the determination of biological maternity against the mother's wishes. The concurring Justice argued that the better grounds for the Court's decision would have been that the question of determining paternity is not comparable to abortion – where the right to life and its protection in the uterus life faces off against women's right to self-determination – either factually or in terms of the values involved.

#### *Cross-references:*

Constitutional Court:

- nos. 75/10, 23.02.2010 and 401/11, 22.09.2011, *Bulletin* 2011/3 [POR-2011-3-014].

#### *Languages:*

Portuguese.



#### *Identification:* POR-2015-2-013

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 27.07.2015 / **e)** 377/15 / **f)** / **g)** *Diário da República* (Official Gazette), 156 (Series I), 12.08.2015, 5759 / **h)** CODICES (Portuguese).

#### *Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law.**  
 3.10 General Principles – **Certainty of the law.**  
 3.13 General Principles – **Legality.**  
 3.16 General Principles – **Proportionality.**  
 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.**  
 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

*Keywords of the alphabetical index:*

Assets, declaration, failure, consequence / Criminal law, values, assets / Criminal policy / Enrichment, unjustified, sanction / Offence, criminal, definition, criteria.

*Headnotes:*

The decision as to whether it is necessary to resort to penal means pertains primarily to the legislator. In a state based on the rule of law, however, the latter can only define criminal policy measures that comply with the applicable constitutional requirements, first and foremost the principle that any penalty must be necessary. A legislative policy decision that leads to provision for a new type of crime is only in conformity with the principle that restrictions on constitutional rights, freedoms and guarantees must be proportional if the legal value or asset being protected both deserves and needs penal protection. The Constitutional Court is responsible for determining whether new types of crime are in compliance with the Constitution. The Court has held in its jurisprudence that each time a new crime is created, there must be an analogy between the constitutional axiological order and the legal system in terms of criminal-law values and assets; and that any norm which creates or defines a crime and does not seek to protect a clearly defined criminal-law value or asset is null and void, because it is materially unconstitutional.

It is not enough for the legislator to have intended to preserve a social value which, in the light of the Constitution, can be seen as deserving the highest possible degree of legal protection; it is also necessary for there to have been no other possible “legislative-policy” means of achieving the same goal without resorting to penal intervention. The criminal law operates as a last resort. The principle that a penalty must be necessary is linked to the principle of legality – under which the legislator is obliged to identify the behaviour it considers punishable as precisely as possible, with no ambiguity. The punishment must be for a form of behaviour which is specific, adequately described, undertaken by a certain agent, and which results in a certain, determined action or omission that can be attributed to that same agent. The principle of legality places the legislator under a duty to detail the new type of crime in a way that allows citizens to comprehend which wilful acts or omissions on their part – will cause them to contravene the criminal law. The only way to know exactly what constitutes punishable criminal behaviour is to establish the criminal-law value of a particular form of behaviour as precisely as possible. The principle that the penalty must be

necessary and the principle of legality in the guise of *lex certa* together express the value ‘individual freedom’, which is a fundamental value in a state based on the rule of law; both assume compliance with the principle *in dubio pro libertate*. A legislator that chooses to criminalise an act must not construct the applicable penal norms in such a way that their formulation allows the commission of a crime to be merely presumed, because otherwise they would conflict with the presumption of innocence, which must guide the legislator not only when it drafts procedural norms, but also when it establishes substantive ones.

*Summary:*

I. A Decree of the Assembly of the Republic created a new crime, which it called ‘unjustified enrichment’. The Assembly also added an article to the Law on crimes committed by political officeholders or for which they are otherwise responsible, which made specific provision for the crime of unjustified enrichment when committed by a political officeholder or senior public official, either while he or she is in office, or during the three years after leaving it. These were criminal policy measures taken by the Assembly in the exercise of its competence to define new crimes and penalties.

The Assembly decreed (a step in the legislative procedure prior to the new act becoming law) the creation of a new legal type of crime entitled ‘unjustified enrichment’, by typifying an infraction that required the combination of two elements: the acquisition, possession or other form of control over material assets; and an incompatibility between those assets and the natural or legal person’s declared or undeclared income.

The typical agent of the infraction was the ordinary citizen, in that a discrepancy between the assets which are acquired, possessed or controlled and those which ought to be declared would always have been criminally relevant wherever it arose. The legal values and assets protected by the measure were the “state’s fundamental interests”, “trust in institutions and the market”, “transparency”, “probity”, the “fitness of sources of income and assets”, “fairness”, “free competition”, and “equal opportunities”. The typical “behaviour” that was deemed punishable and capable of actually or potentially damaging the valuable legal asset the legislator sought to protect took the shape of the existence of an incompatibility between two amounts – the amount of assets “possessed” and the amount “subject to declaration”. The criminalised form of behaviour was the verified existence, at any time and within the legal sphere of any person, of any

discrepancy in the form of an unexplained positive variation in the assets “possessed” compared to those that were or ought to have been declared.

Both the fact that the legislator included unjustified enrichment in the systematic framework of “crimes against the implementation of a state based on the rule of law”, and the reasons it gave for prefiguring a new type of crime within that framework, mean that the legislative power attached the most intense axiological weight to the legal value or asset it believed would be protected by the new criminalisation, and justified this with reference to the values at the core of the Portuguese constitutional system.

II. The Court took the view that the legislator had manifestly failed to fulfil its duty to identify the wilful act or omission it deemed punishable with the maximum degree of precision. The description of the criminal infraction did not meet the requirement derived from the constitutional principle of *lex certa*. It did not make the sense of the penal prohibition clear enough to enable citizens to comply with or be guided by it.

The Court said that when the legislator considered a mere variation in assets to be punishable, it did not identify the concrete “behaviour”, either in the form of a positive act or an omission, that was to be associated with an infringement of the criminal law. What the Assembly Decree sought to criminalise could be mistaken for a state of affairs based merely on an objective discrepancy.

The new type of crime could be committed as a result of the mere existence of a quantitative incompatibility between the assets its agent “possessed” and those he, she or it felt they had or should have “declared”, regardless of the lawful or unlawful reasons that might justify the variation. The name given to the crime was thus a misnomer, in that the term “unjustified” would indicate that a mismatch between the values of two sets of assets was automatically linked to a judgement of criminality. The scope of the criminalisation was so broad that it could encompass some very heterogeneous life situations which it would not be legitimate to associate with a single, undifferentiated judgement of negative legal value. Such breadth of the provision could mean that the variation in assets instead revealed another unlawful practice – that of making inaccurate or incomplete declarations. The Court said that in that situation, the law should punish this type of “behaviour” by providing for a crime of tax fraud. If the variation in assets revealed increases in wealth obtained by practices involving corruption, it might entail a crime of money-laundering.

The Court also emphasised that by presuming a crime had been committed, the norms placed the burden of justifying the variation in assets on the agent, in criminal proceedings that had already been brought against him, her or it, thereby conflicting with the principle of the presumption of innocence.

The Court said that it was also impossible to determine what legal value or asset deserved penal protection to the point of justifying criminalisation. Criminalising a mere variation in assets – the difference between assets that are actually “possessed” and those that were subject to declaration – would represent a criminal policy that was so imperfectly designed as to make it impossible to determine the form of human “conduct” which was actually the object of this negative judgement.

The other norm before the court specifically concerned crimes pertaining to political and senior public officeholders. This particular version of the crime of unjustified enrichment was almost identical to the general one, but the regime was more severe; the problematic difference between “possessed” and “declared” assets was smaller and the resulting prison terms were longer. Moreover, the crime could be committed not only when the agent was in office, but also during the three years after he or she left it.

The Court was of the opinion that political officeholders (a generic category defined to include senior public officeholders) undertake special duties and responsibilities to the community they serve. The Constitution recognises that such officeholders possess a special status, which not only makes them generically liable in political, civil and criminal terms for actions and omissions linked to their duties, but also requires the legislator to regulate two areas: “duties, responsibilities, liabilities and incompatibilities” pertaining to this type of officeholder; and the “consequences of failure to fulfil them”. They are also subject to a general duty of transparency with regard to the way in which they conduct their personal life, albeit this only applies to persons with public decision-making powers.

However, the Court said that this constitutional status did not enable it to change its views on the type of crime the Assembly Decree sought to add to the Criminal Code. The norm that would have been added to the law on crimes pertaining to political officeholders was entirely homologous to the first norm analysed in the present Ruling. The only features that would have distinguished the crime of unjustified enrichment committed by political officeholders from that committed by other citizens were the special condition of the agent and the greater severity of the applicable sanctions.

The Court accordingly concluded that the norms before it were unconstitutional.

*Supplementary information:*

Five Justices concurred with the Ruling, but either wholly or partially disagreed with the grounds for it. One of them was the rapporteur. When a rapporteur dissents from the majority decision, he or she is replaced in that role. However, when he or she concurs with the decision itself, but only disagrees with part of the grounds for it, and is thus able to draft a ruling that sets out the majority opinion and reflects the fact that the other Justices support the decision itself, albeit not all or part of its grounds, there is nothing to prevent him or her from continuing as rapporteur.

*Cross-references:*

Constitutional Court:

- nos. 270/87, 10.07.1987; 135/92, 02.04.1992; 252/92, 01.07.1992; 83/95, 21.02.1995; 246/96, 29.02.1996; 604/97, 14.10.1997; 108/99, 10.02.1999; 168/99, 10.03.1999 and 128/12, 07.03.2012.

*Languages:*

Portuguese.



*Identification:* POR-2015-2-014

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 27.08.2015 / **e)** 403/15 / **f)** *Diário da República* (Official Gazette), 182 (Series I), 17.09.2015, 8245 / **g)** / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

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

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence.**

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

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

*Keywords of the alphabetical index:*

Espionage / Crime, organised, fight / Metadata, access / Security, right / Terrorism, fight.

*Headnotes:*

A constitutional norm that enshrines a right subject to the possibility that the ordinary law may restrict it allows the ordinary legislator to impose limits on the scope of the protection guaranteed by the Constitution but simultaneously recognises and guarantees a certain protective scope on which the legislator cannot encroach when the right is a fundamental one.

When it defines the field of application of the ordinary law which restricts the right to the inviolability of communications as “*matters related to criminal procedure*”, the Constitution states that the ordinary legislator is authorised to impose restrictions, but only with regard to criminal procedural matters. Even if one were able to consider in abstract terms that there are other matters in which the value ‘security’ surpasses the values underlying the right to the inviolability of communications, the Constitution does not allow it.

When the constitutional legislator decided to authorise the public authorities to intrude into means of communication, but only in criminal procedural matters, it sought to ensure that access to those means in order to safeguard the values ‘justice’ and ‘security’ would be achieved via a procedural instrument that also protects peoples’ fundamental rights. Even though the goal might be to provide preventative penal protection to very important legal assets, it is not legitimate to expand the scope of the restriction on the right that is permitted by the constitutional norm.

*Summary:*

I. The President of the Republic asked the Constitutional Court to conduct a prior review of a norm contained in an Assembly of the Republic Decree approving the Portuguese Republic’s Intelligence System (SIRP). The norm would have allowed intelligence officers from the SIS and SIED security services to access ‘traffic data’ under certain

conditions. One of the objectives of the Decree of the Assembly of the Republic containing the norm was to adapt the regime governing SIRP to current information and security requirements.

The purposes had to be linked to: safeguarding Portugal's independence and interests and the domestic and external security of the Portuguese State; guaranteeing the conditions needed to ensure citizens' safety and security and the full and proper functioning of the country's democratic institutions; and/or activities appropriate to the prevention of sabotage, espionage, terrorism, highly organised transnational crime or acts that could change or destroy the democratic state based on the rule of law established in the Constitution. The conditions were that the use of these means had to be necessary, appropriate and proportionate in a democratic society; and that a prior request setting out the grounds for the use had to be sent to a Prior Control Commission (hereinafter, "CCP"), which had to authorise it in advance.

The idea was not to access the contents of communications (written or oral), but to be able to obtain authorisation to ask the entities that are legitimately responsible for treating the data for access to them. These are metadata, or "data about data", in that they concern the circumstances under which communications took place, rather than the actual contents of the communication.

II. In the Court's view, this norm was in breach of the constitutional precept which prohibits public authorities from engaging in any form of intrusion into communications, except in cases provided for in criminal procedural law.

The Constitutional Court had already stated in earlier case-law that the fact that traffic data (direction, recipient, place, time and duration) identify, or make it possible to identify, a communication means that the information about the latter which they contain is important enough to warrant protecting their confidentiality. The Court recalled that the Court of Justice of the European Union has emphasised several times the gravity of the intrusion caused if traffic data are stored without limits. On the question of whether the mandatory prior control by the CCP was equivalent to the control that exists in criminal proceedings, thereby enabling this case to benefit from the exception which the norm that prohibits intrusion into telecommunications allows in criminal matters, the Court noted that the prohibitive norm is a general one, whereas the permissive norm is exceptional. Sacrificing the right to the inviolability of private communications constitutes a restriction on the constitutional content of that fundamental right

and the scope of the protection it provides. This is permissible when there are very important reasons imposed by the criminal investigation linked to criminal proceedings, not otherwise.

There is a broad range of national, European and international legal regulations on data access. Access to data on actual or attempted communications can undermine the fundamental rights of the persons involved in the act of communication. Even without access to the content, the cross-referencing of traffic data can provide a profile of the person in question. In its jurisprudence the Constitutional Court recognises that private communications, including their content and the circumstances in which they take place, are a means by which it is possible to manifest aspects of people's private lives that fall within the scope of the protection which the Constitution affords to the privacy of personal life.

The right to communicational self-determination protects the personal sphere against public and private intrusions; the Constitution in turn protects that right by making communications inviolable. Interlocutors are entitled not to have third parties intervene in either their communications, or the accompanying circumstances. This is a guarantee that must be available *prima facie* to all private communications, regardless of whether or not they concern the parties' intimate relations. Technological progress has increased the possibilities of intrusion. From a privacy point of view, it is necessary to ensure that communication at a distance between private parties takes place as though they were face-to-face. Given that the interaction between people who are physically distant from one another must be mediated by a third party – a communications provider – both the latter and the state are also required to guarantee the integrity and confidentiality of communications systems.

There is a broad consensus in both doctrine and case-law that traffic data should be included in the concept of communications that are constitutionally relevant to the prohibition on intrusion.

Widening the constitutional exception that allows the public authorities to intrude into telecommunications in the cases provided for in criminal procedural law would imply both expanding the scope of application of the restriction on the right to inviolability, and reducing the guarantee that only a judge can authorise such interventions by relegating the control of acts that affect fundamental rights to a merely administrative entity.

The Court concluded that the exceptions referred to in the constitutional precept are limited to matters

regarding criminal proceedings. This is the only restriction on the right to the inviolability of communications which the Constitution authorises; there can be no other interpretation that would make it possible to extend the restriction for other purposes. The Court therefore pronounced the norm before it unconstitutional.

III. The original rapporteur dissented from the Ruling and was accordingly replaced in that role. He sustained his views in a very extensive opinion. Another Justice concurred with the decision, but disagreed with the grounds for it.

In the view of the concurring Justice there is no absolute restriction on the exceptions to the constitutional precept which means that the authorities can only intrude into telecommunications in matters related to criminal proceedings. If such a restriction did exist (and unless the Constitution itself were to be revised), the security services could never intercept so-called traffic data. She argued that the understanding that such a restriction does exist is so narrow that it would preclude any solution to situations like the one in the present case, involving difficult problems of collisions between different fundamental rights (the right to freedom and the right to security) or different constitutional values; freedom on the one hand and defence of the democratic constitutional order on the other.

In her opinion the existence of intelligence services in an order in which the state is democratic and based on the rule of law is justified by the need to safeguard collective and individual legal assets to which constitutional axiology attributes a place that is no less important than that of the assets protected by criminalising penal norms. However, she considered that if the legislator wanted to include the possibility of intercepting telecommunications traffic data in the system of competences pertaining to the security services (SIRP, SIS and SIED), it would have to make the circumstances in which this access was legitimate as clear and precise as possible, so as not to leave the administration free to weigh up the need for intervention without any legal limits. In her view the norm in the present case did not do this, which was why she deemed it to be unconstitutional.

The dissenting Justice argued that the norm before the Court was in conformity with the Constitution. He said that the issue here was the promotion of security as a constitutional value – as a form of active protection of the democratic model. He considered that the text of the Constitution serves as a ‘social contract’, with explicit and implicit self-defence clauses which construct the content of a function of ‘protecting the Constitution’ that not only legitimises a

penal form of protection, but also what could be described as an ‘administrative protection’. He also observed that the need for authorisation from the CCP represented a concrete mechanism for controlling the need, appropriateness and proportionality of data interceptions, as required by the Constitution; and that in the particular context of the work of SIRP this procedure would have played a part whose axiological proximity to that of the judge in criminal proceedings would have made it equivalent to the latter’s role.

#### Cross-references:

- Opinions of the Consultative Council of the Public Prosecutors’ Office (*Conselho Consultivo da Procuradoria-Geral da República*), (CC-PR);
- Complementary Opinion no. 16/94, 26.10.1995;
- Opinion 21/00, 16.06.2000;
- Opinion of the National Data Protection Commission, (*Comissão Nacional de Proteção de Dados*), (CNPD) no. 29/98, 16.04.1998.

#### Constitutional Court:

- nos. 198/85, 30.10.1985; 128/92, 01.04.1992; 355/97, 07.05.1997; 407/97, 21.05.1997; 241/02, 29.05.2002; 368/02, 25.09.2002; 306/03, 25.06.2003; 442/07, 14.08.2007; 70/08, 31.01.2008; 230/08, 21.04.2008; and 486/09, 28.09.2009.

#### Court of Justice of the European Union:

- C-293/12 and C-594/12, Digital Rights Ireland Ltd, 08.04.2014, Joined Cases declaring the Data Retention Directive 2004/26/EC invalid.

#### European Court of Human Rights:

- *Segerstedt-Wiberg and others v. Sweden*, no. 62332/2000, 06.06.2006;
- *Amann v. Switzerland*, no. 27798/95, 16.02.2000;
- *Valenzuela v. Spain*, no. 27671/95, 30.07.1998;
- *Prado Bugallo v. Spain*, no. 58496/00, 18.02.2003.

#### Other Courts:

- Federal Constitutional Court of Germany: BVerfG, 1 BvR 256/08, 02.03.2010, Rn. (1-345) and ECLI:DE:BVerfG:2013:rs20130424.1bvr121507;
- Constitutional Court of Spain: nos. 49/99, 05.04.1999 and 184/2003, 23.10.2003;



- Supreme Court of Israel: *Association for Civil Rights in Israel v. The General Security Service* (1999), 06.09.1999, Concerning the Legality of the General Security Service's Interrogation Methods, 38, I.L.M. 1471 (1999).

### Languages:

Portuguese.



## Romania

### Constitutional Court

### Important decisions

*Identification:* ROM-2015-2-004

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 07.05.2015 / **e)** 351/2015 / **f)** Decision on the exception of unconstitutionality of the Government Emergency Ordinance no. 82/2013 amending Law no. 188/1999 on the status of public servants / **g)** *Monitorul Oficial al României* (Official Gazette), 433, 17.06.2015 / **h)** CODICES (Romanian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Public servant, status / Government Emergency Ordinance.

*Headnotes:*

Removal by Government Emergency Ordinance of a guarantee, granted by law, to public servants dismissed for reasons not attributable to them, replacing the obligation to assign them to a vacant public position according to their qualifications with a mere possibility left at the sole discretion of the public authority or institution concerned, affects the civil service. It also affects the right to work and infringes the constitutional provisions determining the limits of legislative delegation.

*Summary:*

I. The Constitutional Court was asked, pursuant to Article 146.d of the Constitution, to examine the constitutionality of the provisions of Government Emergency Ordinance no. 82/2013 amending Law no. 188/1999 on the status of public servants. This is a legislative act, which regulates the redeployment of civil servants who have ceased service for reasons

not attributable to them. In particular, where the public authority or institution has reduced its staff as a result of the reorganisation of the institutions, by cutting down on posts held by civil servants. Unlike the earlier regulation, which required the public authority or institution concerned to offer a vacant position to the civil servant if such a vacancy was found during the period of notice, the new rules only provided for a possibility, exclusively in the hands of the public authority or institution, to reinstate public servants dismissed for reasons not attributable to them.

The argument was put forward that the changes made by Government Emergency Ordinance no. 82/2013 to Article 99.5 and 99.6 of Law no. 188/1999 had an impact on the status of public servants and the regime of certain fundamental institutions of the State, in breach of Article 115.6 of the Constitution. Article 115.6 of the Constitution precludes emergency ordinances from being adopted in fields pertaining to constitutional laws and from having an effect on the status of fundamental institutions of the State, any rights, freedoms and duties set out in the Constitution or electoral rights. They must also not envisage any measures for the compulsory transfer of assets into public property. These changes also resulted in the infringement of the regulatory purpose of the law, as defined in Article 1.1 of the Constitution, in contravention of Article 1.5 of the Constitution concerning the quality of the law.

II. The Constitutional Court stated that Article 115.6 of the Constitution refers to the constitutionality of a legislative act and sets out the regime of emergency ordinances. These provisions also bind the Government in terms of the fields emergency ordinances may regulate. Emergency ordinances cannot be adopted in fields pertaining to constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution or electoral rights. They must not envisage any measures for the compulsory transfer of assets into public property. Consequently, the conditions imposed are real limitations on the competence attributed to Government; emergency ordinances cannot be adopted in the fields referred to in Article 115.6 of the Constitution, since the Government does not have the constitutional legitimacy to do so (see also Decision no. 55 of 5 February 2014, published in the Official Gazette of Romania, Part I, no. 136 of 25 February 2014).

The Court's case-law has established that an inference may be made that restricts the adoption of emergency ordinances totally and unconditionally. They cannot be adopted in fields pertaining to constitutional laws or envisage any measures for the

compulsory transfer of assets into public property. In other fields covered by the text, emergency ordinances cannot be adopted if they "affect", i.e. have negative consequences. They may, however, be adopted if the rules they contain have positive consequences in the fields they regulate. The Court noted that the verb "to affect" is capable of different interpretations. In the Court's view, only the legal meaning of the term, in its different nuances, should be retained, such as: "to undermine", "to infringe", "to damage", "to harm", "to breach", "to entail negative consequences" (see Decision no. 1.189 of 6 November 2008, published in the Official Gazette of Romania, Part I, no. 787 of 25 November 2008).

However, in terms of the aspects the applicants had invoked, the provisions of Government Emergency Ordinance no. 82/2013 affect both the civil servants' right to work and their status as governed by Law no. 188/1999, which implements the constitutional provisions of Article 73.3.j.

The provisions of Article 99.5 and 99.6 of Law no. 188/1999, as amended by Government Emergency Ordinance no. 82/2013, envisaged the safeguarding of the exercise of the right to work. It did so by providing that during the notice period, any appropriate vacant public positions had to be made available to civil servants. In the context of some instability already created by the organisational and institutional reorganisation, also caused by emergency ordinances, Government Emergency Ordinance no. 82/2013 removes a guarantee granted by law to the public servant dismissed for reasons not attributable to him or her, i.e. that of his or her reinstatement in a vacant public position in keeping with his or her qualifications. The new regulation only provides for a possibility, currently in the hands of the public authority or institution, to reinstate the public servant, without setting any conditions or criteria that would achieve a minimum circumstantiation of this entity's decision. Consequently, the public servant remains at the discretion of the public authority or institution, with no opportunity to avail himself or herself of the prerogative granted to him or her under that law.

As concerns Article 41 of the Constitution on labour and social protection of labour, the Constitutional Court noted that, in its case-law (for example, in Decision no. 1.221 of 12 November 2008, published in Official Gazette of Romania, Part I, no. 804 of 2 December 2008), it has stated that the right to work is complex, as is the right to remuneration and the right to social protection at work. It follows that all components and guarantees of the right to work must be set by means of imperative rather than permissive rules, such as those set out in Government Emergency Ordinance

no. 82/2013, which give the employer the discretion to make appropriate vacant public positions available to public servants. As a result, this complex right, although enshrined at constitutional level, becomes formal and illusory.

Government Emergency Ordinance no. 82/2013 has a negative impact both on the legal regime of public service and civil servants' right to work and runs counter to the provisions of Article 115.6 of the Constitution. Accordingly, and in view of the stated aim of Law no. 188/1999 (to ensure a stable, professional, transparent, efficient and impartial public service, in the interests of citizens, public authorities and institutions in central and local public administration), it was held unanimously to be unconstitutional in its entirety.

#### *Languages:*

Romanian.



#### *Identification:* ROM-2015-2-005

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 23.06.2015 / **e)** 485/2015 / **f)** Decision on the exception of unconstitutionality of the provisions of Articles 13.2 second sentence, 84.2 and 486.3 of the Civil Procedure Code / **g)** *Monitorul Oficial al României* (Official Gazette), 539, 20.07.2015 / **h)** CODICES (Romanian).

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
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:*

Appeal process, legal persons.

#### *Headnotes:*

The rule that requests for appeal on the part of legal persons must be formulated and supported through a lawyer or legal counsellor, violates the principle of free access to justice and the right of defence. It

results in the imposition of excessive conditions and additional costs on legal persons seeking the exercise of the right to appeal, so that a legal framework is created which actually discourages recourse to justice.

#### *Summary:*

I. Pursuant to Article 146.d of the Constitution, the Constitutional Court was asked to review the constitutionality of the provisions of Articles 13.2 second sentence, 84.2 and 486.3 of the Civil Procedure Code, which require requests for appeal to be formulated by a lawyer or legal counsellor.

The argument was put forward that this rule was likely to hinder the exercise of the right of free access to justice or of the right of defence. It meant that other categories of legal staff were precluded from drawing up such procedural acts, although most legal persons employ such staff "in house". It effectively prevented legal persons from exercising the right to appeal by means of employed staff. The right to choose a lawyer regulated as a guarantee of the right of defence cannot be transformed into an obligation or into a condition of admissibility in the exercise of a legal remedy.

II. The Court found that although Article 21 of the Constitution on free access to the courts is contained in Chapter I – Common provisions, and Article 24 of the Constitution, on the right to defence, is contained in Chapter II – Fundamental rights and freedoms of Title II – Fundamental rights, freedoms and duties of the Constitution, it is clear that the guarantee of free access to the courts and the right to defence must be granted to legal persons as well as to natural persons. As regards the application of the fundamental rights and freedoms to legal persons, the Court has held that these guarantees also apply to legal persons, insofar as citizens exercise a constitutional right through them (see Decision no. 35 of 2 April 1996, published in the Official Gazette of Romania, Part I, no. 75 of 11 April 1996). Therefore, the requirements and guarantees resulting from the fundamental rights and freedoms covered by the Constitution also apply to legal persons, insofar as their normative content is compatible with the nature and characteristics of the legal status of the legal person in question.

The Court held that in this case, the requirements stemming from Article 21 of the Constitution and from Article 24 of the Constitution as safeguards of the right to a fair trial, under Article 21.3 of the Constitution, also apply to legal persons. In this respect, Article 6 ECHR on the right to a fair trial as interpreted by the European Court of Human Rights,

also applies to legal persons. Moreover, the case-law of the European Court of Human Rights constantly applies the guarantees of the right to a fair trial both to individual and to collective persons.

Note was taken in this regard of the Judgment of 8 January 2013, given in *SC Raisa M. Shipping v. Romania*, where the European Court of Human Rights found that the national courts applied a formalism that is incompatible with the letter and spirit of Article 6.1 ECHR, which interfered in an unjustifiable manner with the applicant company's right of access to a court (paragraph 35).

On the basis of the need to recognise the guarantees of the right to a fair trial for legal persons as well as natural persons, and applying *mutatis mutandis* the reasoning of Decision no. 462 of 17 September 2014 (which found legal provisions requiring natural persons to be represented by lawyers in the appeal process to be unconstitutional), the Court found that the obligation of representation and assistance through a legal counsellor or lawyer in the exercise of an appeal amounted to a condition of admissibility to exercise a legal remedy. The right to have a legal representative is transformed into an obligation, in the context of an appeal. In the case of legal persons, whether in terms of public or private law, the provision under review restricts free access to justice and the right to defence.

Analysis was needed as to whether the limits the legislator had introduced represented a reasonable limitation, proportionate to the objective pursued and which did not transform the right into an illusory or theoretical one. To be deemed proportionate, the measure taken must be adequate, objectively capable of fulfilling the purpose, necessary, and indispensable for fulfilling the purpose. The right balance must be struck between the concrete interests in order to correspond to the aim pursued. By imposing a rule that legal persons must be represented by a legal counsellor or a lawyer for their appeals, the legislator was following a legitimate goal, in that it imposes rigorous and disciplined procedures, ensures adequate legal representation for the parties and the proper functioning of appeal courts examining only the compliance of the judgment with the law. It corresponds to the new vision of the appeal process as an extraordinary legal remedy; conditions for its exercise are strict, and grounds for appeal are narrowly construed to respect legality.

The Constitutional Court found no reasonable level of proportionality between the requirements of general interests relating to the proper administration of justice and the protection of the right to defence and of free access to courts. Thus, the interests of those

seeking to rely on the judiciary in order to attain their legitimate rights and interests are irretrievably damaged. Making the exercise of the legal remedy subject to the appointment of a legal counsellor or to the compulsory conclusion of a contract of legal aid, as a condition for the admissibility of the appeal, imposes excessive conditions on legal persons wishing to pursue an appeal.

The legal provisions in question violate Article 24 of the Constitution, the guarantee of the right to a fair trial, in relation to both the plaintiff and the defendant. This constitutional provision does not only concern the defence at first instance, but also the right of defence by the exercise of legal remedies against certain findings of fact and law or against solutions adopted by a court of law, which are considered to be erroneous by one or other of the parties in the trial. If the interested party is prevented from appealing, they will be unable to avail themselves of the right to defend their rights before the Court of Appeal.

They also run counter to Articles 21 and 24 of the Constitution. The measure which the provision introduced was excessive compared to the legitimate aim pursued; it rendered it impossible to pursue an appeal.

The Court also noted that although natural persons receive public legal aid under Government Emergency Ordinance no. 51/2008 on public legal aid in civil matters, legal persons only receive (under strictly-defined conditions) facilities for the reduction, spreading or delay of payment of judicial stamp duties, under Article 42.2 – 42.4 of Government Emergency Ordinance no. 80/2013 on judicial stamp duties. As well as the expenses incurred by the payment of judicial stamp duty, legal persons who are involved in a dispute have to shoulder the costs incurred in obtaining legal advice, assistance and representation in order to promote an extraordinary appeal, under the conditions set out in the disputed provisions of the Civil Procedure Code.

The Court considered the position of legal persons in a difficult economic situation or who cannot make payments as their bank accounts are blocked and who did not hire a legal counsellor. It noted that making the exercise of the legal remedy subject to the appointment of a legal counsellor or the compulsory conclusion of a contract of legal aid imposes excessive conditions and costs on a legal person seeking to exercise the right to appeal. A legal framework has been created with the potential of deterring recourse to justice.

The Court also considered the provisions of Government Emergency Ordinance no. 26/2012 on

measures to reduce public spending and strengthen financial discipline. Article 1, on providing legal advisory, assistance and representation services for public authorities and institutions of central and local government, national corporations, national companies, publicly owned or controlled trade companies, and autonomous companies, which have specialist legal staff within their organisational structure, has established a rule whereby such services are provided primarily by the specialist legal staff employed in these entities.

In cases where the necessary legal advice, assistance or representation cannot be provided by specialist in-house staff, the provisions of Government Emergency Ordinance no. 34/2006 on the assignment of public procurement contracts, public works concession contracts and services concession contracts, will become applicable. Regardless of the procedure for the assignment of public procurement contracts, pursuant to Government Emergency Ordinance no. 34/2006, the exercise of the legal remedy and the correct drafting of the grounds for appeal must be realised within the legal deadline.

The Court accordingly admitted the exception of unconstitutionality and found the provisions of Articles 13.2 second phrase, 84.2 and 486.3 of the Civil Procedure Code to be unconstitutional.

#### *Cross-references:*

European Court of Human Rights:

- *SC Raisa M. Shipping v. Romania*, no. 37576/05, 08.01.2013.

#### *Languages:*

Romanian.



## Russia Constitutional Court

### Important decisions

*Identification:* RUS-2015-2-002

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 01.07.2015 / **e)** 18 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 147, 08.07.2015 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

4.5.3.3.1 Institutions – Legislative bodies – Composition – Term of office of the legislative body – **Duration.**

5.3.41.6 Fundamental Rights – Civil and political rights – Electoral rights – **Frequency and regularity of elections.**

*Keywords of the alphabetical index:*

Term of office / Amendment / Criteria.

*Headnotes:*

In its decision, the Constitutional Court of the Russian Federation approved the reduction in the term of office of the State Duma.

*Summary:*

I. Under the Constitution of the Russian Federation, the term of office of the State Duma is five years. The last State Duma elections were held on 4 December 2011.

On 19 June 2015, the Duma adopted at first reading a draft law stating that the next parliamentary elections were to be held on 18 September 2016.

In a legislative initiative with a view to postponing the State Duma election, the Federation Council asked the Constitutional Court to assess whether the State Duma's term of office could be reduced for constitutionally significant purposes.

II. The Court considered the Federation Council's application and provided an interpretation of Article 96.1 and of Article 99.1, 99.2 and 99.4 of the Constitution.

The Court ruled that the State Duma's term could be reduced for constitutionally significant purposes on the following conditions:

- a. such measure could be applied only once and must not disrupt the reasonable regularity of elections to the State Duma or interrupt its work;
- b. the reduction in the actual term of office of Duma deputies, in relation to what was stipulated in the Constitution, must be slight (not more than a few months) and must apply only to the current parliament;
- c. the rescheduling of the election should be announced well in advance so as to enable proper preparations to be made for the polls and so that the principle of political competition was not violated.

#### *Languages:*

Russian.



#### *Identification:* RUS-2015-2-003

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 14.07.2015 / **e)** 20 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 163, 27.07.2015 / **h)** CODICES (Russian).

#### *Keywords of the systematic thesaurus:*

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

2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **European Convention on Human Rights and constitutions.**

#### *Keywords of the alphabetical index:*

ECHR / Constitution / Supremacy, ECHR judgment / Enforcement.

#### *Headnotes:*

Decisions of the European Court of Human Rights are to be enforced with due regard to the supremacy of the Russian Constitution in the domestic legal system.

#### *Summary:*

I. The applicants were a group of deputies of the State Duma (lower house of the Russian parliament). They asked the Court to assess the constitutionality of the law ratifying the European Convention on Human Rights and various domestic instruments implementing the Convention.

They pointed out that Russia, in ratifying the European Convention in 1996, had recognised the jurisdiction of the European Court of Human Rights and had undertaken to implement its decisions. In the applicants' view, there was a risk of conflict between the decisions handed down by the European Court and the Russian Constitution. They submitted that participation in international organisations must not lead to human rights violations or be incompatible with the Constitution.

According to the deputies, the bodies responsible for implementing European Court of Human Rights judgments were compelled to execute them even if they contradicted the Russian Constitution. The laws in question, therefore, were in breach of the Russian Constitution, in particular Article 15.1, 15.2, 15.4 and Article 79 of the Constitution.

II. Neither the European Convention on Human Rights nor the legal positions adopted by the European Court of Human Rights on the basis of this Convention can override the supremacy of the Constitution.

The Constitutional Court ruled that the execution of certain decisions handed down by the European Court of Human Rights in Russia was not compulsory, particularly in cases where an European Court of Human Rights decision was incompatible with the Russian Constitution.

The Russian Federation's participation in an international treaty does not imply relinquishment of national sovereignty. Neither the European Court nor decisions based on the Convention can override the supremacy of the Constitution. Their practical implementation in the Russian legal system is possible only on condition that the Russian Constitution is recognised as having supreme legal force.

The Constitution of the Russian Federation and the European Convention on Human Rights are based on common values. Conflicts therefore do not usually occur, but they could occur if the European Court of Human Rights were to interpret the Convention in a way that contravened the Russian Constitution. In such an event, Russia would be compelled to abstain

from literal compliance with the decisions of the Strasbourg Court. Such an approach is in line with the practice of the highest courts in several European countries (notably the UK, Italy and Germany) which have similarly concluded that domestic constitutional provisions must take precedence when implementing European Court of Human Rights judgments and the provisions of the Vienna Convention on the Law of Treaties. Should conflicts arise, the key to resolving them is not isolation but rather dialogue and constructive engagement. Only in that way can a truly harmonious relationship develop between Europe's legal systems, one based on mutual respect rather than submission.

The Court also referred to the judicial practices of the Supreme Courts in various European countries (notably Germany, Italy, Austria and the United Kingdom) "which likewise apply the principle of the primacy of national constitutions when enforcing the decisions of the European Court of Human Rights and the provisions of the Vienna Convention on the Law of Treaties". The Constitutional Court further stressed that Russia remained under the jurisdiction of the European Court of Human Rights in Strasbourg.

The supremacy of the Constitution when implementing decisions handed down by the European Court of Human Rights can be ensured by the Constitutional Court of the Russian Federation through two types of proceedings:

1. review of the constitutionality of legislation in which the European Court of Human Rights has found flaws; any lower-instance court re-examining a case on the basis of a decision of the European Court must apply to the Constitutional Court;
2. interpretation of the Constitution at the request of the President or the Government of the Russian Federation where the authorities consider that a particular European Court of Human Rights ruling with regard to Russia cannot be enforced without violating the Constitution. If the Constitutional Court of the Russian Federation concludes that the Strasbourg decision is incompatible with the Constitution, it is not to be implemented.

The Constitutional Court also stated that federal lawmakers had the right to introduce a special legal mechanism for the Constitutional Court to ensure the supremacy of the Constitution in the implementation of European Court of Human Rights judgments.

### *Languages:*

Russian.



## Serbia

### Constitutional Court

#### Important decisions

*Identification:* SRB-2015-2-002

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 18.09.2014 / **e)** UŽ-1338/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 114/2014 / **h)** CODICES (English, Serbian).

*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.**

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

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

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

*Keywords of the alphabetical index:*

Witnesses, examination.

*Headnotes:*

The decision to exclude the right of the accused to examine witnesses must be balanced with an adequate, effective exercise of the right to defence.

*Summary:*

I. M.Š. filed a constitutional appeal against the judgment of the Court of Appeal – War Crimes Department and the judgment of the High Court – War Crimes Department for violation of the right to adversarial procedure, the right to defence and the right to equality of arms guaranteed under Articles 32.1, 33.2 and 33.5 of the Constitution, as well as under Article 6.3.d ECHR.

By judgment of the High Court, the appellant has been found guilty of committing a criminal offence of a war crime against civilians. The Court of Appeal has

rejected his appeal as ungrounded. The appellant alleged that in the criminal proceedings, his rights were violated: he was not allowed to face and cross-examine the prosecution witnesses; and the disputed judgments were adopted subsequent to the reading of the recorded testimonies of the witnesses (injured parties), in the absence of any other direct evidence against him.

II. The Constitutional Court, firstly, stipulated that the right to an adversarial procedure is not absolute and in criminal proceedings, it may be limited. It cited the relevant case-law of the European Court of Human Rights: *A and Others v. United Kingdom*, 3455/05, 19.02.2009, paragraphs 204-208.

It also noted that it is necessary to consider the rule of “sole and decisive evidence”, referring to the case-law of the European Court of Human Rights. In *Luca v. Italy*, 33354/96, 27.02.2001, the European Court of Human Rights found that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (paragraph 40). This legal standpoint was partially departed from in the judgment *Al-Khawaja and Tahery v. United Kingdom*, 26766/05 and 22228/06, 15.12.2011. In this case, where a hearsay statement is the sole or decisive evidence against a defendant, the statement's admission as evidence will not automatically result in a breach of Article 6.1 ECHR. Where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny (paragraph 147). The word “decisive” should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case (paragraph 131).

Article 6 ECHR does not establish any rule on admissibility of evidence, leaving this matter to national legislation. Such rules have not been envisaged under Article 32.1 of the Constitution either, but they are in provisions of the Law on Criminal Procedure (hereinafter, the “LCP”). The LCP sets certain limitations on the right to adversarial procedure. One of them is prescribed in Article 337.1.1, according to which records of statements may, if so decided by the chamber, be read out, *inter alia*, if persons who were interrogated or questioned have died, are suffering from a mental illness or cannot be found, or where advanced age, poor health or other reasons make their appearance before the court impossible or very difficult. In the instant criminal proceedings, the court of first



instance read the statements of the witnesses – injured parties, who were examined in the Republic of Croatia by means of a letter rogatory.

Under Articles 530 and 531 of the LCP and Articles 1 and 83.1 of the Law on Mutual Legal Assistance in Criminal Matters, the acting court was authorised (through mutual international legal and criminal assistance from competent bodies of the Republic of Serbia and the Republic of Croatia) to request the execution of individual procedural activities in relation to the disputed criminal proceedings. This includes the delivery of written documentation and use of an audio and video conference call for the purpose of hearing the witnesses, i.e. hearing of the witnesses (injured parties) by the competent court in the Republic of Croatia. Excluding the right of the accused, however, to examine the witnesses (injured parties) must be balanced with an adequate, effective exercise of the right to defence. In this case, this was ensured by the fact that the examination of the injured parties was conducted in the presence of the accused's lawyer and that their evidence was presented to the accused at the hearing. Hence, he was in the position to dispute it, offer counter-arguments and propose evidence to dispute the statements of the injured parties. Also, when adopting the decision, the statements of the injured parties, taken when the injured parties were examined in the absence of the attorney of the accused, were not considered.

In the criminal proceedings, a lot of written evidence had been provided and numerous witnesses examined. The statements of the injured parties were not the only evidence on which the disputed decisions were grounded. However, they were decisive for adopting a convicting judgment. The Constitutional Court pointed out that the very fact that the decision for conviction is based on "a hearsay statement" (i.e. statements of witnesses or injured parties whom the accused was not in a position to examine) does not constitute an automatic violation of the right to a fair trial. In the disputed first instance judgment, every individual piece of evidence was carefully analysed. Also, the statements of witnesses (injured parties) were assessed in relation to the statements of other examined witnesses who had only indirect knowledge of the events related and in relation to the written evidence against which the statements of the injured parties were checked.

On the basis of the above-mentioned, the Constitutional Court assessed that the appellant's rights to adversarial proceedings, to defence and to equality of parties to the proceedings had not been violated.

### *Cross-references:*

European Court of Human Rights:

- *A. and Others v. United Kingdom*, no. 3455/05, 19.02.2009;
- *Luca v. Italy*, no. 33354/96, 27.02.2001;
- *Al-Khawaja and Tahery v. United Kingdom*, nos. 26766/05 and 22228/06, 15.12.2011.

### *Languages:*

English, Serbian.



# Slovakia

## Constitutional Court

### Important decisions

*Identification:* SVK-2015-2-001

**a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 24.10.2012 / **e)** PL. ÚS 4/12 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 58/2012 / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

1.3.4.13 Constitutional Justice – Jurisdiction – Types of litigation – **Universally binding interpretation of laws.**

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

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

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.7.4.3.2 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Appointment.**

*Keywords of the alphabetical index:*

Presidential acts, counter-signature / Presidential powers, increase.

*Headnotes:*

The President of the Republic, who appoints the Prosecutor General upon the proposal of Parliament, has limited powers to consider the integrity of a candidate.

*Summary:*

The Constitutional Court has special competence for abstract, generally-binding interpretation of the Constitution, where there is a genuine dispute (over competences and objective law) between constitutional authorities.

Parliament put a candidate forward for the post of Prosecutor General, for appointment by the President. However, the President was inactive and

did not appoint him. (There were tensions between the political majority at that time and the then President). The Constitutional Court was asked to interpret the Constitution in such a way that the President was obliged to appoint the candidate if he fulfilled the legal, technical criteria (with no discretion regarding the candidate's personality).

II. The Court had decided in earlier proceedings (PL. ÚS 14/06 on the appointing of the vice governor of the national bank) that the President may and indeed must review the legal requirements of candidates, but this was not applicable in the present case.

The rationale behind the reasoning was that the constitutional system is based on both principles – democracy and the rule of law. Slovakia is a parliamentary democracy, but this does not necessarily entail the dominance of parliament. The Constitution recognises procedures, which must be adopted through co-operation between Parliament and the President. The Court emphasised that it only interprets the Constitution; it is not within its remit to rewrite it in the sense of which alternative is better.

The constitutional design of the President's role has its roots in the 1992 Czechoslovakian Constitution. An important feature of this was the non-requirement for counter-signature of the President's acts. Under Article 101.1 of the Constitution, the President maintains the proper functioning of constitutional mechanisms through his decisions. This position, in combination with the somewhat autonomous character of the prosecution service, would suggest that the President has discretion over the appointment of a candidate. Such discretion must not be arbitrary, it must be based on the President's neutral role in the constitutional system, and he must give reasons for any non-appointment. Finally the Court noted that Parliament and the President, even after non-appointment of the candidate, both bear responsibility for coming up with a new Prosecutor General.

On this basis, the Court issued its interpretation of Article 102t (the President is to appoint the General Prosecutor) and Article 150 (the prosecution service will be headed by the Prosecutor General, who will be appointed and recalled by the President upon the proposal of the National Council of the Slovak Republic), which is published in the Collection of Laws and is generally binding.

The President is under an obligation to act on a proposal from the National Council for the appointment of the Prosecutor General under Article 102t of the Constitution. If the candidate has been duly elected in

accordance with the law, the President is under an obligation within a reasonable time either to appoint the proposed candidate or to inform the National Council that he will not appoint the candidate.

The President may decline to appoint the candidate for one of two reasons: either the candidate does not fulfil the legal requirements for appointment, or there are serious factors connected with the candidate's personality, which substantially compromise their ability to discharge the office in a manner which does not diminish the status of its constitutional position or the body itself of which this person is to be the highest representative or in a manner which is not contrary to the essential purpose of this body, if, as a consequence of the above, the proper functioning of constitutional bodies might be disrupted.

The President must state the justifications for the non-appointment so that these are not arbitrary.

III. There were three dissenting opinions and one concurring opinion. One of the judges argued that the interpretation should have been stricter in the sense that the President's decision should be immediate and the reasons for rejection very serious (the judge cited related decisions of the Polish – SK 37/08 – and Hungarian – 48/1991 – Constitutional Courts and Czech Supreme Administrative Court – 4 Aps 3/2005). Another judge would also have preferred an immediate decision, but thought that the President might simply review the formal, legal criteria. Two other judges, in a joint dissenting opinion, argued for an immediate decision, observing that it depended on which authority nominated the candidates for the President to consider (executive or legislative power). In the case of the Prosecutor General, Parliament (s)elects the candidate, so the reasons for rejection must be very serious. In this sense they agreed with the interpretation, but would have preferred a less complicated formulation. The President of the Court concurred that the President is equal in power with Parliament, stressing the direct election of the President and thus his legitimacy.

#### *Supplementary information:*

Before Parliament asked the Court for its interpretation, the candidate, who had been waiting for appointment, submitted a constitutional complaint (III. ÚS 427/2012) alleging a breach of his right to access to public office due to the President's inactivity. Early parliamentary elections were held at that time. After the decision on interpretation, which introduced a degree of discretion for the President, the then President refused to appoint the candidate elected by Parliament, giving extensive reasons for his refusal. The candidate submitted a second

complaint (I. ÚS 397/2014) alleging a breach of his right to access to public office, this time because of unacceptable reasons articulated by the President.

The senates of the Court could not decide on these complaints because both the President and the rejected candidate called for the recusal of almost all of the judges of the Court on the basis that they were not impartial. The Court was obstructed to such an extent that Parliament adopted an amendment to the Law on the Constitutional Court, to the effect that if the Court was obstructed by too many objections, these should be ignored. This amendment was unsuccessfully challenged by the opposition in abstract review, arguing that it was *ad hoc* legislation.

Meanwhile the new Parliament (s)elects a new candidate, who was immediately appointed by the President. In case I. ÚS 397/2014, the Court decided that the reasons the President had given for not appointing the original candidate were insufficient and the latter's right was violated, although the appointment of the new Prosecutor General was legal and legitimate. In case III. ÚS 427/2012, the Court decided that the President had not been arbitrarily inactive; he may have been waiting for the outcome of two pending cases. It did, however, take the view that he could have been more decisive, rather than wait for so long.

In 2015 the new President refused to appoint certain new judges to the Constitutional Court, who had been elected by Parliament. Related cases and appointments are presently pending.

#### *Cross-references:*

Constitutional Court of Slovakia:

- no. PL. ÚS 14/06, 23.09.2009, *Bulletin* 2010/1 [SVK-2010-1-001].

Constitutional Court of Hungary:

- no. 48/1991, 26.09.1991, *Special Bulletin Leading Cases* 2 [HUN-1991-S-002].

#### *Languages:*

Slovak.



*Identification: SVK-2015-2-002*

**a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 10.12.2014 / **e)** PL. ÚS 10/13 / **f)** Compulsory vaccination / **g)** *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

3.18 General Principles – **General interest.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

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

5.3.4.1 Fundamental Rights – Civil and political rights – Right to physical and psychological integrity – **Scientific and medical treatment and experiments.**

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

*Keywords of the alphabetical index:*

Vaccination / Treatment, medical, compulsory.

*Headnotes:*

The importance of the protection of public health from outbreaks of infectious diseases outweighs the importance of the protection of natural persons from interference with their physical and psychological integrity as part of the right to respect for private life. The public interest in protecting public health and lives of members of society by preventing infectious diseases from spreading through compulsory vaccination must be preferred to the right of an individual to respect for private life.

*Summary:*

I. The case originated in two applications challenging the constitutional conformity of certain provisions of Law no. 355/2007 Coll. on protection, promotion and development of public health (hereinafter, the “Law”) and Regulation no. 585/2008 Coll. on prevention and control of infectious diseases (hereinafter, the “Regulation”), issued by the Ministry for Health.

The applications were submitted by the regional court that had been dealing with two motions to annul the decisions delivered pursuant to the challenged provisions by an administrative body, whereby fines were imposed upon the parents who failed to comply with the requirement of compulsory vaccination with respect to their children. The regional court claimed that the challenged provisions were contrary to Article 13 of the Constitution, according to which

duties may be imposed only by law, or on its basis and within its limits, whereas in this case the requirement of compulsory vaccination was, in the view of the applicant, imposed by the Regulation (i.e. by statutory instrument, not by law) which introduced the vaccination schedule. The regional court also claimed that compulsory vaccination itself violates the constitutional rights to life (Article 15 of the Constitution), to protection of health (Article 40 of the Constitution) and to respect for private life (Article 16 of the Constitution).

II. The Constitutional Court found that the challenged legislation was in line with Article 13 of the Constitution, since the general requirement of compulsory vaccination had been imposed upon all natural persons by the Law, and the Ministry for Health had been entitled to issue the Regulation with the vaccination schedule by the specific provisions of the Law, which were sufficiently clear and precise. Thus the Regulation had been issued on the basis and within the limits of the Law.

The Constitutional Court went on to say that vaccination was proven to reduce or even eradicate various infectious diseases, whilst the risk of its side effects was very low, and according to the Law compulsory vaccination would not be applicable in cases where any contraindications exist. The purpose of compulsory vaccination is therefore to protect health of natural persons, and consequently it cannot contravene the right to life or the right to protection of health.

However, with regard to the right to respect for private life, there was a conflict of two colliding principles: the principle of the protection of public health and the principle of the protection of the integrity of natural persons from any unlawful interference. Compulsory vaccination (as an involuntary medical treatment) amounts to interference with the right to respect for private life, which includes a person’s physical and psychological integrity. The Constitutional Court had already found that this interference was lawful (see above, paragraph 3) and it remained to be established whether it was justified.

To answer this question, the Constitutional Court applied a test of proportionality which involved three steps:

- i. the test of legitimate aim/effect of interference;
- ii. the test of necessity/subsidiarity of interference; and
- iii. the test of proportionality in its strict (narrower) sense, which included firstly the test of the possibility of satisfying both colliding principles concurrently and secondly Robert Alexy’s

- iv. Weight Formula, according to which both the intensity of interference with one principle and the level of satisfaction of the other principle could be given certain values – light, moderate or serious – and it was a matter of balancing them in order to decide which principle should be satisfied at the expense of the other.

The Constitutional Court concluded that the aim of compulsory vaccination (to protect public health) was legitimate and that compulsory vaccination was necessary to achieve this aim, since there is no other effective means to reduce or eradicate infectious diseases. It was evident that both of the colliding principles could not be satisfied concurrently, and for that reason the Constitutional Court had to employ the Weight Formula in order to decide which principle should be satisfied. The Court concluded that the intensity of interference with the right to respect for private life was moderate or serious (vaccination could have detrimental side effects, but it would not be applied in cases of contraindications and there were legal instruments to seek damages if any side effects happened to occur), whereas the satisfaction of the principle of protection of public health had a serious value (if compulsory vaccination were to be abolished, there would be no other means to control infectious diseases). It followed that the principle of protection of public health must be preferred to the principle of protection of the right to respect private life.

For all these reasons the Constitutional Court dismissed both of the applications.

#### *Languages:*

Slovak.



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2015-2-005

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 26.06.2015 / **e)** CCT 150/14 / **f)** De Vos N.O. and Others v. Minister of Justice and Constitutional Development and Others / **g)** [www.constitutional.court.org.za/Archimages/23159.pdf](http://www.constitutional.court.org.za/Archimages/23159.pdf) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**

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

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

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

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 procedure, juvenile / Mentally incapacitated, detention, preventative / Mental disorder, criminal proceedings, status / Child, best interest.

*Headnotes:*

Imprisonment of an adult accused person whilst undergoing psychiatric observation for determining criminal capacity in the commission of an offence is inconsistent with the Constitution to the extent that it is mandatory.

Imprisonment or hospitalisation of a child accused whilst undergoing psychiatric observation for determining criminal capacity in the commission of an

offence is inconsistent with the Constitution to the extent that it is mandatory.

Institutionalisation of an accused person whilst undergoing psychiatric observation for determining capacity to understand criminal proceedings is inconsistent with the Constitution to the extent that it is mandatory.

### *Summary:*

I. Mr Stuurman and Mr Snyders faced charges of murder and rape in the Oudtshoorn Regional Court. The proceedings concerning the determination of both of the accused's criminal capacity and Mr Stuurman's capacity to understand criminal proceedings had been postponed pending the outcome of the constitutional challenge. Their matters commenced as separate applications that were subsequently consolidated and heard together in the Western Cape Division of the High Court in light of the similarity of the relief sought.

In the Stuurman matter, the accused was 14 years old when, in 2005, he allegedly stabbed a 14 year old girl to death. He was arraigned for murder. He sustained a serious head injury at the age of five which left him severely intellectually disabled. For this reason, the Magistrate referred him for observation in terms of his capacity to understand criminal proceedings and his criminal capacity at the time of the commission of the offence. He was evaluated by three psychiatrists. They agreed that he would not be in a position to understand court proceedings, and could not appreciate the wrongfulness of his actions.

In the Snyders matter, Mr Snyders, who is currently 35 years old, was charged with the rape of an 11 year old girl. When he appeared in the Magistrates' Court, he was referred for observation in terms of the Criminal Procedure Act. He was assessed by three psychiatrists who unanimously found that he suffered from "moderate mental retardation". They found that he could not appreciate the wrongfulness of his conduct nor was he capable of understanding the court proceedings. They advised against an order declaring him a State patient because, given his intellectual disability, his cognition would never improve. The Magistrate, without conducting the requisite factual enquiry, immediately issued a detention order in terms of Section 77.6.a.i of the Criminal Procedure Act. This was brought on special review before the High Court which determined that the Magistrate had to first comply with the procedure in terms of Section 77.6.a of the Criminal Procedure Act.

The High Court invalidated the provisions. It held that in some circumstances it may be justified to detain a person with a mental illness or an intellectual disability, but further held that not every person with a mental illness or an intellectual disability is a danger to himself or to society. It held that the Criminal Procedure Act does not allow a presiding officer to:

- i. determine whether an accused person continues to be a danger to society;
- ii. evaluate the individual needs or circumstances of that person; or
- iii. consider whether other options are more appropriate in the individual circumstances of the accused.

The Court held that there exists a distinction insofar as the law relates to the discretion of a presiding officer in instances where an accused was found not to be criminally responsible for his actions at the time of committing the offence as opposed to an instance where an accused is incapable of understanding court proceedings. In the former, the presiding officer had discretion to release the accused with or without conditions whereas in the latter instance the presiding officer has no discretion. The Court held that there was no justification for this difference. The High Court also observed that the Section applied particularly harshly in respect of children. The Court dismissed the respondents' argument that any limitation of rights was justified.

In the Constitutional Court, the applicants contended that the impugned Section provides for the compulsory incarceration or institutionalisation of accused persons who are found to be mentally unfit to stand trial and who have been found to have committed, on a balance of probabilities, the offence with which they are charged.

The respondents submitted that after the Constitution, an overhaul of mental health care policy was undertaken and a progressive policy that caters for the care, treatment and rehabilitation of a person with a mental illness or an intellectual disability was put in place. Further, the impugned provisions are consistent with the Constitution in that they are rational and serve a legitimate government purpose. The respondents submitted that a judicial discretion – in dealing with mentally ill or intellectually disabled persons who have been found, on a balance of probabilities, to have committed serious offences – could put society at risk.

II. In a unanimous judgment, Leeuw AJ held the provision dealing with serious offences to be inconsistent with the Constitution and invalid to the extent that it provides for compulsory imprisonment of

all accused persons and compulsory hospitalisation of children. Presiding officers should be afforded discretion when dealing with children so as to ensure that detention is undertaken as a measure of last resort and for the shortest period possible. However, the Court found that the mandatory hospitalisation of adult accused persons is rational as a precautionary measure to guarantee the care of the accused and the safety of society. The Court held that the second provision is constitutionally invalid as it prescribes that an accused person who has committed no act or a minor offence be institutionalised, regardless of whether they are likely to inflict harm to themselves or others and do not require care, treatment and rehabilitation in an institution which violates their freedom and security of the person.

The Court suspended the order of invalidity in respect of the compulsory imprisonment of adults and the compulsory hospitalisation and imprisonment of children for 24 months to allow Parliament to remedy the defects. In addition, the order of invalidity does not operate retrospectively.

#### *Supplementary information:*

Legal norms referred to:

- Sections 72, 9.3, 9.4, 12.1, 28.1.g, 28.2, 35.1.f, 39.1.b and 167.5 of the Constitution of the Republic of South Africa, 1996;
- Sections 17.2.b.i, 43.a, 47.9.c, 48.5.b and 53 of the Child Justice Act 75 of 2008;
- Sections 77.1, 77.6.a.i, 77.6.a.ii, 78.2, 78.6 and 79.2.c of the Criminal Procedure Act 51 of 1977;
- Section 9.1.c, 37 and 47 of the Mental Health Care Act 17 of 2002;
- Section 49D of the Correctional Services Act 111 of 1998.

#### *Cross-references:*

Constitutional Court:

- *Abahlali baseMjondolo Movement SA and Another v. Premier of the Province of KwaZulu-Natal and Others* [2009] ZACC 31;
- *AD and Another v. DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* [2007] ZACC 27;
- *Bernstein and Others v. Bester and Others NNO* [1996] ZACC 2;
- *Biowatch Trust v. Registrar, Genetic Resources and Others* [2009] ZACC 14;
- *Carmichele v. Minister of Safety and Security, Bulletin 2001/2* [RSA-2001-2-010];

- *Centre for Child Law v. Minister of Justice and Constitutional Development and Others* [2009] ZACC 18;
- *Cool Ideas 1186 CC v. Hubbard and Another* [2014] ZACC 16;
- *De Lange v. Smuts NO and Others* [1998] ZACC 6;
- *De Vos NO and Another v. Minister of Justice and Constitutional Development and Others* [2014] ZAWCHC 135;
- *Glenister v. President of the Republic of South Africa and Others* [2011] ZACC 6;
- *Hoffmann v. South African Airways* [2000] ZACC 17;
- *Malachi v. Cape Dance Academy International (Pty) Ltd and Others* [2010] ZACC 13;
- *Nel v. Le Roux NO and Others* [1996] ZACC 6;
- *S v. Coetzee and Others*, [1997] ZACC 2;
- *S v. Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5;
- *SATAWU and Another v. Garvas and Others* [2012] ZACC 13.

European Court of Human Rights:

- *H.L. v. United Kingdom*, no. 45508/99, 05.10.2004.

#### *Languages:*

English.



#### *Identification: RSA-2015-2-006*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 04.06.2015 / **e)** CCT 93/14 / **f)** Sarrahwitz v. Martiz N.O. and Another / **g)** www.constitutionalcourt.org.za/Archimages/23178.pdf / **h)** [2015] ZACC 5; CODICES (English).

#### *Keywords of the systematic thesaurus:*

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

5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

*Keywords of the alphabetical index:*

Equality, categories of persons, comparison / Eviction, vulnerable person / Property, transfer, obligation / Insolvency, creditor, vulnerable, protection.

*Headnotes:*

Vulnerable purchasers who pay the full purchase price for residential property but are denied transfer by a seller's intervening insolvency should receive protection equal to those who pay for land in instalments over a longer period. Rectification of the Alienation of Land Act 68 of 1981 by reading in words to confer a right on a vulnerable purchaser to take transfer of residential property, for which the full purchase price was paid in one lump sum or in less than a year, in the event of the seller's intervening insolvency.

*Summary:*

I. Ms Sarrahwitz entered into an agreement to purchase a house. She borrowed money from her employer and paid the full purchase price in one lump sum. The house was not registered in her name despite numerous attempts she made over the years to obtain transfer. The seller was later declared insolvent and the property became part of his insolvent estate. A trustee of the insolvent estate was appointed. After failed negotiations with Ms Sarrahwitz, he decided against transferring the house to her.

Ms Sarrahwitz launched an application seeking transfer of the property. She argued that, in terms of the Alienation of Land Act (hereinafter, the "Land Act"), she was entitled to transfer of the house and that the trustee had to effect transfer. The High Court held that her sale agreement was regulated by the common law and that the house vested in the insolvent estate. She was therefore not entitled to transfer.

Ms Sarrahwitz applied for leave to appeal against this decision on the basis that the common law position infringed her constitutional rights of access to adequate housing and equality. The High Court dismissed her application for appeal, as did the Supreme Court of Appeal. She then applied for leave to appeal to the Constitutional Court.

Ms Sarrahwitz argued that the common law read with the Land Act infringed her rights to equality, property, just administrative action, housing and human dignity. The Minister of Trade and Industry, who administers the Land Act, was in broad support of her contention.

The Minister also supported the reading of appropriate words into the Land Act, to cure the inconsistency and afford Ms Sarrahwitz the remedy she sought. The trustee of the insolvent estate withdrew his opposition.

II. The majority judgment by Chief Justice Mogoeng noted that the Land Act entitles a vulnerable purchaser of residential property who pays the purchase price in two or more instalments over a period of one year or longer to demand transfer of that property if the seller becomes insolvent. However, an equally vulnerable purchaser who somehow manages to make a once-off payment, or pays the purchase price within one year, is not entitled to transfer in those circumstances. Transfer is precluded even if the failure to do so would render the vulnerable purchaser homeless. The Court held that the Land Act was therefore inconsistent with Ms Sarrahwitz's constitutional rights of access to adequate housing, dignity and equality.

Consequently, the Court rectified the Land Act by reading in words to confer a right on a vulnerable purchaser to take transfer of residential property, where the full purchase price was paid in one lump sum or in less than one year, in the event of the seller's intervening insolvency. This right will arise only when the purchaser is likely to become homeless should transfer not take place. The Court ordered the trustee to transfer the house to Ms Sarrahwitz. The appeal was upheld and the order of the High Court set aside.

III. In a concurring judgment by Cameron J and Froneman J, the outcome of the main judgment was agreed with but with some reservation that included the main judgment's approach to the right to equality. The concurrence asserts that this risks future interpretation that any beneficial distinction the Legislature draws in extending consumer protections may be struck down as irrational if all persons are not protected. The main judgment should have found that the Constitution does not protect against homelessness in absolute terms, but does afford protection by providing that no one may be evicted from their home without an order of court made after considering all relevant circumstances. The Constitution further protects against arbitrary eviction. Thus, the more appropriate and simpler remedy could be found in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act. It could never be just and equitable to evict a purchaser in Ms Sarrahwitz's position who had paid in full. This anti-eviction protection would extend to her successors in title. The result would be that the trustee, in whose hand the house would be valueless, would have to grant her transfer.



*Supplementary information:*

Legal norms referred to:

- Sections 9, 10 and 26 of the Constitution of the Republic of South Africa, 1996;
- Sections 4, 21 and 22 of the Alienation of Land Act 68 of 1981;
- Section 17 of the Prescription Act 68 of 1969.

*Cross-references:*

- *Government of the Republic of South Africa and Others v. Grootboom and Others* [2000] ZACC 19;
- *Jaftha v. Schoeman and Others; Van Rooyen v. Stoltz and Others* [2004] ZACC 25;
- *Ngewu and Another v. Post Office Retirement Fund and Others* [2013] ZACC 4;
- *Van der Merwe v. Road Accident Fund and Another* [2006] ZACC 4.

*Languages:*

English.

*Identification:* RSA-2015-2-008

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 19.06.2015 / **e)** CCT 182/14 / **f)** DE v. RH / **g)** [www.constitutionalcourt.org.za/Archimages/23115.pdf](http://www.constitutionalcourt.org.za/Archimages/23115.pdf) / **h)** [2015] ZACC 8; CODICES (English).

*Keywords of the systematic thesaurus:*

- 2.1.2.2 Sources – Categories – Unwritten rules – **General Principles of law.**
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 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.**
- 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.**

*Keywords of the alphabetical index:*

Adultery, punishment / Adultery, delictual claim, abolishment, global trend / Common law, development / Common law, principle, constitutionality / Constitution, application to common law / Constitution, values / Court, intervention, necessity / Marriage, as a symbolic institution / Marriage, fidelity / Personal affairs, intimate, state interference, repugnance, societal / Value, societal, public policy.

*Headnotes:*

South African law no longer recognises a spouse's right to claim damages for adultery against a third party. Maintaining the claim in our law would infringe various rights of adulterous spouses as well as third parties, including the rights to dignity and privacy.

When developing the common law, courts must take into account societal values, which are based on constitutional norms.

Marriages are founded on love and respect, which are not legal rules, and are the responsibility of the spouses to maintain. Thus it would be inappropriate for the courts to intervene.

*Summary:*

I. The applicant, Mr DE, sued the respondent, Mr RH, in the North Gauteng High Court, Pretoria for damages on the basis that Mr RH had an extramarital affair with Mr DE's former wife, Ms H. Mr DE launched an action based on the general remedy for the infringement of personality rights (*actio iniuriarum*), specifically claiming for insult to his self-esteem (*contumelia*) and loss of comfort and society of his spouse (*consortium*). The High Court found in favour of Mr DE in respect of his claim for insult, but not in respect of his claim for loss of comfort and society of his spouse.

Mr RH appealed to the Supreme Court of Appeal. The Court, of its own accord, raised the question whether a delictual action based in adultery should continue to exist in South African law. In dealing with this, it canvassed the historical trajectory of the claim, foreign law, changing social norms and the detrimental financial and emotional cost of an action of this nature. Its conclusion was that the action was outdated and should be abolished.

In applying for leave to appeal to the Constitutional Court, Mr DE argued that the claim should continue to exist as it served the important purpose of protecting marriage and the family as well as a non-adulterous

spouse's right to dignity. He also submitted that the Supreme Court of Appeal erred by not developing the common law having regard to the Constitution. Mr RH, on the other hand, argued that the decision of Supreme Court of Appeal was correct.

II. In a unanimous judgment written by Madlanga J, the Court held that courts have a duty to develop the common law in light of public policy, which is based on societal values and constitutional norms. The central issue, therefore, was whether society still considered the act of adultery to be wrongful for the purposes of a delictual claim. The Court found that in South Africa, it is clear that attitudes towards the legal sanction of adultery have been softening. In reaching its decision, the judgment considered the global trend towards abolishing delictual claims based on adultery and the increasing societal repugnance toward state interference in the intimate personal affairs of individuals. It also considered the action's interference with the constitutional rights of adulterous spouses and third parties to security of person and privacy. For these reasons, the Court concluded that adultery should no longer be punished through a civil damages claim against a third party and thus a delictual claim based in adultery should no longer exist in South African law.

III. In a separate concurring judgment, Mogoeng CJ (Cameron J concurring) supported the outcome and reasoning of the main judgment, emphasising that it is a responsibility of spouses to maintain their marriage – as opposed to the law.

#### Supplementary information:

Legal norms referred to:

- Sections 8, 10, 12, 14, 15.3, 18 and 39.2 of the Constitution of the Republic of South Africa, 1996;
- Section 3 of the Divorce Act 34 of 2005;
- Civil Union Act 17 of 2006.

#### Cross-references:

- *Barkhuizen v. Napier*, *Bulletin* 2007/1 [RSA-2007-1-005];
- *Brisley v. Drotsky* [2002] ZASCA 35;
- *Carmichele v. Minister of Safety and Security*, *Bulletin* 2001/2 [RSA-2001-2-010];
- *Dawood and Another v. Minister of Home Affairs and Others*; *Shalabi and Another v. Minister of Home Affairs and Others*; *Thomas and Another v. Minister of Home Affairs and Others*, *Bulletin* 2000/2 [RSA-2000-2-007];

- *Du Plessis and Others v. De Klerk and Another*, *Bulletin* 1996/1 [RSA-1996-1-008];
- *E v. H* [2013] ZAGPPHC 11;
- *Loureiro and Others v. iMvula Quality Protection (Pty) Ltd*, *Bulletin* 2014/1 [RSA-2014-1-002];
- *Minister of Home Affairs and Another v. Fourie and Another*; *Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others*, *Bulletin* 2005/3 [RSA-2005-3-014];
- *Paulsen and Another v. Slip Knot 777 (Pty) Ltd*, *Bulletin* 2015/1 [RSA-2015-1-002];
- *RH v. DE* [2014] ZASCA 133;
- *Viviers v. Kilian*, 1927 AD 449;
- *Volks NO v. Robinson*, *Bulletin* 2006/3 [RSA-2006-3-014].

#### Languages:

English.



#### Identification: RSA-2015-2-009

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 25.06.2015 / **e)** CCT 42/15 / **f)** Molaudzi v. The State / **g)** [www.constitutionalcourt.org.za/Archimages/23112.pdf](http://www.constitutionalcourt.org.za/Archimages/23112.pdf) / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

1.4.8.7.1 Constitutional Justice – Procedure – Preparation of the case for trial – Evidence – **Inquiries into the facts by the Court.**  
 2.1.2.2 Sources – Categories – Unwritten rules – **General Principles of law.**  
 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 proceedings, evidence, received out of court / Evidence, admissibility / Appeal, requirements, formal / Common law, development / Injustice, grave / Injustice, significant / Injustice, manifest / *Res judicata*, exception.

*Headnotes:*

Where significant or manifest injustice would result if a final order stands, the doctrine of *res judicata* ought to be relaxed in a manner that permits this Court to revisit its past decisions under its inherent powers and constitutional mandate to develop the common law.

*Summary:*

I. The applicant, Mr Molaudzi, together with seven others, was accused of shooting and killing a police officer in 2002. They were charged with murder and related offences. The High Court, Mafikeng, found all the accused guilty and sentenced them to life imprisonment.

Seven of the accused appealed to the Full Court of the High Court. The Full Court held that there was sufficient evidence implicating them all and confirmed their convictions and sentences. Several of the accused unsuccessfully applied for leave to appeal to the Supreme Court of Appeal.

In 2013, Mr Molaudzi applied for leave to appeal to the Constitutional Court (first application). The application was dismissed because it was an attack on the factual findings of the High Court, thus not raising a constitutional issue and engaging this Court's jurisdiction.

In 2014, two of Mr Molaudzi's co-accused, Mr Mhlongo and Mr Nkosi, applied for leave to appeal against their convictions and sentences (related cases), but raised constitutional arguments regarding admissibility of the evidence admitted against them. They challenged the constitutional validity of admitting out-of-court statements of an accused against a co-accused in a criminal trial. This Court considered this to be a constitutional issue that engaged its jurisdiction and granted them leave to appeal. The Court overturned their convictions and ordered their immediate release in an order dated 25 March 2015.

In 2015, Mr Molaudzi brought another application for leave to appeal (second application), to have his convictions and sentences set aside, in which he now raised the arguments advanced in the related cases. He maintained that the case was not *res judicata* because the second application raised new constitutional arguments not previously before the Court. The State did not oppose the application and supported the relief sought.

II. In a unanimous judgment, Theron AJ found that while in the first application this Court was not called upon to adjudicate the substantive constitutional challenges now raised, the second application was still *res judicata* as the Court had already made a final judgment on the merits of the case. However, the Court found that where significant or manifest injustice would result if a final order stands, the doctrine ought to be relaxed in a manner that permits the Constitutional Court to revisit its past decisions in accordance with its inherent powers and constitutional mandate to develop the common law. This requires rare and exceptional circumstances, where there is no alternative effective remedy.

Like Mr Mhlongo and Mr Nkosi, Mr Molaudzi's conviction was based primarily on the out-of-court admissions by his co-accused, which this Court in the related cases found to be inadmissible. It would be a grave injustice if Mr Molaudzi was not afforded the same relief as Mr Mhlongo and Mr Nkosi in circumstances where he was similarly situated and had failed to raise the same constitutional arguments in his first application, which may have been due to his lack of legal representation.

The Court found that these are exceptional circumstances and that it was in the interests of justice to fashion an appropriate remedy. The Court concluded that, without the out-of-court admissions of his co-accused, the evidence as a whole was insufficient to support Mr Molaudzi's conviction. The appeal was upheld and his convictions and sentences were set aside. The Court directed that Mr Molaudzi be released from prison immediately.

*Supplementary information:*

Legal norms referred to:

- Sections 39.2 and 173 of the Constitution of the Republic of South Africa, 1996;
- Section 3.1.c of the Law of Evidence Amendment Act 45 of 1988;
- Section 219 of the Criminal Procedure Act 51 of 1977.

*Cross-references:*

- *Ndhlovu and Others v. The State*, 31.05.2002, *Bulletin* 2002/2 [RSA-2002-2-009];
- *S v. Molimi* [2008] ZACC 2;
- *Mhlongo v. S; Nkosi v. S* [2015] ZACC 19;
- *Mpofu v. Minister for Justice and Constitutional Development and Others*, 06.06.2013, [2013] ZACC 15, *Bulletin* 2013/2 [RSA-2013-2-015].

*Languages:*

English.

*Identification: RSA-2015-2-010*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 26.06.2015 / **e)** CCT 198/14 / **f)** Trencon Construction (Pty) Limited v. Industrial Development Corporation of South Africa Limited and Another / **g)** [www.constitutionalcourt.org.za/Archimages/23148.pdf](http://www.constitutionalcourt.org.za/Archimages/23148.pdf) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**  
 4.6.2 Institutions – Executive bodies – **Powers.**  
 4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**  
 4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

*Keywords of the alphabetical index:*

Administrative decision, substitution by judicial decision, criteria / Administrative act, judicial review.

*Headnotes:*

The case concerned the circumstances in which courts can set aside the decision of an administrator and substitute it with its own decision. Courts appreciate that administrative agencies are better suited to make decisions within their area of competence. This is because the courts are not in the best position to appreciate the poly-centric, sensitive, practical and financial considerations that affect the making of administrative decisions. Therefore, generally courts must exercise judicial deference, within the doctrine of the separation of powers, when reviewing a decision of an administrator performing a public function. Only in exceptional circumstances will a court substitute its own decision for that of the administrator. Exceptional circumstances which justify the substitution of an administrator's decision include first, whether a court is in as good a position as the administrator to make the decision. Second, whether the decision of the administrator is a foregone conclusion. Third, whether there are other relevant factors for consideration, including delay, bias or the

incompetence of an administrator. The ultimate consideration is whether a substitution order would be just and equitable. Generally, a judicial officer will not be in as good a position as an administrator where the application of the administrator's expertise is still required and a court does not have all of the relevant information before it. A further relevant consideration would be the stage at which the administrator's process was situated when the administrative decision was taken.

*Summary:*

I. A state owned company, the Industrial Development Corporation Limited (hereinafter, "IDC") issued a public invitation to building contractors to upgrade its head office. The contractors' profiles were screened and a shortlisting process was conducted. Of the seven contractors shortlisted, only four submitted bids, which were then evaluated. The evaluation was carried out by the IDC's Procurement Committee, Procurement Department and Bid Evaluation Committee. The IDC also engaged an independent firm of experts and a group of quantity surveyors to assist the evaluators. The applicant, Trencon earned the highest points and all of the evaluators recommended that the tender be awarded to it. Despite this, the IDC's Executive Management Committee awarded the tender to a different bidder, Basil Read (second respondent). According to the IDC, Trencon's bid was defective. Trencon approached the North Gauteng High Court, Pretoria which reviewed and set aside the IDC's decision to award the tender to Basil Read. It found that the decision was based on a material error of law. In considering a remedy, it found that there were exceptional circumstances justifying an exceptional remedy of substitution in terms of the Promotion of Administrative Justice Act (hereinafter, "PAJA"). The IDC appealed to the Supreme Court of Appeal on the issue of the substitution order only. The Supreme Court of Appeal found that there were no exceptional circumstances justifying a substitution order. It reasoned that the High Court had not considered the doctrine of separation of powers; that the award of the tender to Trencon was not a foregone conclusion; and that the substitution order would not provide for supervening circumstances like price increases. As a result, it set aside the substitution order and remitted the matter to the IDC for decision.

II. In a unanimous judgment written by Khampepe J, the Constitutional Court found that it was in as good a position as the IDC to award the tender and that awarding the tender to Trencon was a foregone conclusion. Trencon had earned the highest points and there were no objective criteria or justifiable reasons to award the tender to another bidder or to

cancel the tender. This Court found that the separation of powers was sufficiently catered for by the fact that PAJA allows for substitution remedies in “exceptional circumstances”. The tender conditions agreed to by the parties could address any concerns around changed circumstances arising from the delay occasioned by the appeal process. Further, it was held that the Supreme Court of Appeal should not have interfered in the exercise of the High Court’s broad discretionary powers. Consequently, this Court set aside the Supreme Court of Appeal’s decision and reinstated the High Court’s order.

### Supplementary information:

Legal norms referred to:

- Sections 217 and 33.1 of the Constitution of the Republic of South Africa, 1996;
- Sections 6.1 and 8.1 of the Promotion of Administrative Justice Act 3 of 2000;
- Section 2.1.f of the Preferential Procurement Policy Framework Act 5 of 2000.

### Cross-references:

- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15;
- *Joseph and Others v. City of Johannesburg and Others* [2009] ZACC 30;
- *Livestock and Meat Industries Control Board v. Garda*, 1961 (1) SA 342 (A);
- *Johannesburg City Council v. Administrator, Transvaal, and Another*, 1969 (2) SA 72 (T);
- *Gauteng Gambling Board v. Silver Star Development Limited and Others*, 2005 (4) SA 67 (SCA);
- *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12;
- *Billiton Aluminium SA Ltd t/a Hillside Aluminium v. Khanyile and Others* [2010] ZACC 3;
- *Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20;
- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17;
- *Logbro Properties CC v. Bedderson NO and Others*, [2002] ZASCA 135;
- *Telkom SA Limited v. Merid Training (Pty) Limited; Bihati Solutions (Pty) Limited v. Telkom SA Limited* [2011] ZAGPHC 1;
- *Joubert Galpin Searle Inc v. Road Accident Fund*, 2014 (4) SA 148 (ECP);

- *Media Workers Association of South Africa and Others v. Press Corporation of South Africa Limited*, 1992 (4) SA 791 (A);
- *Florence v. Government of the Republic of South Africa* [2014] ZACC 22;
- *Knox D’Arcy Ltd and Others v. Jamieson and Others*, [1996] ZASCA 58;
- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* [1999] ZACC 17.

### Languages:

English.



### Identification: RSA-2015-2-011

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 30.06.2015 / **e)** CCT 216/14 / **f)** Shoprite Checkers (Pty) Limited v. Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others / **g)** [www.constitutionalcourt.org.za/Archimages/23163.pdf](http://www.constitutionalcourt.org.za/Archimages/23163.pdf) / **h)** CODICES (English).

### Keywords of the systematic thesaurus:

3.11 General Principles – **Vested and/or acquired rights.**  
 3.22 General Principles – **Prohibition of arbitrariness.**  
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

### Keywords of the alphabetical index:

License, alcohol, sale, property / License, to practise a trade, conditions / Liquor licence, meaning / Alcohol, licence for trade, property / Property, deprivation.

### Headnotes:

The conception of property must be derived from the Constitution. It must embrace constitutional entitlements beyond the original ambit of private common law property in order to ensure that the property clause does not become an obstacle to transformation, but central to its achievement.

Therefore, grocer's wine licences are property under Section 25 of the Constitution. Licensing system and courts should not easily interfere with the choices made by legislatures.

### *Summary:*

I. The Eastern Cape Liquor Board granted the applicant, Shoprite Checkers (Pty) Ltd, grocer's wine licences between 1989 and 2003, under the Liquor Act of 1989. The licensing regime changed in 2004, when the Eastern Cape Liquor Act came into force. This Act provides that, from its date of operation, grocer's wine licences in the Eastern Cape would be valid only until 2014. However, licence holders could also apply for a registration to sell all kinds of liquor on separate premises five years after the date of commencement of the Eastern Cape Liquor Act.

Shoprite challenged the constitutional validity of these provisions in the High Court. It argued that grocer's wine licences are property under the Constitution and that the provisions of the Eastern Cape Liquor Act violated its constitutional right not to be arbitrarily deprived of property. The respondents argued the opposite. The High Court found that the grocer's wine licences constituted property under the Constitution. It held that the impugned provisions of the Act arbitrarily deprived Shoprite of this property and found these provisions to be constitutionally invalid.

The High Court decision came before the Constitutional Court for confirmation, Shoprite persisted in its arguments raised, as did the respondents.

II. The main judgment, written by Froneman J (Cameron J, Nkabinde J and Jappie AJ concurring), held that the grocer's wine licence constitutes property. The judgment further found that the right to sell liquor bears many of the traditional hallmarks of property. However, the deprivation of this property by the new regime was not total as Shoprite had the opportunity to convert that right to a registration under the Eastern Cape Liquor Act to sell all kinds of liquor, albeit not on the same premises as a grocery business. Finally, because the change in regulatory regime did not extinguish any other fundamental rights of holders of grocer's wine licences or fundamental constitutional values, rationality would be sufficient reason to avoid a finding of arbitrariness. It held that it was rational to change the regulatory regime of liquor sales to provide for simplification. Therefore, the main judgment held that the declaration of constitutional invalidity should not be confirmed as there was no arbitrary deprivation of property.

III. A concurring judgment written by Moseneke DCJ (Mogoeng CJ, Khampepe J, Molemela AJ and Theron AJ concurring) supported but on a different basis the main judgment's conclusion that the Constitutional Court should not confirm the High Court's order of constitutional invalidity. Moseneke DCJ disagreed with the main judgment's characterisation of the grocer's wine licence as "property". This characterisation was unnecessary as the same outcome may be arrived at without deciding this difficult and fluid question. However, if one must decide this question, Moseneke DCJ would part ways with the main judgment and hold that a liquor licence is not property. A licence is a bare permission to do something that would otherwise be unlawful. It is normally issued to overcome a statutory prohibition. Further, licences are subject to administrative withdrawal and change. They are never absolute, often conditional and frequently time-bound. Thus, they do not vest in their holder. Even so, their grant and termination may not always be arbitrary or unlawful because they are adequately protected by the requirements of administrative justice. The Constitution has given the provincial legislature the competence to regulate the sale of liquor. Defining a liquor licence as property may very well impede legislative regulation and make it impracticable.

In a judgment dissenting on the outcome, Madlanga J (Tshiqi AJ concurring) agreed with Froneman J's judgment in concluding that a grocer's wine licence was property. However, unlike Froneman J, he concluded that Shoprite was arbitrarily deprived of this property. Madlanga J, concurring with the main judgment's finding that Shoprite's grocer's wine licences was property, found that the main judgment gave insufficient value to the property right as a self-standing concept worthy of protection under our law. He also held that the extent of Shoprite's deprivation was total, as it is now wholly divested of the unique essence of the grocer's wine licence. The ability to apply for a broader licence does not alleviate the deprivation as this option was, regardless, always available to Shoprite. Ultimately, Madlanga J concluded that the respondents had shown virtually no evidence on record in justification of this total deprivation and that, accordingly, the deprivation was arbitrary.

The overall effect of the three judgments is six judges held that deprivation of property was at issue, but that the order of constitutional invalidity of the impugned provisions was not confirmed and the respondents' appeal on certain preliminary issues was dismissed. For the sake of clarity, a majority – the main judgment and that of Madlanga J – held that grocer's wine

licences are property under Section 25 of the Constitution and that Shoprite was deprived of this property in terms of the provisions of the Eastern Cape Liquor Act. Moseneke DCJ agreed with the main judgment that the order of constitutional invalidity should not be confirmed, and also held that the provisions of the Eastern Cape Liquor Act are not arbitrary. Thus, on the question of arbitrariness, the majority finding was that the deprivation was not arbitrary.

#### Supplementary information:

Legal norms referred to:

- Section 25 of the Constitution of the Republic of South Africa, 1996;
- Section 71.2 and 71.5 of the Eastern Cape Act 10 of 2003.

#### Cross-references:

- *First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance*, 16.05.2002, *Bulletin* 2002/2 [RSA-2002-2-006];
- *Reflect-All 1025 CC and Others v. Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another*, 27.08.2009, *Bulletin* 2009/2 [RSA-2009-2-012];
- *Lawrence v. State and Another; Negal v. State and Another; Solberg v. State and Another*, 06.10.1997, *Bulletin* 1997/3 [RSA-1997-3-010].

#### Languages:

English.



## Spain Constitutional Court

### Important decisions

*Identification:* ESP-2015-2-003

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 14.05.2015 / **e)** 93/2015 / **f)** Right to housing in Andalusian Law Decree / **g)** *Boletín Oficial del Estado* (Official Gazette), 146, 19.06.2015; [www.boe.es/boe/dias/2015/07/31/pdfs/BOE-A-2015-6831.pdf](http://www.boe.es/boe/dias/2015/07/31/pdfs/BOE-A-2015-6831.pdf) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Pagin as/Sentencia.aspx?cod=21271](http://www.tribunalconstitucional.es/es/jurisprudencia/Pagin as/Sentencia.aspx?cod=21271); CODICES (Spanish).

#### Keywords of the systematic thesaurus:

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

1.3.4.10.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – **Limits of the legislative competence.**

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

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

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

5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

#### Keywords of the alphabetical index:

Housing, eviction / Legislation, urgent need / Property, private, right / Status, autonomy / Housing, right / Competence, legislative, limit / Housing, eviction, alternative, availability / Economy, state regulation / Expropriation, purpose.

*Headnotes:*

Provisions of the Law Decree 6/2013 of the Andalusian Regional Executive (“*Gobierno de Andalucía*”) concerning the right to housing and the expropriation of uninhabited houses are unconstitutional because they infringe upon the State’s authority to regulate the economy.

*Summary:*

I. The President of the Government lodged an action of unconstitutionality against provisions of the Law Decree of the Andalusian Regional Executive. The contested provisions concern the expropriation of uninhabited houses, which envisaged protecting the housing needs of persons in dire situations.

II. The Constitutional Court ruled that the provisions on the right to housing are unconstitutional because they directly affect the right to property. The Court reasoned that the Autonomous Community is not authorised to regulate the expropriation of housing use (the right to use regardless of the property regime), as such authority is under the State’s jurisdiction to regulate the economy. Also, the measure conflicts with the State’s mechanism of housing protection.

The Court rejected the unconstitutionality of the general definition of “uninhabited house” (house unused as residence for more than six consecutive months) set forth in the Law Decree. The concept has an instrumental use related to the promotion of the right to housing and respects the State jurisdiction.

III. The judgment has three partial dissenting opinions, one of them signed by two judges.

*Cross-references:*

- Articles 33, 47, 86.1 and 149 of the Constitution;
- Law Decree of the Andalusian Regional Executive 6/2013, 09.04.2013, on measures to ensure proper compliance of the housing social function.

## Constitutional Court:

- no. 96/2014, 12.06.2014;
- no. 142/2014, 11.09.2014.

*Languages:*

Spanish.

*Identification:* ESP-2015-2-004

a) Spain / b) Constitutional Court / c) Plenary / d) 11.06.2015 / e) 138/2015 / f) / g) *Boletín Oficial del Estado* (Official Gazette), 160, 06.07.2015; [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2015-7590](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-7590) / h) [www.tribunalconstitucional.es/es/jurisprudencia/PaginAs/Sentencia.aspx?cod=21316](http://www.tribunalconstitucional.es/es/jurisprudencia/PaginAs/Sentencia.aspx?cod=21316); CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

1.3.5.11 Constitutional Justice – Jurisdiction – The subject of review – **Acts issued by decentralised bodies.**

1.3.5.13 Constitutional Justice – Jurisdiction – The subject of review – **Administrative acts.**

3.6.2 General Principles – Structure of the State – **Regional State.**

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

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

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

*Keywords of the alphabetical index:*

Conflict of powers / Constituent power, powers / Consultation, public / Democracy, referendum-based / Federal State, region, autonomy / Referendum, scope / Referendum consultative, organisation, conditions / Referendum, for the establishment of municipality and the determination of territory / Referendum, local, scope.

*Headnotes:*

Autonomous communities lack jurisdiction to convene a public consultation on issues affecting the basis of the constitutional order.

*Summary:*

I. The Autonomous Community of Catalonia approved the non-referendum popular consultations and other forms of citizen participation law (no. 10/2014) on 26 September 2014. However, the Constitutional



Court Judgment no. 31/2015, 25 February 2015 partially upheld the unconstitutionality of the autonomous law.

The Constitutional Court acknowledged that, among the *genus* “popular consultations”, there are two different institutions: the referendum and other public consultations. The referendum is characterised by the opinion of the electoral body about public affairs obtained through an electoral process, which is based on an electoral registration with legal guarantees. On one hand, Article 149.1.32 of the Constitution provides that the State holds exclusive jurisdiction over “authorisation for popular consultations through the holding of *referenda*”. On the other hand, Article 122 of the Statute of Autonomy of Catalonia confers jurisdiction to the Government of Catalonia on “public opinion polls, public hearings, participation forums and any other instruments of popular consultation”.

Thus, the Court declared unconstitutional the regulation of general consultation. Convoking the electoral body to participate in public affairs through the vote and with electoral guarantees encroaches upon the State’s exclusive jurisdiction. At the same time, the Court recognised that the Catalanian legislator has jurisdiction to regulate sectorial consultation different from the referendum and other forms of citizen participation in its sphere of powers, given that the results of the consultation cannot be attributed to the electoral body.

Furthermore, the President of the Catalanian Community decided to call a non-referendum popular consultation on the political future of Catalonia via Decree 129/2014, 27 September 2014. There were two questions in the Decree: “Do you want Catalonia to become a State?” and if the answer is affirmative, “Do you want this State to be independent?” This Decree was automatically suspended by the Constitutional Court (Order issued on the 29 September 2014) when the Spanish Government challenged it and eventually, declared unconstitutional by the Constitutional Court Judgment no. 32/2015, 25 February 2015. The Court concluded that the questions in the popular consultation exceeded the sphere of powers of the Autonomous Community of Catalonia.

Finally, a “participation process” was held on 9 November 2014, with the support of the Catalanian Government through different acts, which are challenged in this constitutional review. Particularly, the information about this process was on the website: [www.participa2014.cat/es/index.html](http://www.participa2014.cat/es/index.html).

II. The Constitutional Court applied its case-law (nos. 31/2015 and 32/2015, 25 February 2015) and decided that the Autonomous Communities have jurisdiction to convene non-referendum popular consultations in their “sphere of powers”. In this sense, the Court considered it was not necessary to resolve the nature of the “process of citizen participation”, whether it is a referendum, because any form of consultation shall be subject to this limit of competence.

Therefore, the Court, after examining the content of the questions submitted to consultation, concluded that the challenged acts exceeded the sphere of power of the Autonomous Community of Catalonia. An Autonomous Community cannot convene a public consultation on issues affecting the basis of the constitutional order.

#### *Cross-references:*

- Article 149.1.32 of the Constitution;
- Article 122 of the Statute of Autonomy of Catalonia;
- Non-referendum popular consultations and other forms of citizen participation Law, passed by the Parliament of Catalonia (no. 10/2014, 26.09.2014).

#### Constitutional Court:

- no. 103/2008, 11.09.2008;
- no. 31/2010, 28.06.2010;
- no. 31/2015, 25.02.2015;
- no. 32/2015, 25.02.2015.

#### *Languages:*

Spanish.



#### *Identification:* ESP-2015-2-005

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 25.06.2015 / **e)** 145/2015 / **f)** Conscientious objection / morning-after pill / **g)** *Boletín Oficial del Estado* (Official Gazette), 182, 31.07.2015; [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2015-8639](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8639) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Pagin as/Sentencia.aspx?cod=21323](http://www.tribunalconstitucional.es/es/jurisprudencia/Pagin as/Sentencia.aspx?cod=21323); CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Abortion, legal time limit / Medicine / Conscientious objection / Conscientious objector.

*Headnotes:*

Conscientious objection stems from the fundamental right to ideological freedom. This right applies to pharmacists when they dispense medicine with the ingredient *levonorgestrel* (known as “morning-after pill”) because of the possible abortive effects of the pill.

*Summary:*

I. In the Autonomous Community of Andalusia (Spain), the minimum stocks of medicines and health products at pharmacies are regulated. These stocks include condoms and the morning-after pill. When a pharmacy does not fulfil those minimum requirements, it may be subject to an administrative fine. Although Andalusia has no regulation on the right to conscientious objection of pharmacists, this right is recognised in the Articles of the Bar Association of Pharmacist of Seville.

The Government of Andalusia (*“Junta de Andalucía”*) sanctioned a pharmacist from Seville with a fine of 3,300 euros. Because the pharmacy neither dispensed condoms nor the morning-after pill, the Administration determined that the pharmacist breached the regulatory duty to have the minimum stock of medicines and pharmacy products. The sanction was confirmed by the Administrative Court (*“Juzgado de lo Contencioso-Administrativo”*). The pharmacist challenged that decision with an *amparo* appeal.

II. The Constitutional Court upheld the appeal. Concerning the morning-after pill, the Court ruled that the pharmacist’s right to conscientious objection, which is linked to the right to ideological freedom, was violated. From this perspective, the absence of unanimity in scientific positions on the possible abortive effects of the morning-after pill creates a reasonable doubt. Thus, the pharmacist is authorised

– by virtue of his convictions about the right to life – not to stock the medicine at his pharmacy.

In addition, since the pill was available at nearby pharmacies, it cannot be inferred that the right of women to have access to contraceptive drugs was breached.

Although Andalusia lacks a specific regulation on the right to conscientious objection of pharmacists, the right is expressly recognised in the Articles of the Bar Association of Pharmacist of Seville. The pharmacist was admitted and registered as a conscientious objector; hence, that he exercised his right is a legitimate expectation. In addition, the Administration did not contest the statutory recognition of the right to conscientious objection.

On the contrary, ideological freedom does not cover the breach of the duty to stock condoms. Consequently, the actions are reverted back to the Administrative Court, which shall clarify the issues surrounding the application of pharmacy laws.

The special constitutional significance of the case is its novelty. There is no decision on conscientious objection of a pharmacist in relation to his obligation to stock the morning-after pill.

III. The judgment has three dissenting opinions, one of them signed by two judges.

*Cross-references:*

- Article 16.1 of the Constitution;
- Article 8.5 of the Statutes of College of Sevillian Pharmacists;
- Articles 28 and 33 of the Code of Ethics and Deontology of Pharmacist Profession.

*Constitutional Court:*

- no. 53/1985, 11.04.1985;
- no. 212/1996, 19.12.1996;
- no. 116/1999, 17.06.1999.

*Languages:*

Spanish.



**Identification:** ESP-2015-2-006

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 25.06.2015 / **e)** 146/2015 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 182, 31.07.2015; [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2015-8640](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8640) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=21324](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=21324); CODICES (Spanish).

**Keywords of the systematic thesaurus:**

2.3.4 Sources – Techniques of review – **Interpretation by analogy.**  
 4.7.3 Institutions – Judicial bodies – **Decisions.**  
 4.10.7.1 Institutions – Public finances – Taxation – **Principles.**  
 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**  
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

**Keywords of the alphabetical index:**

Economic crime / Judgment, obligation to comply, breach, financial penalties, periodic penalty payment, lump sum / Administrative Court, jurisdiction, attribution / Decision, administrative / Penalty, administrative / Sanction, administrative, violation / Tax control / Tax, duty to pay, income / Tax evasion.

**Headnotes:**

Provisions of the Tax Law cover penalties on entrepreneurs for issuing false invoices for economic activities. The sanction will also apply to those who simulate an economic activity that causes the issuance of false invoices.

**Summary:**

I. The Tax Agency sanctioned the applicant for falsely representing economic activity. The Agency concluded that the applicant, who lacked proper certification for his masonry and construction business, worked as a sole trader and issued false invoices for non-existent services to create the appearance of economic movements. Thus, the income declared by the applicant was excluded from the tax base of the personal income tax.

II. The Constitutional Court agreed with the Administration's decision to apply a penalty for breaching the obligation to bill for economic transactions. The provision is also applied to anyone who bills without having this legal duty. The

interpretation neither exceeded the literal meaning nor involved an analogous interpretation (in *malam partem* analogy). Therefore, taxpayers of personal income tax who do not obtain income from economic activities and are not expressly required to issue invoices have the obligation to not invoice.

In conclusion, the Court believed that the facts in this case were correctly subsumed into the penalty system that punishes anyone who issues false invoices.

III. The judgment has one dissenting opinion.

**Cross-references:**

- Article 25 of the Constitution;
- Article 201 of the Tax Law of Spain 58/2003, 17.12.2003.

**Constitutional Court:**

- no. 137/1997, 21.07.1997, Second Chamber;
- no. 57/2010, 04.10.2010, Second Chamber.

**Languages:**

Spanish.

**Identification:** ESP-2015-2-007

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 09.07.2015 / **e)** 155/2015 / **f)** Higher education for foreigners without residence authorisation / **g)** *Boletín Oficial del Estado* (Official Gazette), 194, 14.08.2015; [www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2015-9197.pdf](http://www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2015-9197.pdf) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=21333](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=21333); CODICES (Spanish).

**Keywords of the systematic thesaurus:**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**  
 3.21 General Principles – **Equality.**  
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

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

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

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

5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

*Keywords of the alphabetical index:*

Education, access, citizenship, condition, student, non-resident / Education, higher, right / Grant, state / Scholarship, access, restriction / Immigration, residence, permit.

*Headnotes:*

Foreigners, regardless of their administrative situation in Spain, hold the right of access to higher education equal to that of Spanish nationals.

*Summary:*

I. The applicant [Parliament of the Chartered Community of Navarre (“*Comunidad Foral de Navarra*”)] filed an action of unconstitutionality against the Organic Law 2/2009 of 11 December. The contested Law modifies Article 9.2 of the Organic Law 4/2000 of 11 January on Rights and Freedoms of foreigners in Spain and their social integration. The wording of the modified Article stipulates the right to education of adult foreigners residing in Spain, namely equal access to higher education and the acquisition of the corresponding titles from the public system that are granted to Spanish nationals according to education legislation.

II. The Court rejected the action of unconstitutionality. The Court noted that the challenged Article contains a general recognition of the entitlement of the right to education, which is extended to all adult foreigners without reference to their administrative situation. It also highlighted that the provision refers to the education legislation, enshrining the full equality between Spanish nationals and foreigners. Thus, a “non-resident” foreigner, the Court stipulated, should not be excluded from the right to access higher education, as a foreigner’s right to education is independent from the right he/she may hold to stay in the territory of the country.

The judgment has two concurring opinions, one of them subscribed by three judges.

*Cross-references:*

- Articles 13 and 27 of the Constitution;
- Article 9.2 of the Spanish Organic Law 4/2000, 11.01.2000, on Rights and Freedoms of foreigners in Spain and their social integration.

Constitutional Court:

- no. 236/2007, 07.11.2007.

European Court of Human Rights:

- *Vikulov v. Latvia*, no. 16870/03, 25.03.2004.

*Languages:*

Spanish.



*Identification:* ESP-2015-2-008

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 14.07.2015 / **e)** 159/2015 / **f)** Revision of invalidated electoral votes / **g)** *Boletín Oficial del Estado* (Official Gazette), 194, 14.08.2015; [www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2015-9201.pdf](http://www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2015-9201.pdf) / **h)** [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=21337](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=21337); CODICES (Spanish).

*Keywords of the systematic thesaurus:*

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

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

4.9.11.1 Institutions – Elections and instruments of direct democracy – Determination of votes – **Counting of votes.**

4.9.13 Institutions – Elections and instruments of direct democracy – **Judicial control.**

4.9.14 Institutions – Elections and instruments of direct democracy – **Non-judicial complaints and appeals.**

4.9.15 Institutions – Elections and instruments of direct democracy – **Post-electoral procedures.**

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

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

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

*Keywords of the alphabetical index:*

Election, candidate list, holder, status / Election, candidate, condition / Election, control.

*Headnotes:*

Insuring an effective judicial protection and access to public services with legal requirements mean not rigidly applying the principle of preclusion. Failure to exhaust all remedies should not be the basis for refusing an electoral appeal.

*Summary:*

I. The applicant (“*Ganemos – Izquierda Unida – Los Verdes*”, an electoral coalition in Extremadura) challenged the general vote counting of elections to the Parliament of Extremadura. The applicant requested for an inspection of all the invalid votes from the constituency of Badajoz, specifically any vote that had been annulled because of the difference in colours between the envelopes granted by the Administration on the day of the election (black envelopes) and the envelopes (dark blue) that the coalition offered before the election. The distinction was noted and raised to the Electoral Commission of Llerena on election day.

The applicant appealed the decision of the Electoral Commissions of Badajoz and Extremadura to dismiss the claims. The High Court of Extremadura declared the applicant’s petition inadmissible because it was unspecified, generic, improperly founded and unjustified, in addition to the fact that the applicant did not exhaust all remedies.

II. The Constitutional Court upheld the *amparo* appeal, finding a violation of the right to effective remedy and access to public services with requirements established by law. The Court declared that the High Court of Extremadura should have examined the complaints made subsequently to the act of general vote counting in order to avoid imposing a rigid application of the preclusion principle. It specified that the decision to dismiss the electoral appeal for failure to exhaust the remedies, is contrary to constitutional case-law (no. 169/2007, 28 July 2007). *Ergo*, the High Justice Court of Extremadura unduly limited the right to vote, because it did not admit evidence in the review of the null votes. To redress the rights infringed, the

Electoral Commission must examine the eventually annulled votes in the constituency of Badajoz for the specific reason given by the coalition related to the colours of the envelopes.

*Cross-references:*

- Articles 23.2 and 24.1 of the Constitution.

Constitutional Court:

- no. 169/2007, 21.08.2007.

*Languages:*

Spanish.



*Identification:* ESP-2015-2-009

a) Spain / b) Constitutional Court / c) Plenary / d) 22.07.2015 / e) 177/2015 / f) / g) *Boletín Oficial del Estado* (Official Gazette), 200, 21.08.2015; [www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2015-9392.pdf](http://www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2015-9392.pdf) / h) [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=21339](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=21339); CODICES (Spanish).

*Keywords of the systematic thesaurus:*

4.4 Institutions – **Head of State**.  
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person**.  
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.  
 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.  
 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.  
 5.3.30 Fundamental Rights – Civil and political rights – **Right of resistance**.

*Keywords of the alphabetical index:*

Freedom of expression, scope of protection / Freedom of speech / Fundamental rights, balance / Fundamental rights, limitation / Hate speech / Hatred, incitement / Head of State, defamation / Insult.

*Headnotes:*

Burning the King and Queen's portrait is neither an exercise of the freedom of expression nor the freedom of thought.

*Summary:*

I. The King and the Queen of Spain visited the city of Gerona. There was a demonstration headed by a banner with the slogan "300 years of Borbons, 300 years against the Spanish occupation". During a subsequent public rally, the applicants burned a portrait of the Royal couple. The National High Court ("*Audiencia Nacional*") condemned the action for "insults against the Crown".

II. The Constitutional Court rejected the *amparo* appeal, declaring neither the freedom of expression nor their freedom of thought had been violated. Regarding interference with freedom of expression, the Constitutional Court considers the following points:

- a. The reinforced legal protection that the criminal law recognises to the Crown;
- b. The destruction of an official portrait is a manifestation of freedom of expression since it has an undeniable symbolic effect; and
- c. Even if disgusting, the criticism to persons in public offices and to the representatives of a public institution is legitimate, but not when it results in humiliation.

In this sense, the Court determined that the facts were not protected by the freedom of expression because the burning of the portrait constituted a sign of "hate speech", inciting hatred and violence against the Royal couple and fostering feelings of threat. The Court took into account that the acts were prepared deliberately and there were no political speeches. Also, the Court stressed that the case departs significantly from the European Court of Human Rights Judgment on *Otegui v. Spain*, 15 March 2011, as the applicants were not elected representatives and they had not spoken on a matter open to public debate.

Finally, the Court stated that freedom of thought was not violated. The punishment was not based on the applicants' ideological position, but on the content of a symbolic act that could have provoked hate and violence.

III. The judgment has three dissenting opinions, one of them signed by two justices.

*Cross-references:*

- Article 20 of the Constitution.

European Court of Human Rights:

- *Otegui v. Spain*, no. 2034/07, 15.03.2011.

*Languages:*

Spanish.



# Sweden

## Supreme Administrative Court



### Important decisions

*Identification:* SWE-2015-2-003

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 28.05.2015 / **e)** 1161-14 / **f)** / **g)** HFD 2015 ref. 20 / **h)** CODICES (Swedish).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Firearm permit / Weapon, license.

*Headnotes:*

The Swedish procedure to withdraw a firearms license when a person, who has been convicted of a crime, is considered unsuitable to possess firearms, does not violate the right not to be tried or punished twice for the same offence.

*Summary:*

I. According to the Swedish Firearms Act (SFS 1996:67), the Police shall withdraw a firearms license if it turns out that the person is unsuitable to possess firearms. The person concerned in the case was sentenced for assault and battery against his two young sons. The Police then withdrew the person's firearms license because it considered that he was no longer suitable to possess firearms.

II. The Supreme Administrative Court found that the procedure of withdrawing a firearms license cannot be considered a criminal procedure. The procedure is, therefore, not in violation of Article 4 Protocol 7 ECHR and Article 50 of the Charter of Fundamental Rights of the European Union.

*Languages:*

Swedish.

*Identification:* SWE-2015-2-004

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 28.05.2015 / **e)** 1757-14 / **f)** / **g)** HFD 2015 ref. 31 / **h)** CODICES (Swedish).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Withdrawn driving licence / General criminal offence.

*Headnotes:*

The Swedish procedure to withdraw a driving licence of a person convicted of a criminal offence (i.e., an offence other than a traffic offence but the person nevertheless is considered unsuitable to drive any vehicle for which a driving licence is required) fails to give rise to a violation of the right not to be tried or punished twice for the same offence.

*Summary:*

I. According to the Swedish Driving Licence Act (SFS 1998:488), the Swedish Transport Agency shall withdraw a person's driving licence if he or she was convicted for a general criminal offence other than a traffic offence. Even if it was not a traffic offence, the person is deemed not to respect traffic regulations and to show consideration, judgment and responsibility when driving.

The person concerned in the case was sentenced for arson. Based on this reason, the Swedish Transport Agency withdrew the person's driving licence, believing he was not suitable to drive any vehicle for which a driving licence is required.

II. The Supreme Administrative Court found that the procedure of withdrawing a driving licence does not constitute a criminal procedure. The procedure is therefore not in violation of Article 4 Protocol 7 ECHR.

*Languages:*

Swedish.



*Identification:* SWE-2015-2-005

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 09.06.2015 / **e)** 60615-14 / **f)** / **g)** HFD 2015 ref. 37 I / **h)** CODICES (Swedish).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Tax surcharges / Tax offence.

*Headnotes:*

A petition for a new trial was denied in a case where tax surcharges had been imposed on a person who had also been indicted for tax offences. Since both proceedings were finished and the tax surcharges had been imposed before the indictment, there was no ground – even with regard to the prohibition on double punishment – to set aside the decision to impose tax surcharges.

*Summary:*

I. The person concerned submitted incorrect information in his tax returns whereby the Swedish Tax Agency in 2003 decided to impose tax surcharges on him. The person appealed the decision but with no success in the administrative courts. In 2005 the person was indicted for tax offences based on the same submission of incorrect information. He was, however, acquitted by a legally binding judgment from the Court of Appeal in 2009. The proceedings in the administrative courts regarding the tax surcharges ended in 2011 when the Supreme Administrative Court decided not to grant a leave of appeal. In 2014 the person made a petition for a new trial with regard to the decision to impose tax surcharges, claiming that the surcharges should have been set aside by the courts since he had already been tried and acquitted in the criminal case.

II. The Supreme Administrative Court declared that the parallel proceedings in the administrative and criminal courts had been incompatible with the prohibition on double punishment. The Court noted that since both proceedings were now finished, it was

no longer possible to discontinue either one of them. With regard to the petition for a new trial, the Court recollected that such petitions could be granted when proceedings had been initiated in violation of the prohibition on double punishment.

In the case at hand, however, the court concluded that the person had been indicted for tax offences after the Tax Agency had decided to impose tax surcharges on him. There was, therefore, no reason to set aside the decision to impose tax surcharges. The petition for a new trial was therefore denied.

*Languages:*

Swedish.





# Switzerland

## Federal Court

### Important decisions

*Identification:* SUI-2015-2-003

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 11.03.2015 / **e)** 1D\_2/2014 / **f)** A. v. Municipality of Trimmis / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 141 I 60 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

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

3.23 General Principles – **Equity.**

4.7.9 Institutions – Judicial bodies – **Administrative 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.**

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:*

Administrative authority / Good faith, principle / Co-operation / File, administrative / Right to be informed / Fairness, procedural, principle / Naturalisation, integration / Naturalisation, procedure / Naturalisation, rejection / Procedure, respect, obligation.

*Headnotes:*

Articles 5.3, 9 and 29 of the Federal Constitution; Articles 14, 15, 15b and 15c of the Nationality Act; requirements relating to the ordinary naturalisation procedure.

Scope of the principles of good faith, fairness of proceedings and the right to a hearing, in particular the appellant's prior right to be informed and the authority's duty to keep proper records (recitals 2-4). Relationship between the inquisitorial maxim and the duty of co-operation (recital 5).

*Summary:*

I. A., an Iranian national, has been living in Switzerland since 1989. In 2012, he applied to the municipality of Trimmis for naturalisation. During an interview with A. lasting some ten minutes, the municipal council told him that his application had little chance of success and invited him to withdraw it. After initially withdrawing it, A. nevertheless maintained his application for naturalisation, which, in the end, was unanimously rejected by the municipal council. The latter argued that A. was not sufficiently integrated into the community, did not take part in the activities of associations and local events and was not sufficiently familiar with the political system and local customs.

The Administrative Court of the Canton of Graubünden upheld the municipality's decision. A. lodged an appeal against this decision with the Federal Court, which declared his appeal admissible.

II. The Federal Court noted that, in addition to meeting the residence requirement (12 years in Switzerland, Article 15 of the Nationality Act), candidates for naturalisation must satisfy the other eligibility conditions of Article 14 of the Act (integration, knowledge of the Swiss way of life and Swiss customs, respect for the legal system, etc.). The Canton of Graubünden has defined the scope of these federal requirements in more concrete terms in a law and regulations on the right of permanent residence.

The Federal Court next considered the question of whether or not the municipality respected A.'s right to a hearing. In its view, the political character of the naturalisation procedure does not exempt the municipality from the obligation to respect general procedural safeguards, the principle of good faith and the prohibition of arbitrariness (Articles 29, 5.3 and 9 of the Federal Constitution), particularly when the authority enjoys wide discretion. The authority must accordingly inform candidates for naturalisation of the procedural steps which may influence the outcome of the process so that they can be prepared for them. In the case in point, the municipal council merely called A. to the naturalisation interview by phone, via his daughter. It failed to provide him with adequate information about what the interview entailed, in particular the fact that his knowledge of local customs would be tested. Furthermore, A.'s interview with the municipal council lasted no more than ten minutes, during which the main topic of discussion was the withdrawal of his application. In the view of the Federal Court, the municipal council violated A.'s right to a hearing by not giving serious consideration to the question of his integration.

A. challenged the findings of the lower authorities regarding his integration with the local community. On the contrary, he argued that he has very good neighbourly relations. The Federal Court pointed out that the obligation to co-operate requires the parties to participate in establishing the facts, provided it is easier for them than for the authority to adduce evidence in support of those facts. Since A. was not in a position to prove his social relations more easily than the authority, the inquisitorial maxim required the latter to undertake the necessary checks to ascertain the veracity of A.'s claims, for example by questioning his neighbours. In merely finding that A. failed in his duty to co-operate because he did not provide proof of his integration, the authority did not sufficiently establish the facts and violated A.'s right to a hearing. Consequently, the Federal Court sets aside the decision and refers the case back to the municipality for a fresh decision.

#### Languages:

German.



#### Identification: SUI-2015-2-004

**a)** Switzerland / **b)** Federal Court / **c)** Court of Criminal Law / **d)** 04.05.2015 / **e)** 6B\_307/2014 / **f)** X. v. Public Prosecutor's Department of the Canton of Basel-Stadt / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 141 I 105 / **h)** CODICES (German).

#### Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.  
 3.22 General Principles – **Prohibition of arbitrariness**.  
 5.2 Fundamental Rights – **Equality**.  
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.  
 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.

#### Keywords of the alphabetical index:

Court fee / Principle of equivalence / Court fee, ceiling.

#### Headnotes:

Article 9 of the Federal Constitution (arbitrary decisions); assessment of judicial costs, principle of equivalence.

Judicial costs are causal charges which must comply with the principles of cost coverage and equivalence (recital 3.3.2).

The question of whether the doubling of the fee in the event of giving written reasons for a first-instance judgment is permissible and consistent with Article 80.1 and 80.2 of the Swiss Code of Criminal Procedure in conjunction with Article 82.2 of the Swiss Code of Criminal Procedure (form of judgment) can be left open (recital 3.5.1).

In principle, the number of hearing days has no influence on the costs involved in giving reasons for a judgment. Where a hearing lasts several days, in view of the principle of equivalence and equal treatment, only the costs for additional hearing days may be taken into consideration (recital 3.5.2). Principle of equivalence violated in the instant case (recital 3.6).

#### Summary:

I. On 31 January 2013, the Criminal Court of the Canton of Basel-Stadt gave X. a suspended custodial sentence of 20 months and ordered him to pay a fine of 100 Swiss francs for professional fraud and violation of road traffic regulations. The procedural costs of 4 602 Swiss francs (about 4 600 euros) and a court fee of 5 500 Swiss francs (about 5 500 euros) were charged to X. In the event of an appeal against this decision or a request for written reasons, the court fee would be raised to 11 000 Swiss francs (about 11 000 euros).

On 7 January 2014, the Court of Appeal gave X. a suspended custodial sentence of 16 months and ordered him to pay a fine of 100 Swiss francs for professional fraud and violation of road traffic regulations. For the remainder, it upheld the first-instance decision. X. lodged a criminal-law appeal with the Federal Court, asking that the judgment be set aside, particularly with regard to costs. In his view, the costs involved in providing a statement of reasons for the first-instance decision should be paid from the court's funds and, furthermore, the Criminal Court

and Public Prosecutor's Office of the Canton of Basel-Stadt should be obliged to bear the costs of the official defence counsel. The Federal Court declared the appeal admissible.

The appellant argued that the court fee of 11 000 Swiss francs set by the Court of first-instance and confirmed by the appellate court is contrary to the guarantees of access to a court and effective remedy under the European Convention on Human Rights. Furthermore, this fee violated the principles of cost coverage and equivalence and the right to a written statement of reasons for the judgment.

II. Under the Swiss Code of Criminal Procedure, the Confederation and the cantons issue regulations on the calculation of procedural costs and stipulate the fees. Under the legislation of the Canton of Basel-Stadt, the fees of criminal courts may be between 150 and 5 000 Swiss francs. In exceptional cases they may be as much as 100 000 francs where proceedings are split or last several days.

Judicial costs are causal charges and must therefore respect the principles of cost coverage and equivalence. According to the principle of cost coverage, the amount of the fees charged may not exceed, or may only slightly exceed, the amount of the administrative costs. In the case of court fees, this principle is generally of little importance because the fees do not cover the actual costs. Where causal charges are concerned, the principle of equivalence gives concrete expression to the principle of proportionality and the prohibition of arbitrariness. The amount of the fee must be commensurate with the objective value of the service provided and remain within reasonable limits. The value of the service is measured either by its economic usefulness to the taxpayer or by its cost in relation to the overall expenditure of the administrative activity in question. The fee does not have to correspond exactly to the costs of the administrative operation; however, it must be determined in accordance with objective and reasonable criteria and must not introduce differences for which there are no valid grounds. The economic situation of the person liable and his interest in the official act must also be taken into account to some extent. Authorities have a wide measure of discretion in setting judicial fees.

The appellant had not given sufficient reasons for his claim that the principle of cost coverage had been violated. Where the principle of equivalence is concerned, however, the appeal satisfied the requirements in terms of reasons. When delivering the judgment orally, the Criminal Court of the Canton of Basel-Stadt set the court fee at 5 500 francs, specifying that this sum would be raised to

11 000 francs in the event of a request for a written statement of reasons. The question of whether the doubling of the fee in the event of a request for written reasons is acceptable and consistent with the Swiss Code of Civil Procedure can be left open. However, the doubling of the fee owing to the fact that the hearing lasted two days is unacceptable because, in principle, the number of hearing days has no influence on the time needed to produce written reasons. In the case in point, the hearing only lasted one day (actually around four hours) and the delivery of the judgment, scheduled for the following day, lasted a little over half an hour. If the authority had delivered its decision, including a written statement of reasons, the same day, the fee could not have been more than 5 000 francs. In interpreting the cantonal order on court fees, only additional hearing days can be taken into account. However, there are no reasonable grounds for charging judicial fees for a written statement of reasons simply because the hearing lasted for more than one day. The authority's calculation is therefore incompatible with the principle of equivalence.

For these reasons, the fee charged is arbitrary and violates the principles of equivalence and equality of treatment. Furthermore, the amount is such that it infringes the guarantee of access to a court under Article 29a of the Federal Constitution and Article 6 ECHR taken together with Article 13 ECHR.

#### *Languages:*

German.



#### *Identification:* SUI-2015-2-005

**a)** Switzerland / **b)** Federal Court / **c)** Second Civil Law Court / **d)** 21.05.2015 / **e)** 5A\_748/2014 / **f)** Federal Department of Justice and Police v. A.B. and others / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 141 III 312 / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

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:*

Judgment, foreign country, recognition / Surrogacy, abroad, child, registration / Surrogacy, same-sex couple, registration, parents / Surrogacy, child, non-biological parent, registration / Fraudulent evasion of the law / Public order / Civil status, register.

*Headnotes:*

Article 8 ECHR; Articles 2, 3 and 7 of the Convention of 20 November 1989 on the Rights of the Child (CRC); Article 119.2.d of the Federal Constitution (prohibition of surrogate motherhood); Articles 27.1 and 32 of the Federal Law on Private International Law; inclusion of foreign decisions in the civil status registry; recognition of a decision conferring on two registered partners the status of legal parents of a child born through surrogacy.

A Californian paternity judgment establishing the existence of a legal parent-child relationship between a child born through surrogacy and a couple in a registered partnership cannot be recognised without circumventing the prohibition on surrogate motherhood in Switzerland. Only the child's biological father may be recognised as a legal parent (recitals 3-8).

*Summary:*

I. Two men living in Switzerland in a registered partnership entered into a surrogacy agreement with an American couple in July 2010. An embryo created from the egg of an anonymous donor and the sperm of one of the two Swiss men was implanted in the surrogate mother, who gave birth to a child in California in April 2011.

A Californian court recognised the two Swiss men as the child's legal parents. The two Swiss men subsequently applied for recognition of the American decision in Switzerland and for a corresponding entry to be made in the civil status register. Ruling on the application, the administrative court of the Canton of St Gallen recognised the dual paternity of the homosexual couple.

The Federal Department of Justice and Police, acting through the Federal Office of Justice, brought an action before the Federal Court disputing the existence of a legal parent-child relationship between the child and the man genetically unrelated to him.

II. After noting that, in Switzerland, all forms of surrogacy are prohibited by Article 119.2.d of the Federal Constitution, the Federal Court said that the

problem in this case was not the fact of a child having two fathers. In its view, what was problematical was the fact that two men had gone to a country with which they had no particular ties for the purpose of circumventing the ban on surrogate motherhood in Switzerland. In this connection, the federal judges observed that the purpose of this ban was to protect the child against the risk of being reduced to the status of a commodity and to protect surrogate mothers from commercialisation of their bodies. In the view of the Federal Court, the recognition of a Californian judgment would have the effect of encouraging surrogacy tourism and rendering inoperative the ban laid down in Article 119.2.d of the Federal Constitution. The Court accordingly held that Swiss public order precluded the recognition of dual paternity in this case. Consequently, only the paternity of the child's biological father could be recognised.

The federal judges also considered whether the rejection of the application to register a second father was consistent with the requirements of the European Convention on Human Rights and the Convention on the Rights of the Child. They came to the conclusion that the refusal to recognise a legal parent-child relationship between the child and the biological father's partner created no legal uncertainty for the child from the standpoint of his right to parents and to a family life. Given that a legal parent-child relationship had been recognised between the biological father and the child, the latter had the right to live in Switzerland with the couple in question.

*Languages:*

German.



# “The former Yugoslav Republic of Macedonia” Constitutional Court

## Important decisions

*Identification:* MKD-2015-2-002

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 03.06.2015 / e) U.br.16/2014 / f) / g) / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

3.18 General Principles – **General interest.**

3.21 General Principles – **Equality.**

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

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

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

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

*Keywords of the alphabetical index:*

Property, foreigner, right to acquire / Agricultural, land.

*Headnotes:*

The Constitution gives the legislator exclusive competence to define the conditions whereby foreign natural and legal persons may acquire property and the legislator is not obliged to treat citizens and foreigners equally in this respect.

*Summary:*

I. The applicant requested a constitutional review of Article 246.1 of the Law on Ownership and Other Real Rights. Under the challenged provision, foreign natural and legal persons are barred from owning farmland in the Republic of Macedonia.

The applicant claimed that the ban has consequences for legal heirs, as the prohibition violates not only their fundamental rights and freedoms, but also the natural right of every person to inherit the

property from his or her parents. The applicant underlined that foreigners who are legal heirs to the property should enjoy the rights and freedoms guaranteed by the Constitution and should have the same inheritance rights as citizens.

II. The Court first noted that the State has exclusive jurisdiction to regulate the acquisition, exercise and termination of the rights to real estate. This is in accordance with the principle of sovereignty of States, as a basic principle of international law.

The Court assessed that the impugned provision does not fall within the constitutional guarantees of the right to property of Article 30.1 and 30.3 of the Constitution. The reason is that the provision does not regulate the exercise of the right to property and its legal protection, but determines the conditions under which certain entities may not acquire the same.

The Court also rejected the applicant’s allegations that the contested provision deprived foreign nationals *a priori* the right of inheritance, which is acquired upon the demise of the testator.

It explained that the law determines the types of subjective civil powers, terms and conditions of their acquisition, content and restrictions, and terms and conditions for their termination. Therefore, they are not a previously existing category, but are acquired and exercised only on the basis of the conditions laid down by the objective law. In particular, this means that foreign nationals would be able to become holders of the right to property and the right to inheritance, only after the objective law determines the cases and conditions for acquiring these rights.

The Court also found that the impugned provision was in accordance with Article 29.1 of the Constitution whereby foreigners enjoy freedoms and rights guaranteed by the Constitution, under conditions determined by law and international agreements. According to the above constitutional norm, the legislator has no obligation whatsoever to prescribe the same conditions for the exercise of individual freedoms and rights of foreigners that are reserved for citizens, thus putting them in the same or equal position.

The scope of legislative responsibility for setting the conditions for foreigners to acquire the right of ownership, an obligation undoubtedly stemming from Article 31 of the Constitution, includes defining the restrictions of ownership rights as well as the possibility of acquiring other real rights (for instance, right to a long-term lease of farmland). The Court concluded that regarding the acquisition of the right to

property, the Constitution treats foreigners differently from nationals and such disparate treatment has a constitutional basis, which justifies the contested provision of the Law.

The Court further opined that the ban is also justified by public interest, as the farmland is a good of general interest and a natural resource that has an important share in the country's economic activity. Hence, this public interest should be owned by domestic entities with established legal links with the State and be limited to foreigners who do not possess such a legal relationship.

For the reasons explained above, the Court held that the disputed provision of Article 246.1 of the Law on Ownership and Other Real Rights is in accordance with the Constitution and did not initiate a procedure for constitutional review.

III. Judge Natasha Gaber-Damjanovska and Judge Sali Murati disagreed with the majority and submitted separate opinions, which are attached to this Resolution.

#### *Languages:*

Macedonian, English (translation by the Court).



#### *Identification:* MKD-2015-2-003

**a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 24.06.2015 / **e)** U.br.121/2014 / **f)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 113/2015, 06.07.2015 / **g)** / **h)** CODICES (Macedonian, English).

#### *Keywords of the systematic thesaurus:*

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

3.25 General Principles – **Market economy.**

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

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

#### *Keywords of the alphabetical index:*

Pharmacy, establishment / Pharmacy, ownership, condition / Freedom of enterprise.

#### *Headnotes:*

Restricting the right to establish a pharmacy only to people who met the requirement of earning a high education in the field of pharmacy, violates the constitutional guarantee of freedom of the market and entrepreneurship and does not ensure equal legal position of all subjects in the market, in terms of free movement of capital and the free enjoyment of possessions.

#### *Summary:*

I. The applicant requested the Constitutional Court to consider the constitutionality of provisions of the Medicines and Medical Devices Act concerning the conditions to establish pharmacies. The disputed provision established that a founder of a pharmacy must have earned a university degree in pharmacy or a trade company in any form, whose founder(s) is(are) exclusively people with a university degree in pharmacy.

II. The Court noted that the rule of law and freedom of market and entrepreneurship are the fundamental values of the constitutional order, in the sense of Article 8.1, 8.3 and 8.7 of the Constitution. The Court also noted that citizens are equal in their freedoms and rights irrespective of their sex, race, colour of skin, national and social origin, political and religious affiliation, property, and social status. All citizens are equal before the Constitution and law.

The Court found that by determining the type and level of education of the founder of a pharmacy, the contested provision limits the right to establish a pharmacy, despite the fact that any person who possesses capital has the right (under the Trade Company Law) to dispose and manage his or her capital in any area whatsoever. The contested provision thus creates the possibility the founding rights for pharmacies to be monopolised by certain natural and legal persons in the market, as opposed to be open all who wish, can and have the capital to join the market as founders of pharmacies.

The Court distinguished between the rights and obligations of the founders of pharmacies and those of the persons employed in the pharmacies for which a separate law determines the employment

conditions. The Court took into consideration the opinion of the Government that such regulation should raise the level of professional management with pharmacies and that it is justified with the objective to prevent the potential hazards posed by the use of medicines. However, the Court did not accept this reasoning, since it found that the legal requirement to employ pharmacists serves this purpose.

The Court found that restriction of the right to establish a pharmacy only to persons who have completed a high education in the field of pharmacy, violates the constitutional guarantee of freedom of the market and entrepreneurship and does not ensure equal legal position of all subjects in the market, in terms of free movement of capital and the free enjoyment of possessions.

Based on the aforementioned, the Court repealed Article 81.4 of the Law on Medicines and Medical Devices.

#### *Languages:*

Macedonian, English (translation by the Court).



## Ukraine Constitutional Court

### Important decisions

*Identification:* UKR-2015-2-004

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.05.2015 / **e)** 4-rp/2015 / **f)** Official interpretation of the provisions of Article 63.3 of the Law “On pension provision of persons, dismissed from military service and some other persons” / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

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

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

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

*Keywords of the alphabetical index:*

Pension, allowance, increase, recalculation / Pension, military / Pension, bonus, increase, recalculation.

*Headnotes:*

Parliament exclusively determines the types of financial support to calculate and recalculate the pensions of military personnel and persons entitled to a pension by adopting laws while the Cabinet of Ministers enacts measures to ensure the right of persons to pension, as guided by the Constitution and laws of Ukraine. The list of additional types of monthly financial support (basis to recalculate pensions of specified categories of persons) is determined by laws exclusively.

*Summary:*

I. The applicant, a citizen named Vadym Leonidovych Serdiuk, requested the Constitutional Court to officially interpret the first sentence of Article 63.3 of the Law “On pension provision of persons, dismissed from military service and some other persons” no. 2262-XII dated 9 April 1992 (hereinafter, the

“Law”). Specifically, “all pensions granted under this Law are subject to recalculation in connection with a change of a size of at least one of the types of financial support of relevant categories of military personnel, persons entitled to a pension under this Law, or in connection with the introduction new monthly additional types of financial support (allowances, bonuses, increases)”. According to the applicant, the ambiguity and inconsistency violated his constitutional right to equality before the law, guaranteed by Article 24.1 of the Constitution.

II. The Constitutional Court noted that citizens have the right to social protection. In effect, they possess the right to provision in cases of complete, partial or temporary disability, loss of the principal wage-earner, unemployment due to circumstances beyond their control and in old age, and in other cases established by law (Article 46.1 of the Constitution). The right to social protection also encompasses different forms and types of pensions, as guaranteed in Article 92.1.6 of the Constitution. To ensure the provisions, the Cabinet of Ministers is obligated to implement laws to carry them out (Article 116.1.1 and 116.1.3 of the Constitution).

The Court analysed the general terms, procedure of calculation and the amount of pensions, according to the laws “On Pension Provision” no. 1788-XII dated 5 November 1991 and “On mandatory state pension insurance” no. 1058-IV dated 9 July 2003. It considered the pension provision of certain categories of citizens are governed by special laws that take into account working conditions, nature, complexity and importance of the performed work, degree of responsibility, certain restrictions of the constitutional rights and freedoms of others.

The Court emphasised that laws exist to protect the right to state pension of persons who served in the military and to unify the conditions and rules of pension provision for this category of citizens (preamble of the Law). Article 11.3 of the Law stipulates that changing the conditions and norms of pension provision of persons dismissed from military service and some other persons entitled to a pension under the law, is carried out exclusively by amending the Law and the Law “On mandatory state pension insurance”.

According to Article 43.3 of the Law, the pension of officers, ensigns and warrant officers, extended military servicemen, military servicemen enlisted on a contract basis, persons who are entitled to a pension under the Law, and their family members are calculated by factoring in additional types of monthly financial support (allowances, bonuses, increases) and premiums in the amount established by legislation.

The first sentence of Article 63.3 of the Law justifies recalculating pensions and provides a list of additional types of monthly financial support that is taken into account for their recalculation, which includes allowances, bonuses, increases and premiums in the amount established by legislation to the relevant categories of military personnel, persons entitled to a pension under the Law.

After analysing the above provisions of the Law, the Constitutional Court indicated that the legislators seem to have clarified the types of financial support of military personnel that should be considered both when granting pensions (Article 43) and recalculating pensions granted earlier (Article 63).

From a literal of the first sentence of Article 63.3 of the Law, the Court interpreted that the words “allowances, bonuses, increases” relate to the phrase “new monthly additional types of financial support”, which indicates that the legislators intended to limit the types only to allowances, bonuses, increases. Hence, the Court ruled that the pensions relevant to categories of military personnel according to the Law are subject to recalculation, in light of their new monthly additional types of support (i.e., allowances, bonuses and increases).

#### *Cross-references:*

Constitutional Court:

- no. 10-rp/2001, 20.06.2001.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2015-2-005*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.05.2015 / **e)** 5-rp/2015 / **f)** Official interpretation of the provision of Article 276.1 of the Code of Administrative Offences / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).



*Keywords of the systematic thesaurus:*

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

3.12 General Principles – Clarity and precision of legal provisions.

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

5.3.25 Fundamental rights – Civil and political rights – Right to administrative transparency.

*Keywords of the alphabetical index:*

Offence, administrative / Inconsistency, application / Crime, place of commission / Liability, administrative / Administrative and territorial unit.

*Headnotes:*

The Code of Administrative Offence establishes a system of legal mechanisms that ensures the rights of the person brought to administrative responsibility at the stage when the authorised body (official) reviews the case on administrative offence. These provisions also set legislative guarantees in order that the case is fairly and objectively considered during the administrative proceedings. The guarantees are possible only when there is time between the stage when the protocol on an administrative offence is drawn up and the stage when the case is considered on the merits, in order to sufficiently prepare for defence of the person brought to administrative responsibility.

Summary proceedings in cases on administrative offences provide, *inter alia*, for the determination of the administrative offence and imposition of an administrative penalty on the offender directly at the place of its commission. Application of summary proceedings by the official in other cases that are not defined by law (i.e. consideration of the case on administrative offence at the place of its commission and not at the location of the body authorised by law to consider the case on such offence) violates the procedural rights of the person brought to administrative responsibility, as enshrined in Articles 257, 268, 277, 278, 279 and 280 of the Code.

*Summary:*

I. The applicant (the Parliamentary Commissioner for Human Rights) petitioned the Constitutional Court to officially interpret the provision of Article 276.1 of the Code of Administrative Offences (hereinafter, the “Code”). The issue was whether the phrase “at the place of its commission” contained in this provision

may be understood to allow a case on an administrative offence to be examined at the place of its commission immediately after drawing-up a protocol on such offence.

II. The Constitutional Court analysed the constitutionality of the Code. According to Article 19.2 of the Constitution, authorised state and local government bodies are charged with carrying out official responsibilities, as envisaged in the Constitution and set in the laws. The state is authorised to draw up protocols on administrative offences, consider cases on such offences and bring the perpetrators to administrative responsibility; the order of these undertakings are regulated by the Code.

According to the Code, no one shall be subjected to a measure of influence in connection with an administrative offence, unless prescribed by law. Proceedings in cases concerning administrative offences, including those related to the competence of the bodies of internal affairs, shall be based on the principle of legality (Article 7.1 and 7.2). The proceedings are carried out in a timely manner, completely, objectively, assessed based on the circumstances of each case and resolved strictly in accordance with the law (Article 245).

Proceedings on administrative offences involve a number of measures undertaken by the relevant body (official) specified in the law. Under a general rule, the process begins when an authorised official draws a protocol upon commission of the administrative offence. The protocol shall include: date and place of its execution, position, last name, first name of the person who drew up the protocol; information about the person brought to administrative responsibility (in case of detection thereof); place, time of commission and the essence of the administrative offence; regulation, which provides for liability for the offence; names, addresses of witnesses and victims, if any; explanation of the person brought to administrative responsibility; other information necessary for the resolution of the case (Article 256.1 of the Code).

The protocol shall be signed by the person who drew up the protocol and the person brought to administrative responsibility. Should there be witnesses and victims, the protocol may be also signed by these persons (Article 256.2 of the Code). In case of refusal to sign the protocol by the person brought to administrative responsibility, a record thereof is made; such person has a right to submit explanations and remarks on the content of the protocol attached to it and to explain motives for the refusal to sign (Article 256.3 of the Code). The protocol together with other materials of the case (e.g., evidence procedurally implemented, the list of which is set out

in Article 251 of the Code) shall be sent to the body (official) authorised to consider cases on administrative offences (Article 257.1 of the Code). Jurisdiction of cases on administrative offences is defined in Chapter 17 of the Code.

Article 277.1 of the Code stipulates that cases on administrative offences shall be considered within fifteen days after the body (official) authorised to consider the case receives the protocol on administrative offence and other materials of the case.

After analysing provisions of Chapter 22 of the Code in connection with the provisions of Chapter 17, the Constitutional Court found no reason for the place of commission of administrative offence to be identified with the place of examination of the case on such offence. Also, the Court explained that the phrases “at the place of commission of offence” and “at the place of its commission” contained in Articles 258 and 276 of the Code have a different focus and different legal meaning. In particular, the phrase “at the place of its commission” applied in the provision of Article 276.1 of the Code, according to which “a case on administrative offence shall be considered at the place of its commission”, indicates the location of the official authorised to consider the case within its territorial jurisdiction. This shall be according to administrative-territorial system.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2015-2-006

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.06.2015 / **e)** 1-v/2015 / **f)** Compliance of the draft Law on introducing amendments to the Constitution concerning the immunity of members of Parliament and judges with the provisions of Articles 157 and 158 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

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

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

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

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:*

Member, parliament / Immunity, limitation / Judge, liability, legal / Judge, detention / Judiciary, independence.

#### *Headnotes:*

Draft laws on amending Article 80 of the Constitution to limit or abolish members of Parliament and judicial immunity relate only to their special status and do not affect the content of the constitutional human and citizen's rights and freedoms. Therefore, the draft laws do not contradict the requirements of Article 157.1 of the Constitution.

Committing a grave or especially grave crime against life or health of an individual by a judge is a reasonable basis for detention at the moment of or immediately after the commission of the offence.

#### *Summary:*

I. Pursuant to the Resolution “On submitting the draft Law on introducing amendments to the Constitution concerning the immunity of People’s Deputies and judges to the Constitutional Court of Ukraine” dated 5 February 2015, no. 152-VIII, Parliament (*Verkhovna Rada*) requested the Constitutional Court to opine on the conformity of the draft Law (hereinafter, the “draft Law”) to Articles 157 and 158 of the Constitution.

II. Under Article 158 of the Constitution, the draft Law, “considered by Parliament and not adopted, may be submitted to the *Verkhovna Rada* no sooner than one year from the day of the adoption of the decision on this draft law. Within the term of its authority, Parliament shall not amend twice the same provisions of the Constitution”. The Court noted that Parliament of the eighth convocation has not considered the draft Law and has not amended the provisions of the Constitution during its term of office. Thus, the draft Law conforms to the requirements of Article 158 of the Constitution.

Moreover, because the amendment was not introduced under conditions of martial law or state of emergency or particular areas for which the Constitution provides exceptions (Article 106.1.20

and 106.1.21 of the Constitution), the Constitutional Court considered that the draft Law met the requirements of Article 157.2 of the Constitution.

The Court noted that Parliament had not adopted laws based on the results of the review of the draft laws, which proposed amendments to Article 80 of the Constitution, for which the Constitutional Court had opined on their conformity to Articles 157 and 158 of the Constitution. When the Constitutional Court considered this case, there were no grounds to change its position. Thus, it held that the provision of the draft Law that proposes to exclude Article 80.1 and 80.3 of the Constitution does not abolish or restrict human and citizen's rights and freedoms, and does not contradict the requirements of Article 157.1 of the Constitution.

According to Article 126.1 of the Constitution, the independence and immunity of judges are guaranteed by the Constitution and laws. The Constitution provides for a special procedure to implement preventive measures related to restriction of freedom and the right to free movement of judges. The constitutional requirement creates an obligation upon the authorised body to establish appropriate preventive measures.

According to Article 126.3 of the Constitution, "a judge shall not be detained or arrested without the consent of the *Verkhovna Rada* of Ukraine, until a verdict of guilty is rendered by a court". The draft Law proposes that the specified provision of the Constitution should be read as follows:

"A judge cannot be detained without the consent of the High Council of Justice, and a preventive measure cannot be applied to him or her in the form of detention until a verdict of guilty is rendered by a court, except detention when having committed or immediately after the commission of a grave or especially grave crime against life and health of an individual."

In effect, the amendments would primarily change the subject authorised to give consent to temporary restriction of freedom and the right to free movement of a judge. That is, instead of Parliament, the High Council of Justice will grant consent to detain a judge and to implement preventive measures for the detention until the verdict of guilty is rendered by a court.

The Constitutional Court noted the High Council of Justice is a collective, independent body responsible for the formation of highly professional corps of judges. They were selected and appointed as prescribed by the Law "On the High Council of

Justice", which provides a process based on the principle of the rule of law, transparency, publicity, and political neutrality.

The Constitutional Court drew attention to the proposed amendments to Article 126 of the Constitution, which stipulate the possibility of limiting judicial immunity upon the consent of the High Council of Justice in two cases: detention of a judge and application of a preventive measure to him or her in the form of detention. However, the current legislation provides another preventive measure and administrative penalties aimed at limiting the freedom and the right to free movement of an individual in case of committing an offence. For instance, the Code of Criminal Procedure, along with a preventive measure in the form of detention, determines house arrest, which prohibits a suspect to leave home around-the-clock or at a certain period of the day (Article 181.1). The Code of Administrative Offences stipulates administrative arrest as a form of administrative penalty (Article 24.1.7). Failure to take into account these measures in the proposed wording of Article 126.3 of the Constitution given in the draft Law may lead to ungrounded restrictions of freedom and the right to free movement of a judge in case of necessity to apply house or administrative arrest.

The draft Law also specifies that without the consent of the High Council of Justice, a judge can be detained when committing or immediately after the commission of a grave or especially grave crime against life and health of an individual. Thus, amendments to Article 126 of the Constitution do not foresee the abolition or restriction of human rights and freedoms and comply with the requirements of Article 157.1 of the Constitution.

The draft Law proposes to supplement Article 129 of the Constitution with a new paragraph as follows:

"Judges are brought to legal liability on a common basis. Judges cannot be brought to legal liability for acts committed due to administration of justice, except for consideration of knowingly unjust decision, violation of the oath of the judge or committing an offence."

Amendments to Article 129 of the Constitution do not foresee the abolition or restriction of human rights and freedoms.

The Constitutional Court found that Chapter II "Final provisions" of the draft Law does not provide for the abolition or restriction of human rights and freedoms, therefore it meets the requirements of Article 157.1 of the Constitution. Yet, the Constitutional Court noted that the provisions of items 2 and 3 of this Chapter of

the draft Law may not be a subject of regulation of the Law on introducing amendments to the Constitution, since they do not comply with the requirements of Article 8 of the Constitution.

According to Article 157.1 of the Basic Law, the Constitution cannot be changed if the changes are particularly aimed at threatening the country's independence or violating its territorial integrity. The Constitutional Court considered that the proposed draft amendments to Articles 80, 126 and 129 of the Constitution as well as the provisions of Chapter II "Final provisions" of the draft Law do not contradict the requirements of Article 157.1 of the Constitution. As a consequence, the Court found that the draft Law met the requirements of Articles 157 and 158 of the Constitution.

#### *Supplementary information:*

Upon request, the Venice Commission provided an opinion on these draft amendments: Opinion on draft Constitutional amendments on the immunity of members of parliament and judges of Ukraine (CDL-AD (2015)013).

#### Legal norms:

- European Convention on Human Rights, 1950;
- European Charter on the Law "On the Status of Judges", 10 July 1998;
- Opinion of the European Commission for Democracy through Law on the draft Law on amendments to the Constitution (79<sup>th</sup> Plenary Session, 12-13 June 2009);
- The basic principles of the Magna Carta of Judges approved by the Consultative Council of European Judges, 17 November 2010;
- Appendix to the recommendation of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, 17 November 2010, no. CM/Rec(2010)12;
- Opinion of the European Commission for Democracy through Law on the draft Law on amendments to the Constitution to strengthen the guarantees of independence of judges and amendments to the Constitution proposed by Constitutional Assembly (95<sup>th</sup> plenary session, 14-15 June 2013).

#### *Cross-references:*

#### Constitutional Court:

- no. 1-v/2000, 27.06.2000, *Bulletin* 2000/3 [UKR-2000-3-012];

- no. 2-v/2000, 11.07.2000, *Bulletin* 2000/3 [UKR-2000-3-013];
- no. 3-v/2000, 05.12.2000;
- no. 2-v/2008, 10.09.2008, *Bulletin* 2008/3 [UKR-2008-3-017];
- no. 1-v/2010, 01.04.2010, *Bulletin* 2010/1 [UKR-2010-1-004];
- no. 2-rp/2011, 11.03.2011;
- no. 1-v/2012, 10.07.2012;
- no. 2-v/2012, 27.08.2012, *Bulletin* 2012/2 [UKR-2012-2-011];
- no. 2-v/2013, 19.09.2013, *Bulletin* 2013/3 [UKR-2013-3-007].

#### European Court of Human Rights:

- *Oleksandr Volkov v. Ukraine*, no. 21722/11, 27.05.2013, *Reports of Judgments and Decisions* 2013.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2015-2-007

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.07.2015 / **e)** 2v/2015 / **f)** Compliance of the draft Law on introducing amendments to the Constitution regarding decentralisation of power to the requirements of Articles 157 and 158 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

- 4.6.7 Institutions – Executive bodies – **Administrative decentralisation.**
- 4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**
- 4.8.6 Institutions – Federalism, regionalism and local self-government – **Institutional aspects.**
- 4.8.7.3 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Budget.**
- 4.8.8.2.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione loci*.**

#### 4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision.**

##### *Keywords of the alphabetical index:*

Decentralisation, constitutional amendment / Constitutional amendment, limits.

##### *Headnotes:*

Constitutional amendments on the decentralisation of power, which do not abolish or restrict human rights and freedoms, are in line with the limitation or constitutional amendment to Articles 157 and 158 of the Constitution.

##### *Summary:*

I. The case concerns the Resolution “On inclusion of a draft Law on introducing amendments to the Constitution on decentralisation of power to the agenda of the second session of Parliament of the eighth convocation and its submission to the Constitutional Court” dated 16 July 2015, no. 622-VIII. The Parliament (*Verkhovna Rada*) filed an appeal with the Constitutional Court, requesting it to opine whether the draft Law is consistent with the requirements of Articles 157 and 158 of the Constitution.

According to Article 85.1.1 of the Constitution, the authority of the *Verkhovna Rada* includes introducing amendments to the Constitution within the limits and by the procedure, envisaged by Chapter XIII of the Constitution.

Pursuant to Article 159 of the Basic Law, a draft Law on introducing amendments to the Constitution is considered by Parliament after the Constitutional Court determines that the draft Law meets the requirements of Articles 157 and 158 of this Constitution.

II. The Constitutional Court proceeded from the fact that at the delivery of this opinion, there was no martial law or a state of emergency in Ukraine or in its areas, imposed by the procedure, as determined by the Constitution.

After analysing the content of the draft Law, the Constitutional Court concluded that the proposed amendments do not foresee the abolition or restriction of human or citizen’s rights and freedoms. The above amendments are not introduced to Chapter II of the Constitution on “Human and Citizen’s Rights, Freedoms and Duties” and do not foresee any abolition or restriction of existing rights and freedoms by changing the constitutional norms

from other chapters of the Constitution. As a consequence the Constitutional Court held to recognise the draft Law, which proposes to introduce amendments to Articles 85.1.29, 85.1.30, 92.1.16, 106.1, 118, 121.5, 132, 133, 140, 141, 142, 143, 144 and 150.1, the title of Chapters IX and XV “Transitional Provisions”, as it conforms to the requirements of Articles 157 and 158 of the Constitution.

##### *Supplementary information:*

The draft amendments are available on the website of the Venice Commission in English: CDL-REF(2015)035.

The Venice Commission provided opinions on these amendments, which are available on the Commission’s website: CDL-AD(2015)028; CDL-AD(2015)029rev and CDL-AD(2015)030.

##### *Cross-references:*

Constitutional Court:

- no. 1-v/2003, 30.10.2003, *Bulletin* 2003/3 [UKR-2003-3-018];
- no. 1-v/2005, 07.09.2005, *Bulletin* 2005/3 [UKR-2005-3-004];
- no. 1-v/2008, 15.01.2008, *Bulletin* 2008/1 [UKR-2008-1-002];
- no. 2-rp/2013, 29.05.2013, *Bulletin* 2013/2 [UKR-2013-2-002];
- no. 1-v/2015, 06.06.2015.

##### *Languages:*

Ukrainian.



# United States of America

## Supreme Court

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### Important decisions

*Identification:* USA-2015-2-003

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 08.06.2015 / **e)** 13-628 / **f)** Zivotofsky v. Kerry / **g)** 135 *Supreme Court Reporter* 2076 (2015) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**  
 4.5.2 Institutions – Legislative bodies – **Powers.**  
 4.6.2 Institutions – Executive bodies – **Powers.**

*Keywords of the alphabetical index:*

Foreign relations / Recognition of foreign sovereigns.

*Headnotes:*

Recognition, the formal acknowledgement that a particular entity possesses the qualifications for statehood or that a particular regime is the effective government of a state, may also involve the determination of a state's territorial bounds.

The constitutional Reception Clause, directing that the President shall receive ambassadors and other public ministers, provides support, although not the sole authority, for the Executive Branch's power to recognise foreign states and governments.

The constitutional authority of the Executive Branch to recognise foreign sovereigns is exclusive and is not shared with the Legislative Branch.

The Legislative Branch has substantial authority over passports; however, it may not use that authority to force the President to contradict an earlier recognition determination by the Executive Branch.

*Summary:*

I. No United States President has issued an official statement or declaration acknowledging any country's sovereignty over the City of Jerusalem. Instead, the Executive Branch has maintained that the status of

Jerusalem should be decided not unilaterally but in consultation with all concerned.

The U.S. Department of State has adopted a policy regarding passports that reflects the President's position on Jerusalem. This policy instructs employees to place the single word "Jerusalem" on a passport for a U.S. citizen born in that city.

In 2002, the U.S. Congress passed the Foreign Relations Authorisation Act. Section 214 of the Act is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel." Subsection 214.d, which addresses passports, seeks to override the State Department's policy by allowing citizens born in Jerusalem to list their place of birth as "Israel."

Petitioner Menachem Binyamin Zivotofsky was born in 2002 in the City of Jerusalem. His parents were U.S. citizens. Zivotofsky's mother asked the U.S. Embassy in Tel Aviv to designate "Jerusalem, Israel" as the place of birth on her son's passport. The Embassy clerks explained that, pursuant to State Department policy, the passport would state only "Jerusalem." Zivotofsky's parents objected and filed suit on his behalf in a U.S. District Court, seeking enforcement of Subsection 214.d.

The District Court ruled that the suit presented a no justiciable political question. The Court of Appeals for the District of Columbia Circuit affirmed that determination. The U.S. Supreme Court overruled the Court of Appeals, concluding that Subsection 214.d's constitutionality was not a question reserved for the political branches. On remand, the Court of Appeals ruled that Subsection 214.d was unconstitutional. The U.S. Supreme Court accepted review of that decision.

II. The Supreme Court affirmed the decision of the Court of Appeals. It concluded that Subsection 214.d unconstitutionally interfered with the President's exclusive authority to grant formal recognition to a foreign sovereign.

According to the Court, when the President takes measures that are incompatible with the expressed or implied will of Congress, he or she may rely only upon the Executive Branch's own constitutional powers minus any constitutional powers of Congress over the matter. The President's asserted power, in order to be constitutionally permissible, must be both exclusive and conclusive.

In regard to Subsection 214.d, the Executive Branch contended that it infringes on the President's recognition power by requiring the President to contradict his recognition position regarding Jerusalem as set forth in official communications with

foreign sovereigns. The Court determined that this assertion required it to decide whether the President has the exclusive power to grant formal recognition to a foreign sovereign, and if so, whether the Congress may command the President to issue a formal statement that contradicts the earlier recognition.

The Constitution does not use the term “recognition.” On the basis of its examination of the constitutional text and structure, as well as precedent and history, the Court concluded that the President has the power to grant formal recognition to a foreign sovereign. This power, which may also involve the determination of a state’s territorial bounds, is grounded in the Constitution’s “Reception Clause” in Article II.3, which states in relevant part that the President “shall receive Ambassadors and other public Ministers.”

The Court also concluded that the power to recognise is exclusive, rejecting the argument that this power is shared with the Congress. On this question, the Court took note of the various ways in which the Constitution authorises the President to effect recognition while not vesting any similar power in Congress. It also examined the foreign relations history of the United States, which, while not entirely one-sided on the question, on balance provides strong support for the conclusion that the recognition power is the President’s alone. In addition, functional considerations suggest that the President’s power is exclusive. The United States must have a single policy regarding which governments are legitimate for its purposes and which are not. Also, recognition is a topic on which the United States must speak with one voice, and that voice must be the President’s. Between the two political branches, only the Executive has the characteristic of unity at all times and the ability to exercise comparatively greater decisiveness and secrecy. The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition.

The Court then addressed the question of whether Congress may command the President to issue a formal statement that would contradict the existing Executive Branch policy of withholding recognition of sovereignty over Jerusalem. It concluded that Congress may not do so. While acknowledging that Subsection 214.d would not in itself constitute a formal act of recognition, the Court nevertheless determined that Subsection 214.d amounted to a mandate that the Executive Branch contradict its earlier recognition determination. Also, although Congress has substantial authority over passports, it may not use this authority to infringe on the President’s recognition determination. If the power over recognition is to mean anything, it must mean

that the President not only makes the initial, formal recognition determination, but also may maintain that determination in official documents issued by the Executive Branch. This conclusion, the Court declared, is a matter of both common sense and necessity.

The Court stated that in finding Subsection 214.d invalid it was not questioning the substantial powers of Congress over foreign affairs in general or passports in particular. It emphasised that the instant case was confined solely to the question of the President’s exclusive power to control recognition determinations, including formal statements acknowledging the legitimacy of a state and its territorial bounds.

III. Three of the nine Justices, in two separate opinions, dissented in full from the Court’s decision. A fourth Justice – Justice Thomas – in a separate opinion concurred in part and dissented in part. The full dissenters contended that the Congress shares authority with the President over the policy issues in question. In addition, Chief Justice Roberts asserted that Subsection 214.d does not implicate the act of recognition.

*Languages:*

English.



*Identification: USA-2015-2-004*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 18.06.2015 / **e)** 14-144 / **f)** Walker v. Texas Division, Sons of Confederate Veterans, Inc. / **g)** 135 *Supreme Court Reporter* 2239 (2015) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Government speech.

*Headnotes:*

When government speaks, constitutional guarantees of freedom of speech do not bar it from determining the content of what it says.

Constitutional guarantees of freedom of speech stringently limit government's authority to compel a private party to express a view with which the private party disagrees.

*Summary:*

I. A law of the State of Texas requires all motor vehicles operating on the State's roads to display valid license plates. An applicant for license plates may choose between three different kinds of plates. First, motor vehicle owners may choose to display the State's general-issue license plates. Or, Texas law provides for personalised plates, giving a vehicle owner the opportunity to request a particular alpha-numeric pattern for use as a plate number. Finally, owners may choose from an assortment of specialty license plates. Each of these specialty plates contains the word "Texas," a license plate number, and one of a selection of designs prepared by the State.

Texas offers vehicle owners a variety of specialty plates, generally for an annual fee. Texas selects the designs for specialty plates through three distinct procedures. Under one of these procedures, a non-profit entity may sponsor an idea for a specialty plate. The entity's application must include a draft design of the plate. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas. The applicable legislation states that the Board may refuse to create a new specialty license plate for a number of reasons. For example, it may reject an application "if the design might be offensive to any member of the public."

In 2009, a non-profit entity, the Texas Division of the Sons of Confederate Veterans (hereinafter, "SCV"), applied to sponsor a specialty license plate. SCV's proposed plate design included a square battle flag of the Confederate States of America on one side of the plate, and a faint Confederate battle flag in the background on the lower portion of the plate. The predecessor agency of the Motor Vehicles Board denied SCV's application. In 2010, SCV renewed its application before the Board. The Board invited public comment on its website and at an open meeting. After considering the responses, which included a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuance of the plate. The Board stated that

it had denied the application because of the Confederate battle flag portion of the plate design. It explained that public comments had shown that many members of the general public found the design offensive, and that such comments were reasonable. The Board added "that a significant portion of the public associate the confederate flag with organisations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

SCV filed a complaint in U.S. District Court against the Board, contending that that the Board's decision violated the Free Speech Clause of the First Amendment to the U.S. Constitution. The First Amendment states in relevant part: "Congress shall make no law...abridging the freedom of speech." It is made applicable to the States through the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution. The District Court entered judgment for the Board. The Court of Appeals for the Fifth Circuit reversed it, holding that Texas's specialty license plate designs are private speech and that the Board, in refusing to approve SCV's design, engaged in viewpoint discrimination forbidden under the First Amendment.

II. The U.S. Supreme Court accepted review of the Court of Appeals decision and reversed it. The Supreme Court ruled that Texas's specialty license plate designs constitute government, not private speech. When government speaks, the Court declared, the Free Speech Clause does not bar it from determining the content of what it says. Consequently, Texas was entitled to refuse to issue plates featuring SCV's proposed design.

The Court set forth several reasons why specialty license plate designs are government speech. First, history shows that States, including Texas, have long used license plates to convey government speech, such as slogans urging action, promoting tourism, and promoting local industries. Second, Texas license plate designs are often closely identified in the public mind with the State of Texas. Each plate is a government article serving the governmental purposes of vehicle registration and identification. Lastly, by giving the Board final approval over each design, Texas maintains direct control over the messages conveyed on its specialty plates.

According to the Court, government's freedom from First Amendment restrictions on its speech reflect in part the fact that it is the democratic electoral process that first and foremost provides a check on government speech. If the Free Speech Clause were interpreted otherwise and government lacked the



freedom to select the messages it seeks to convey, government could not function effectively.

The Court acknowledged that government's ability to express itself does have restrictions. Constitutional and statutory provisions outside of the Free Speech Clause may limit governmental speech. Also, the Court's case-law recognises that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. However, the Court stated, compelled private speech was not at issue in the instant case.

The Court also explained its view as to why First Amendment forum analysis, which applies to government restrictions on purely private speech occurring on government property, is not appropriate in the instant case, where the State is speaking on its own behalf. The Court reviewed the several types of fora that fall within the scope of forum analysis – traditional public forum, designated public forum, limited public forum, and non-public forum – and determined that none was applicable in the case of specialty license plates.

III. Four of the nine Justices dissented from the Court's decision. One of the four, Justice Alito, authored a separate opinion that the other dissenters joined. The separate opinion set forth the dissenters' position that the Court had mischaracterised the speech at issue as government speech, establishing a precedent that threatens private speech that government finds displeasing.

#### *Supplementary information:*

The timing was coincidence, but the Court's decision was announced the day after a mass shooting in a Charleston, South Carolina, church that gave rise to an intensified national debate over the Confederate battle flag's symbolic meaning. The flag was one of the national flags used by the Confederate States of America during the 1861-1865 Civil War.

#### *Languages:*

English.



#### *Identification: USA-2015-2-005*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 18.06.2015 / **e)** 13-502 / **f)** Reed v. Town of Gilbert / **g)** 135 *Supreme Court Reporter* 2218 (2015) / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Strict scrutiny.

#### *Headnotes:*

A content-based law – that is, one that targets speech based on its communicative content – presumptively violates constitutional freedom of speech guarantees, unless government can demonstrate that it is narrowly tailored to serve a compelling state interest.

A governmental regulation of speech is content based if it applies to particular speech because of the topic discussed or the idea or message expressed.

If a regulation is content based on its face, a reviewing court need not consider the government's justifications, purposes, or motives for its enactment to determine whether it is subject to strict scrutiny review of its compatibility with constitutional guarantees of freedom of speech.

In a judicial inquiry into a regulation's content neutrality, the first step is to determine if the regulation is content neutral on its face.

A regulation targeted a specific subject matter is content based and thereby subject to strict scrutiny review of its constitutionality even if it does not discriminate among viewpoints within that subject matter.

#### *Summary:*

I. An ordinance adopted by the Town of Gilbert in the State of Arizona regulates the display of outdoor signs. Entitled the Land Development Code (hereinafter, the "Code"), it identifies various categories of signs based on the type of information they convey and imposes different restrictions on each category. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event." Signs in this category are those that direct the public to meetings of non-profit groups,

such as religious or charitable organisations. The Code imposes more stringent size, number, and duration restrictions on these signs than it does on signs conveying other categories of messages, such as “Ideological Signs” or “Political Signs”.

Good News Community Church is a small religious organisation that holds its services at schools or other locations in or near the Town. It does not own a building. It uses temporary outdoor signs to announce the time and location of its Sunday church services. On two occasions, the Town’s Sign Code compliance manager issued citations to the Church for violations of the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church’s failure to include the date of the event on the signs.

The Church and its Pastor, Clyde Reed, filed a complaint in U.S. District Court claiming that the Code violated their freedom of speech protected under the First Amendment to the U.S. Constitution. The First Amendment states in relevant part: “Congress shall make no law...abridging the freedom of speech.” It is made applicable to the States and their subdivisions through the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution.

The District Court ruled that the Sign Code did not violate the First Amendment. The Court of Appeals for the Ninth Circuit affirmed.

II. The U.S. Supreme Court accepted review of the Court of Appeals decision and reversed it. The District Court and the Court of Appeals had determined that the Code was a content neutral form of regulation. The Supreme Court concluded instead that the Code was content based and therefore must be subject to strict scrutiny review. Under strict scrutiny, a content-based law – that is, one that targets speech based on its communicative content – is presumptively unconstitutional and may be justified only if the government proves that it is narrowly tailored to serve a compelling state interest.

The Court explained that a governmental regulation of speech is content based if it applies to particular speech because of the topic discussed or the idea or message expressed. In this regard, the Code is content based on its face. It defines “Temporary Directional Signs” on the basis of whether a sign conveys the message of directing the public to church or some other “qualifying event.” It defines “Political Signs” on the basis of whether a sign’s message is “designed to influence the outcome of an election.” It defines “Ideological Signs” on the basis of whether a sign communicates “a message or ideas” that do not

fit within the Code’s other categories. It then subjects each of these categories to different restrictions. Because the Code is content based on its face, the Court declared that it was not necessary to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

The Court addressed the reasons why the Court of Appeals had concluded that the Code was content-neutral. First, the Court of Appeals determined that the Town had not adopted its regulation based on disagreement with the content of directional signs. According to the Court, however, this analysis overlooked the crucial first step in the content-neutrality inquiry: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny even if the government’s motive was benign.

Next, the Court of Appeals had reasoned that the Code is content neutral because it does not mention any idea or viewpoint, or single one out for differential treatment. However, a regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. The First Amendment is hostile not only to viewpoint discrimination, but to governmental targeting of an entire topic as well.

Finally, the Court of Appeals had characterised the Code’s distinctions as based on the elements of who is speaking through the sign and whether and when an event is occurring. The Court rejected this reasoning on both factual and legal grounds. Regarding the latter, the Court declared that neither of these elements automatically renders a regulation content neutral.

Applying the strict scrutiny inquiry, the Court concluded that the Town could not demonstrate that the Code furthers a compelling governmental interest and is narrowly tailored to that end. The Town presented two governmental interests in support of the Code’s distinctions: preservation of the Town’s aesthetic appeal and traffic safety. Even if it could be assumed that these are compelling, the Court declared, they fail because they are under inclusive. The Town cannot logically claim that placement of strict limits on temporary directional signs is necessary to beautify the Town or eliminate threats to traffic safety while at the same time allowing unlimited numbers of other types of signs that create the same problems.

III. The Court’s decision was unanimous. Three of the nine Justices filed separate opinions. The authors of two of the separate opinions wrote that they joined the Court’s judgment, but not its opinion. They disagreed with what they viewed as the Court’s unnecessarily

sweeping subject matter based approach to the question of content neutrality, which they predicted might call into question many regulatory measures previously perceived as constitutionally valid.

*Languages:*

English.



*Identification:* USA-2015-2-006

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 26.06.2015 / **e)** 14-556, 14-562, 14-571 and 14-574 / **f)** Obergefell v. Hodges / **g)** 135 *Supreme Court Reporter* 2584 (2015) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Due Process / Equal Protection / Marriage, same-sex.

*Headnotes:*

The constitutional guarantee of due process protects fundamental liberties, including the making of personal choices central to individual dignity and autonomy, such as intimate choices defining personal identity and beliefs.

The right to marry is a fundamental liberty protected by the constitutional guarantee of due process.

The right of same-sex couples to marry is a fundamental liberty guaranteed by the constitutional guarantee of due process.

Laws that deny to same-sex couples benefits of marriage that are afforded to opposite-sex couples are invalid under the constitutional guarantee of equal protection of the laws.

While the Constitution contemplates that democratic decision-making generally is the appropriate process for change, that process must not abridge fundamental rights; therefore, redress by the judiciary is required when the rights of persons are violated.

The dynamic of the constitutional system is that individuals need not await legislative action before asserting a fundamental right in the courts.

The Constitution prohibits States from refusing to recognise lawful same-sex marriages performed in other States on the basis of their same-sex character.

*Summary:*

I. The petitioners, fourteen same-sex couples and two men whose same-sex partners are deceased, sought marriage licenses in four States or recognition by those States of marriage licenses granted in other States. Their applications were denied because the laws of the four States – Kentucky, Michigan, Ohio, and Tennessee – defined marriage only as the union of one man and one woman.

The petitioners filed suits in Federal District Courts in their home States, claiming that the denial of marriage licenses or full recognition of marriages performed in other States violated their rights under the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment, Section One, states in relevant part that no State shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” All the District Courts ruled in the petitioners’ favour. The States appealed and the Court of Appeals for the Sixth Circuit consolidated the cases and reversed the District Court decisions. The Supreme Court of the United States decided to review the consolidated decision of the Court of Appeals.

II. The Supreme Court reversed the decision of the Court of Appeals. In doing so, it invalidated the laws in question to the extent that they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. The Court grounded its decision in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Court applied the doctrine that the Due Process Clause protects certain fundamental liberties. These liberties extend to personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. According to the Court, its case-law addressing claims raised by opposite-sex couples has long held

that the right to marry is such a fundamental liberty. This case-law includes the Court's 1967 decision in *Loving v. Virginia*, which invalidated prohibitions against interracial unions. The Court then identified four principles and traditions that demonstrate why the reasons that marriage is a fundamental liberty apply with equal force to same-sex couples. The first is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. The second principle in the Court's jurisprudence is that the right to marry supports a two-person union unlike any other in its importance to the committed individuals. The third is that the right to marry safeguards children and families. It therefore draws meaning from related rights of childrearing, procreation, and education. Lastly, the Court's case-law and the traditions of the United States make clear that marriage is a keystone of the social order.

As to the Equal Protection Clause, the Court emphasised that the Due Process and Equal Protection Clauses are closely interrelated, even though they set forth different principles. Therefore, the Court determined that while the challenged laws burdened the liberty of same-sex couples, they also abridged central precepts of equality. The marriage laws in question were in essence unequal because they denied same-sex couples benefits afforded to opposite-sex couples and barred them from exercising a fundamental right. In this regard, the Court stated that it has recognised that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. In sum, the Court concluded that the right to marry is a fundamental right inherent in the liberty of the person and that under the Due Process and Equal Protection Clauses same-sex couples may not be deprived of that right and that liberty.

The Court also addressed arguments that resolution of the question of same-sex marriage should await further democratic discourse in the forms of legislation, litigation, and debate. The Court concluded, however, that there had been far more deliberation on this question, in a variety of fora, than this argument acknowledges. Moreover, the Constitution indeed contemplates that democracy is the appropriate process for change, but that process must not abridge fundamental rights. When the rights of persons are violated, the Constitution requires redress by the courts, despite the more general value of democratic decision-making. Thus, the dynamic of the constitutional system is that individuals need not await legislative action before asserting a fundamental right.

The instant case also presented the question of whether the Constitution requires States to recognise same-sex marriages validly performed in other States. The Court answered the question by ruling that there is no lawful basis for a State to refuse to recognise a lawful same-sex marriage performed in another State on the basis of its same-sex character.

III. Four of the nine Justices dissented from the Court's decision. Each of the dissenting Justices authored a separate opinion. The dissenters disagreed with the Court's determination that same-sex marriage is a fundamental liberty under the Due Process Clause. Chief Justice Roberts wrote that the Court, in ruling that the laws in question violated a liberty right implied in the Fourteenth Amendment, departed from the Court's case-law under the doctrine of substantive due process. The dissenting Justices also posited that public policy questions of marriage rights are reserved to the individual States, and that such public policy questions should be subject to the democratic process rather than the control of the judiciary.

#### *Cross-references:*

Supreme Court:

- *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

#### *Languages:*

English.



#### *Identification: USA-2015-2-007*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 29.06.2015 / **e)** 14-7955 / **f)** *Glossip v. Gross* / **g)** 135 *Supreme Court Reporter* 2726 (2015) / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Death Penalty / Injection, lethal / Punishment, capital.

*Headnotes:*

The death penalty in itself does not violate the constitutional prohibition against cruel and unusual punishments.

A method of execution will not constitute constitutionally impermissible cruel and unusual punishment unless it creates a demonstrated risk of severe pain and the risk is substantial when compared to known and available alternatives.

Some risk of pain is inherent in any method of capital punishment; therefore, the constitutional prohibition against infliction of cruel and unusual punishments does not require the avoidance of all risk of pain in the administration of an execution.

A claimant who contends that a method of execution is constitutionally impermissible bears the burden of persuasion on evidentiary questions associated with that claim.

*Summary:*

I. The State of Oklahoma uses a three-step protocol to administer the lethal injection method of execution. In the first step, a drug is administered to render and keep the prisoner unconscious. The second drug is used to inhibit all muscular-skeletal movement and the third drug is used to induce cardiac arrest. Oklahoma adopted lethal injection in 1977. It initially used sodium thiopental, a barbiturate, as the first drug in the protocol, but switched to the use of another barbiturate, pentobarbital, when sodium thiopental became unavailable. Pentobarbital then became unavailable, and Oklahoma selected a sedative, midazolam, which it used for the first time in an execution in 2014.

In 2014, four prisoners sentenced to death in Oklahoma brought suit in a U.S. District Court, claiming that the use of midazolam violates the Eighth Amendment to the United States Constitution, which in relevant part prohibits the infliction of “cruel and unusual punishments.” The Eighth Amendment is applied to the States through the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution. The plaintiffs contended that midazolam creates an unacceptable risk that it will fail to protect a person from experiencing the severe pain associated with administration of the second and third drugs in the protocol.

The plaintiffs applied for a preliminary injunction against Oklahoma’s use of midazolam. The District Court held a three-day evidentiary hearing, after which it denied the application. The District Court ruled that the plaintiffs had failed to establish a likelihood of success on the merits of their claim. The Court of Appeals for the Tenth Circuit affirmed.

II. The Supreme Court affirmed the decision of the Court of Appeals. The Supreme Court determined that the District Court had properly denied the plaintiffs’ application on the grounds that the plaintiffs had failed to establish a likelihood of success on the merits of their Eighth Amendment claim.

The Court stated the standard for assessment of method-of-execution claims under the Eighth Amendment. Referring to its holding in the 2008 case of *Baze v. Rees*, it declared that a successful method-of-execution claim must establish that the challenged method creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives. The Court noted that some risk of pain is inherent in any method of capital punishment; therefore, the Constitution does not require the avoidance of all risk of pain. To hold that the Eighth Amendment demands the elimination of essentially all risk of pain, the Court stated, would in effect outlaw the death penalty altogether. The Court observed that it often had reaffirmed that capital punishment is not in itself unconstitutional, and stated that it declined to overrule these decisions.

The Court concluded that the plaintiffs had not demonstrated a likelihood of success in satisfying the *Baze v. Rees* requirements. First, the plaintiffs had failed to meet their burden of identifying a known and available alternative method of execution that entails a lesser risk of pain. On this point, the Court also rejected the plaintiffs’ contention that the *Baze* decision should not be construed to require a claimant to make such an identification.

Next, the Court ruled that the District Court had not committed clear error when it found that midazolam is likely to render a person unable to feel pain associated with administration of the second and third drugs in the protocol. The Court noted that a claimant bears the burden of persuasion on this question. After examining the evidence presented at the District Court’s evidentiary hearing, the Supreme Court concluded that the plaintiffs had failed to demonstrate the existence of a substantial risk of severe pain. Among their arguments, the plaintiffs had pointed to difficulties in two 2014 executions administered by Oklahoma and the State of Arizona in which midazolam was used. The Court, pointing to other factors including the fact that twelve other executions

using the three-drug protocol had been conducted without significant problems, stated that it was not persuaded by this evidence. According to the Court, when all of the circumstances were considered, the Oklahoma and Arizona executions had little probative value. The Court also took note of the District Court's finding that Oklahoma had instituted safeguards to ensure that midazolam is properly administered, including the continuous monitoring of the person's level of consciousness.

III. Four of the nine Justices filed separate opinions. Justices Scalia and Thomas authored concurring opinions and joined each other's opinions. Four Justices dissented from the Court's decision. Two of the dissenting Justices authored separate opinions. Justice Breyer, in an opinion joined by Justice Kagan, asserted that the Court should undertake a full briefing on the question of the constitutionality of capital punishment, and offered his opinion that it is highly likely that it violates the Eighth Amendment. A substantial part of Justice Scalia's opinion was devoted to a response to Justice Breyer's argument. Justice Sotomayor's dissenting opinion, joined by the other three dissenters, differed with the Court's acceptance of the District Court's reliance on the testimony of an expert witness and also the Court's imposition of the requirement that the claimants prove the availability of an alternative means of execution.

*Supplementary information:*

After the Court of Appeals decision in this case, the four plaintiffs petitioned the U.S. Supreme Court for review and applied for a stay in their executions. The Supreme Court denied the stay application, and one of the four plaintiffs, Charles Warner, was executed on 15 January 2015. The Court subsequently agreed to review and, at the request of the State of Oklahoma, stayed the pending executions of the other three plaintiffs.

Lethal injection currently is the most prevalent method of execution among the jurisdictions in the United States that have capital punishment. As the Court reported in its opinion, sodium thiopental and pentobarbital became unavailable for administration of executions after successful campaigns by death penalty opponents in the United States and Europe countries against production of the drugs or their sale for use in executions.

*Cross-references:*

Supreme Court:

- *Baze v. Rees*, 07-5439, 16.06.2008, *Bulletin* 2008/1 [USA-2008-1-002].

*Languages:*

English.



# Inter-American Court of Human Rights

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## Important decisions

*Identification:* IAC-2015-2-002

**a)** Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 14.10.2014 / **e)** C 285 / **f)** Case of Rochac Hernández v. El Salvador / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

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

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

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

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

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

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

*Keywords of the alphabetical index:*

Disappearance, enforced, investigation, obligation / Impunity, termination / Armed conflict, crimes, systematic.

*Headnotes:*

Articles 17 and 19 of the American Convention form part of the non-derogable nucleus of rights, which are not subject to suspension, in conformity with Article 27 ACHR.

International humanitarian law protects children generally as part of the civilian population, that is to

say, the persons taking no active part in hostilities, which must be treated humanely and not be targeted in any attack. In addition, children, given that they are more vulnerable to suffer human rights violations in armed conflict, benefit from special protection according to their age, which is the reason why the States must provide them with the care and the help they need. This principle is also reflected in Article 38 of the Convention on the Rights of the Child. Among the measures of this nature established by treaties of international humanitarian law are those which seek to preserve family unity and facilitate the search, identification, and reunification of families dispersed as a result of armed conflict, and, in particular, of unaccompanied and separated children. Furthermore, the obligations of States to protect children within the context of non-international armed conflicts are defined in Article 4.3 of the Additional Protocol II to the Geneva Conventions which states, *inter alia*, that “b. all appropriate steps shall be taken to facilitate the reunion of families temporarily separated [...]”.

The right to identity encompasses, *inter alia* and as a non-exhaustive list, several elements such as the right to nationality, to a name, and to family relationships. The American Convention protects these elements as separate rights. However, not all of these rights are necessarily affected in all cases relating to the right to identity.

The duty to investigate and the search for disappeared persons constitute an imperative obligation of the state, and these actions must be carried out in compliance with international standards, taking into account that the victims were children at the time of the events. Thus, it is fundamental that the State adopt clear and concrete strategies aimed at ending the impunity in the prosecution of the enforced disappearance of children during the armed conflict, so that the systematic character of these crimes, which affected Salvadoran children in particular, is emphasised, and so that events of this kind do not occur again.

The right to know the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, who participated in them, and the reasons that motivated them. In cases of enforced disappearance, the right to the truth also has a special dimension: to know the fate and whereabouts of the victims. Apart from the work carried out by various entities to determine the fate and whereabouts of the victims and to prosecute those responsible for the crimes, the State must, as a measure of reparation that seeks to satisfy the right of society as a whole to know the truth, implement appropriate measures in order keep the memory of the victims alive and to ensure transparency regarding these human rights violations through the

establishment of public memory sites, such as memorials, monuments, and museums.

Human rights education at different levels is crucial to guarantee that events similar to those of the present case are not repeated and to promote values such as tolerance and mutual respect. Furthermore, the teaching of historical facts, such as those relating to the armed conflict in El Salvador and, in particular, the situation of the disappeared children during this conflict is essential to keep the historical memory alive for generations to come.

### Summary:

I. This case relates to the responsibility of El Salvador for the enforced disappearance of five children in separate incidents between 1980 and 1982, within the context of a pattern of enforced disappearances of children during the armed conflict in El Salvador (1980-1991). The five children were disappeared during military operations which were part of the so-called “counterinsurgency,” and last seen with members of the armed forces. Their fates and whereabouts are unknown as of the date of the judgment. The allegations included the failure to carry out serious, thorough, and exhaustive investigations.

On 21 March 2013, the Inter-American Commission of Human Rights submitted the case, alleging violations to Articles 3, 4, 5, 7, 8, 17, 19 and 25 ACHR, in relation to Article 1.1 ACHR.

II. On the merits, the Court declared that the enforced disappearance of the five children constituted multiple and on-going violations of their rights to personal liberty, humane treatment, life, and juridical personality, contained in Articles 7, 5, 4.1 and 3 ACHR, in conjunction with Article 1.1 ACHR.

The Court also found that the State had violated the right to privacy and the rights of the family, contained in Articles 11.2 and 17 ACHR, in conjunction with Articles 19 and 1.1 ACHR, due to the illegal detention of the children by state officials and the separation from their families. The Court declared that these acts constituted violations of the rights of the children as well as of the members of their families.

Additionally, the Court declared that the State violated the right to humane treatment recognised in Article 5.1 and 5.2 ACHR, in conjunction with Article 1.1 ACHR, due to the suffering caused to the members of the children’s families after their enforced disappearance and the lack of investigations by State authorities. The Court asserted that this constitutes an on-going violation as the whereabouts of the children were unknown as of the date of the judgment.

The Court also found violations of the rights of the children and their family members to a fair trial and judicial protection, contained in Articles 8.1 and 25 ACHR, in conjunction with Article 1.1 ACHR, given that the State failed to carry out serious, thorough, and exhaustive investigations within a reasonable period of time, and that, therefore, as of the date of the judgment a situation of total impunity remained in relation to the children’s enforced disappearance.

Finally, the Court declared that the failure to carry out effective *habeas corpus* proceedings to determine the whereabouts of the children constituted a violation of the rights to personal liberty, fair trial and juridical protection established in Articles 7.6, 8.1 and 25.1 ACHR, in conjunction with Article 1.1 ACHR, to the detriment of the children and their family members.

The Court emphasised the importance of the strengthening of scientific and forensic capacities for the search of disappeared children in order to identify them and determine their parentage. Moreover, if the family members of persons who were children at the time of the events are aging, genetic samples must be taken urgently and conserved in order to allow the future identification of disappeared children.

Accordingly, the Court concluded that the judgment itself constituted a form of reparation and ordered, *inter alia*, that the State: continue investigations and open any other investigations necessary to identify, judge and, if appropriate, punish those responsible for the enforced disappearance of the five children and any related crimes; carry out, as soon as possible, a serious search to determine the whereabouts of the children and adopt all necessary measures for the restoration of their identities if they are found to be alive; adopt appropriate measures to guarantee that authorities charged with the administration of justice, as well as Salvadoran society, have public, technical and systematised access to archives containing useful information for investigations in proceedings related to human rights violations during the armed conflict; provide medical, psychological and or psychiatric attention to the victims; carry out a public act of recognition of responsibility; construct a “garden-museum” (“*jardín museo*”) to commemorate the child victims of enforced disappearance during the armed conflict; and implement training programs.

### Languages:

Spanish, English.





*Identification: IAC-2015-2-003*

a) Organisation of American States / b) Inter-American Court of Human Rights / c) / d) 20.11.2014 / e) C 289 / f) Case of Espinoza Gonzáles v. Peru / g) / h) CODICES (English, Spanish).

*Keywords of the systematic thesaurus:*

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

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

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

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

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

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

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

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

*Keywords of the alphabetical index:*

Gender, stereotyping / Gender, discrimination / Torture, investigation, obligation / Sexual violence, investigation / Treatment, humane, right / Torture, investigation, protocol / Torture, victim, protection.

*Headnotes:*

In order to guarantee access to justice for women victims of sexual violence, the State should establish rules for the assessment of evidence that avoid stereotyped assertions, insinuations, and allusions.

With regard to the interviews of persons who state that they have been subjected to acts of torture:

- i. those persons should be allowed to describe freely what they consider relevant; thus, officials should avoid restricting the interview through limited questioning;
- ii. no one should be required to speak of any form of torture if he or she is uncomfortable doing so;

- iii. the psychosocial history prior to the arrest of the alleged victim should be documented during the interview, together with a summary of the facts narrated relating to the moment of the initial arrest, the circumstances, the place, and the conditions while in State custody, the ill-treatment or acts of torture presumably suffered, as well as the methods presumably used to this end; and
- iv. the detailed statement should be recorded and transcribed. In cases in which the alleged torture includes acts of violence or rape, alleged victims must give their consent to this recording.

In interviews of alleged victims of acts of rape or sexual violence, the statement should be made in a safe and secure environment that provides privacy and instils confidence, and the statement should be recorded in order to avoid or limit the need for its repetition. This statement should contain, with the consent of the alleged victims:

- i. the date, time, and location of the act, including a description of that location;
- ii. the name, identity, and number of assailants;
- iii. the nature of the physical contacts perpetrated;
- iv. whether weapons or restraints were used;
- v. use of medication, drugs, alcohol, or other substances;
- vi. how clothing was removed, if applicable;
- vii. details of actual or attempted sexual activity against the alleged victim;
- viii. whether condoms or lubricants were used;
- ix. whether there were any subsequent activities that could alter evidence; and
- x. details of any symptoms that the alleged victim has developed since that time.

In cases in which signs of torture exist, the medical examinations of the alleged victim must be performed with the latter's prior and informed consent, without the presence of security agents or other State agents, and the corresponding reports should include, at least:

- i. the circumstances surrounding the interview;
- ii. a detailed record of the subject's narration;
- iii. a physical and psychological examination;
- iv. an opinion as to the possible relationship of physical and psychological findings to possible torture or ill-treatment; and
- v. a record of authorship.

In cases of violence against women, on becoming aware of the alleged acts, a complete and detailed medical and psychological examination must be made immediately by appropriate trained personnel of the sex indicated by the victims, informing the

victims that they may be accompanied by a person they trust if they so wish. This examination must be performed in accordance with protocols specifically addressed at recording evidence in cases of gender-based violence.

The Court cited the Istanbul Protocol, indicating that in the investigation of cases of torture, the timeliness of the medical examination is particularly important, and the latter “should be undertaken regardless of the length of time since the torture. However, despite all precautions, physical and psychological examinations by their very nature may re-traumatise the patient by provoking or exacerbating symptoms of post-traumatic stress by reviving painful effects and memories.

In cases of sexual violence, the investigation should try, insofar as possible, to avoid the re-victimisation of the alleged victims or the reliving of a deeply traumatic event. A gynaecological and anal examination should be performed as soon as possible, if it is deemed appropriate and with the prior, informed consent of the alleged victim, during the first 72 hours after the reported act, based on a specific protocol for attention to victims of sexual violence. This does not preclude the gynaecological examination being performed after this period, with the alleged victim’s consent, because evidence can be found some time after the act of sexual violence, particularly with the development of forensic investigation technologies. Consequently, the time limits established for performing an examination of this nature must be considered as guidelines, rather than rigid policy. Thus, the appropriateness of a gynaecological examination must be considered on the basis of a case-by-case analysis, taking into account the time that has passed since the alleged sexual violence occurred. Accordingly, the authority requesting a gynaecological examination must provide detailed reasons for its appropriateness and, should it not be appropriate or if the alleged victim has not given his or her informed consent, the examination should be omitted, although this should never serve as an excuse for doubting the alleged victim and/or avoiding an investigation.

The obligation of independence calls for the doctor to have complete freedom to act in the interests of the patient, and means that doctors must use the best medical practices, whatever the pressure they may be subject to, including any instructions from their employers, prison authorities, or security forces. The State has the obligation to refrain from obliging doctors to compromise their professional independence in any way. Thus, the contractual conditions of doctors employed by the State must grant them the required professional independence to issue their clinical opinions free of pressure. Forensic

physicians also have the obligation to be impartial and objective when assessing the person they are examining.

### Summary:

I. Between 1980 and 2000, Peru was engaged in a conflict between armed groups and agents of the military and police forces. During that time, acts of torture and other cruel, inhuman, or degrading treatments and punishments constituted a systematic and generalised practice and were used as instruments of the counterinsurgency in the context of criminal investigations for the crimes of treason and terrorism. Under these circumstances, a widespread and aberrant practice of rape and other forms sexual violence took place, and this practice primarily affected women and was framed within a wider context of discrimination against women. Such practices were facilitated by the permanent use of states of emergency and the counterterrorism legislation in force at the time, which was characterised by the absence of minimum guarantees for detainees, besides establishing, *inter alia*, the power to hold detainees incommunicado and in solitary confinement.

In this context, on 17 April 1993, Gladys Carol Espinoza González was intercepted in Lima by members of the Abduction Investigations Division (hereinafter, “DIVISE”) of the Peruvian National Police and was taken to their premises. The following day, Espinoza was transferred to the facilities of the National Counterterrorism Directorate (hereinafter, “DINCOTE”). During her initial detention and in both those institutions, Espinoza was subjected to sexual and physical abuse, among other mistreatments, by officers of the Peruvian National Police, acts which were confirmed later on by medical examinations performed during her stay in the DINCOTE.

In June 1993, a military court convicted Gladys Espinoza for the crime of treason, but in February 2003, the Superior Criminal Chamber of the Supreme Court annulled all the criminal proceedings held against her in the military jurisdiction. In March 2004, the National Terrorism Chamber convicted her of the “crime against public peace-terrorism,” and in November 2004, the Permanent Criminal Chamber of the Supreme Court of Justice increased her sentence from 15 to 25 years in prison. Since then, Gladys Espinoza has served time in various penitentiaries, including the Yanamayo Prison. Despite the fact that since 1993, several claims had been filed due to the acts of violence committed against Espinoza, and despite the existence of medical reports that recounted her injuries, no investigations were initiated until 2012, after the Inter-American Commission had served notice, in 2011, of its Admissibility and Merits Report upon the State.

On 8 December 2011, the Inter American Commission of Human Rights submitted the case, alleging violations to Articles 1.1, 5.1, 5.2, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 11.1, 11.2, 8.1 and 25 ACHR; Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter, "Belém do Pará Convention") and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter, "ICPPT").

The State submitted two preliminary objections:

- i. lack of jurisdiction *ratione materiae*, and
- ii. lack of jurisdiction *ratione temporis* of the Court to hear alleged violations of Article 7 of the Belém do Pará Convention. The Court rejected the first preliminary objection, considering that Article 12 of that treaty grants jurisdiction to the Court by not exempting from its application any of the rules and procedures established for individual communications. In contrast, the Court partially admitted the second preliminary objection, declaring itself unable to rule on acts that occurred prior to 4 June 1996, when Peru ratified the Belém do Pará Convention.

II. On the merits, the Court found the State internationally responsible for the violation of the following paragraphs of Article 7, in relation to Article 1.1 ACHR:

- a. Paragraphs 1 and 2 because of the lack of an adequate record of the detention;
- b. Paragraphs 1 and 4 because Espinoza was not informed of the reasons for her detention nor notified of the charges against her, in accordance with the standards established under the American Convention of Human Rights;
- c. Paragraphs 1, 3 and 5 due the absence of judicial control of the detention for at least 30 days, which meant that the detention became arbitrary; and
- d. Paragraphs 1 and 6, in relation also to Article 2, owing to the impossibility of filing an *habeas corpus* petition or any other protective measure while Decree Law no. 25.659, which established the inadmissibility of protective measures for detainees suspected or accused of crimes of terrorism, was in force.

The Court also established that the State violated Articles 5.1, 5.2 and 11 ACHR in relation to Article 1.1 ACHR and Articles 1 and 6 of the ICCPT, for the following reasons:

- a. During her arrest, Gladys Espinoza was beaten and received death threats, and the State did not justify the use of force by its agents. Moreover, when she was transferred to the facilities of DIVISE and DINCOTE,

Espinoza was victim of cruel, inhuman and degrading treatments and remained *incommunicado* for about three weeks without access to her family. Moreover, in those places she was victim of torture because of the psychological and physical violence committed against her with the objective of obtaining information. Furthermore, the Court concluded that Espinoza was victim of rape and other forms of sexual violence repeatedly and for an extended period of time. In this regard, the Court determined that what happened to the victim was consistent with the widespread practice of rape and sexual violence that primarily affected women during the armed conflict, thereby constituting torture.

b. While in the Yanamayo Penitentiary between 1996 and 2001, Espinoza suffered cruel, inhuman and degrading treatment due to:

- i. the conditions of detention in the penitentiary;
- ii. the detention regime intended for detainees being processed and/or convicted of terrorism and treason;
- iii. the absence of specialised, adequate and opportune medical attention, given the progressive deterioration of the victim's health, as evidenced by medical reports practiced at the time; and
- iv. the extent of the use of force during a police search in August 1999. The Court affirmed that sexual violence should never be used by state security forces when exercising the use of force.

c. The widespread use of sexual violence by the security forces constituted torture and gender-based violence because it affected women by the mere fact of being women. In this context, the body of Gladys Espinoza as a woman was used to obtain information about her romantic partner and to humiliate and intimidate both. These acts confirm that state agents used sexual violence and the threat of sexual violence against the victim as a strategy in the fight against a subversive group.

Furthermore, the Court determined that Peru violated Articles 8 and 25 ACHR in relation to Article 1.1 ACHR, and failed to fulfil its obligations under Articles 1, 6 and 8 of the ICPPT and Article 7.b of the Belém do Pará Convention (as of the date of ratification), because of the unjustified delay in initiating investigations into the acts committed against Gladys Espinoza, and because neither the statements taken from her nor the corresponding medical reports related to her health were performed according to applicable international standards for the collection of evidence in cases of torture and sexual violence, in particular, those related to the compilation of declarations and the conduct of medical and psychological evaluations connected with

the acts of violence carried out against the victim. In addition, the violations occurred due to the Permanent Criminal Chamber of the Supreme Court's stereotyped evaluation of evidence, and its consequent failure to order an investigation of the violence alleged, all of which constituted discrimination in access to justice for reasons of gender. The Court recognised and rejected the gender stereotype that considers women suspected of having committed crimes as intrinsically unreliable or manipulative, especially in the context of criminal proceedings. Also, the Court noted that a guarantee for access to justice for women victims of sexual violence must be the provision of rules for the assessment of evidence, so that stereotypical statements and innuendoes are avoided. Such rules did not exist in the present case. Finally, the Court concluded that in Peru, the grave pattern of sexual violence against women detained due to their alleged participation in the crimes of terrorism and treason was made invisible, which constituted an obstacle to the prosecution of such acts, favouring impunity and constituting gender discrimination in access to justice.

Accordingly, the Court ordered, *inter alia*, that the State:

- i. open, conduct, continue, and conclude, as appropriate and with due diligence, criminal investigations and proceedings, in order to identify, prosecute and, if applicable, punish those responsible for the violations of Espinoza's personal integrity;
- ii. provide medical and psychological or psychiatric treatment;
- iii. develop protocols so that cases of torture, rape, and other forms of sexual violence are properly investigated and prosecuted in accordance with the standards specified in the judgment;
- iv. incorporate the standards established in the judgment into permanent education and training programs aimed at those in charge of criminal prosecution and judgment; and
- v. implement a mechanism that will allow all women victims of the generalised and aberrant practice of sexual violence and rape during the armed conflict to have free access to specialised medical, psychological, and/or psychiatric rehabilitation.

#### Languages:

Spanish, English.



## Court of Justice of the European Union

### Important decisions

*Identification:* ECJ-2015-2-016

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 04.06.2015 / **e)** C-579/13 / **f)** P and S v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen / **g)** ECLI:EU:C:2015:369 / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.  
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.  
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.

#### *Keywords of the alphabetical index:*

European Union, member state, citizen, third-country national, equality / Foreigner, residence permit, language, knowledge, examination / Foreigner, residence permit, civic integration, examination / Immigration, residence, permit.

#### *Headnotes:*

The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

Directive 2003/109 concerning the status of third-country nationals who are long-term residents and, in particular, Articles 5.2 and 11.1 thereof do not preclude national legislation, which imposes on third-country nationals who already possess long-term resident status the obligation to pass a civic integration examination, under pain of a fine, provided that the means of implementing that obligation are not liable to jeopardise the achievement of the objectives pursued by that directive, which it is for the referring

court to determine. Whether the long-term resident status was acquired before or after the obligation to pass a civic integration examination was imposed is irrelevant in that respect.

In this regard, by granting Member States the option of subjecting the obtention of long-term resident status to the prior fulfilment of certain integration conditions, as established in their national legislation, Article 5.2 of Directive 2003/109 neither requires those Member States to impose integration obligations on third-country nationals after they have obtained long-term resident status, nor precludes them from doing so.

Furthermore, insofar as the situation of third-country nationals is not comparable to that of nationals as regards the usefulness of integration measures such as the acquisition of knowledge of the language and society of the country, the fact that the civic integration obligation is not imposed on nationals does not infringe the right of third-country nationals who are long-term residents to equal treatment with nationals, in accordance with Article 11.1 of Directive 2003/109.

As a result, the national legislation enforced by the Netherlands which imposes on third-country nationals who already possess long-term resident status the obligation to pass a civic integration examination, under pain of a fine, is not contrary to EU law.

### Summary:

I. P and S are third-country nationals who possess since, respectively, 14 November 2008 and 8 June 2007, long-term residence permits of indefinite duration, granted on the basis of the directive. In accordance with Dutch law, they are required to pass a civic integration examination by a prescribed date, on pain of a fine, in order to demonstrate the acquisition of oral and written proficiency in the Dutch language and sufficient knowledge of Netherlands society. If the examination is not passed by that date, a new date is set, the amount of the fine being increased each time.

P and S brought actions against the decisions obliging them to pass that examination. The *Centrale Raad van Beroep* (Higher Social Security Court, Netherlands), before which the matter came on appeal, expresses doubts as to whether the civic integration obligation complies with the Directive. It asks the Court of Justice, *inter alia*, whether, after the grant of long-term resident status, Member States may subsequently impose integration conditions in the form of a civic integration examination, with penalties in the form of a system of fines.

II. First of all, the Court notes that passing the examination in question is not a condition for acquiring or conserving long-term resident status, but gives rise only to the imposition of a fine. In addition, the Court points out the importance which the EU legislature attaches to integration measures. In that respect, the Court notes that the directive neither requires that Member States impose integration obligations on third-country nationals after they have obtained long-term resident status nor precludes them from doing so.

As regards the principle of equal treatment, the Court considers that the situation of third-country nationals is not comparable to that of nationals as regards the usefulness of integration measures such as the acquisition of knowledge of the language and society of the country. Therefore, the fact that the civic integration obligation at issue in the main proceedings is not imposed on nationals does not infringe the right of third-country nationals who are long-term residents to equal treatment with nationals.

### Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



### Identification: ECJ-2015-2-017

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 09.07.2015 / **e)** C-153/14 / **f)** Minister van Buitenlandse Zaken v. K and A / **g)** ECLI:EU:C:2015:453 / **h)** CODICES (English, French).

### Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.  
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.  
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.

*Keywords of the alphabetical index:*

Foreigner, family reunion, language, knowledge, requirement / Foreigner, residence, permit, conditions.

*Headnotes:*

Since the general rule is that family reunification should be authorised, Article 7.2.1 of Directive 2003/86 must be interpreted strictly. Furthermore, the leeway given to Member States in this context must not be used by them in a manner which would undermine the objective and effectiveness of the directive, which is to promote family reunification.

In this connection, in accordance with the principle of proportionality, which is one of the general principles of EU law, the measures implemented by the national legislation transposing Article 7.2.1 of Directive 2003/86 must be suitable for achieving the objectives of that legislation and must not go beyond what is necessary to attain them. The integration measures referred to in the said Article must be aimed not at filtering those persons who will be able to exercise their right to family reunification, but at facilitating the integration of such persons within the Member States.

As a result, a requirement for third country nationals to pass a civic integration examination at a basic level is capable of ensuring that these persons acquire knowledge which is undeniably useful for establishing connections with the host Member State.

In any case, the principle of proportionality requires the conditions of application of such a requirement not to exceed what is necessary to achieve the aims of family reunification pursued by Directive 2003/86. Specific individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members must be taken into consideration in order to dispense those family members from the requirement to pass a civic integration examination when, due to those circumstances, they are unable to take it or pass it.

Were that not the case, in such circumstances such a requirement could form a difficult obstacle to overcome in making the right to family reunification recognised by Directive 2003/86 exercisable. That interpretation is supported by Article 17 of Directive 2003/86, which requires applications for family reunification to be examined on a case-by-case basis.

Finally, Article 7.2.1 of Council Directive 2003/86 must be interpreted as meaning that Member States may require third country nationals to pass a civic integration examination, such as the one at issue in the main

proceedings, which consists in an assessment of basic knowledge both of the language of the Member State concerned and of its society and which entails the payment of various costs, before authorising that national's entry into and residence in the territory of the Member State for the purposes of family reunification, provided that the conditions of application of such a requirement do not make it impossible or excessively difficult to exercise the right to family reunification.

*Summary:*

I. Ms K, an Azerbaijani national, and Ms A, a Nigerian national, wish to enter the Netherlands, where their respective spouses, also third-country nationals, are already residing. In order to be granted exemption from the civic integration examination requirement, they pleaded physical or mental difficulties. The competent authority did not, however, consider these to be sufficiently serious and accordingly refused the applications of Ms K and Ms A. Litigation on those rejections having been brought before the *Raad van State* (Council of State, Netherlands), that court decided to refer questions to the Court of Justice on the compatibility of the civic integration examination with the Directive 2003/86.

II. First of all, the Court of Justice notes that, in the context of family reunification other than that of refugees and their family members, the directive does not preclude Member States from subjecting the granting of authorisation of entry into their territory to the observance of certain integration measures prior to entry. Nevertheless, in so far as the directive concerns only measures of 'integration', the Court holds that those measures can be considered legitimate to the extent they are capable of facilitating the integration of the sponsor's family members.

The Court also notes that the cost of the examination preparation pack and the course fees are capable of making family reunification impossible or excessively difficult.

*Languages:*

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



# European Court of Human Rights

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## Important decisions

*Identification:* ECH-2015-2-003

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 23.04.2015 / e) 29369/10 / f) *Morice v. France* / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Lawyer, freedom of expression / Judge, acceptable criticism, limits.

*Headnotes:*

Members of the judiciary are subject to wider limits of acceptable criticism than ordinary citizens.

*Summary:*

I. In 1995 Bernard Borrel, a Judge who had been seconded in the context of cooperation agreements between France and Djibouti, was found dead. The investigation by the Djibouti gendarmerie in the days that followed concluded that he had committed suicide. His widow, disputing the finding of suicide, filed a complaint as a civil party, and appointed the applicant to represent her in the proceedings. Two judicial investigations were opened in respect of premeditated murder committed by a person or persons unknown. The judicial investigation was assigned to investigating Judges M. and L.L.

In June 2000 the Indictments Division of the Court of Appeal removed those judges from the case and transferred it to a new investigating judge, Judge P. Shortly afterwards the same Division upheld a request by the applicant for the withdrawal of the high-profile “Scientology” case from Judge M.

In September 2000 the applicant and one of his colleagues wrote to the French Minister of Justice in connection with the judicial investigation into Judge Borrel’s death. They stated that they were approaching the Minister once again about the conduct of Judges M. and L.L. which was “completely at odds with the principles of impartiality and fairness” and they asked for an investigation to be carried out by the General Inspectorate of Judicial Services into the “numerous shortcomings ... brought to light in the course of the judicial investigation”.

The following day, an article in the newspaper *Le Monde* stated that Mrs Borrel’s lawyers had “vigorously criticised” Judge M. to the Minister of Justice, accusing her in particular of conduct which was “completely at odds with the principles of impartiality and fairness”, and adding that she had apparently failed to register an item for the case file and to transmit it to her successor.

The two judges filed a criminal complaint as civil parties against the publication director of *Le Monde*, the journalist who had written the article and Mr Morice, accusing them of the offence of public defamation of a civil servant. The applicant was found guilty of complicity in that offence by the Court of Appeal and was ordered to pay a fine of EUR 4,000. The sum of EUR 7,500 in damages was awarded to each of the judges, to be paid by the applicant jointly with the two other defendants.

II. The applicant’s conviction had constituted an interference with his right to freedom of expression, as guaranteed by Article 10 ECHR. The interference had been prescribed by law and its aim had been the protection of the reputation or rights of others.

In convicting the applicant, the Court of Appeal had taken the view that the mere fact of asserting that an investigating judge’s conduct was “completely at odds with the principles of impartiality and fairness” was a particularly defamatory allegation. That court had added that the applicant’s comments concerning the delay in forwarding the video-cassette and his reference to the handwritten card from the public prosecutor of Djibouti to Judge M., in respect of which the applicant had used the term “connivance”, merely confirmed the defamatory nature of the accusation, the “veracity” of the allegations not having been established and the applicant’s defence of good faith being rejected.

a. The applicant’s status as lawyer – While it was not in dispute that the impugned remarks fell within the context of the proceedings, they had been aimed at investigating judges who had been removed from the proceedings with final effect at the time they were

made. His statements could not therefore have directly contributed to his task of defending his client, since the judicial investigation had by that time been entrusted to another Judge who was not the subject of the criticism.

b. Contribution to a debate on a matter of public interest – The applicant’s impugned remarks, which concerned the functioning of the judiciary, a matter of public interest, and the handling of the Borrel case – one which had attracted significant media attention – had fallen within the context of a debate on a matter of public interest, thus calling for a high level of protection of freedom of expression, with a particularly narrow margin of appreciation accordingly being afforded to the authorities.

c. Nature of the impugned remarks – The impugned statements had been more value judgments than pure statements of fact, in view of the general tone of the remarks and the context in which they had been made, as they had reflected mainly an overall assessment of the conduct of the investigating judges in the course of the investigation.

The “factual basis” for those value judgments had been sufficient. The failure by the Judge to forward the video-cassette had not only been established but it was also sufficiently serious for it to be recorded by Judge P. in the file. As for the handwritten card, in addition to the fact that it had shown a certain friendliness on the part of the public prosecutor of Djibouti towards Judge M., it had accused the civil parties’ lawyers of “orchestrating their manipulation”.

Lastly, it was an established fact that the applicant had acted in his capacity as lawyer in two high-profile cases in which Judge M. was an investigating judge. In both of them the applicant had succeeded in obtaining findings by the appellate courts that there had been shortcomings in the proceedings, leading to the withdrawal of the cases from Judge M.

Moreover, there had been a sufficiently close connection between the expressions used by the applicant and the facts of the case, and his remarks could not be regarded as misleading or as a gratuitous attack.

d. Specific circumstances of the case

i. The need to take account of the overall background – The background to the case could be explained not only by the conduct of the investigating judges and by the applicant’s relations with one of them, but also by the very specific history of the case, its inter-State dimension and its substantial media coverage. However, the Court of Appeal had attributed an

extensive scope to the impugned remark of the applicant criticising an investigating Judge for “conduct which [was] completely at odds with the principles of impartiality and fairness”, whereas that quotation should have been assessed in the light of the specific circumstances of the case, especially as it was in reality not a statement made to the author of the article, but an extract from the letter sent by the applicant and his colleague to the Minister of Justice. In addition, at the time when the applicant answered his questions the journalist had already been informed of the letter to the Minister by his own sources. The article’s author had been solely responsible for the reference to the disciplinary proceedings against Judge M. in the context of the “Scientology” case. Lawyers could not be held responsible for everything appearing in an “interview” published by the press or for actions by the press.

The Court of Appeal had thus been required to examine the impugned remarks with full consideration of both the background to the case and the content of the letter, taken as a whole.

The use of the term “connivance” could not constitute “in itself” a serious attack on the honour and reputation of Judge M. and the public prosecutor of Djibouti.

In addition, the applicant’s statements could not be reduced to the mere expression of an antagonistic relationship with Judge M. The impugned remarks had formed part of a joint professional initiative by two lawyers, on account of facts that were new, established and capable of revealing serious shortcomings in the justice system, involving the two judges who had formerly been conducting the investigation in a case in which the lawyers’ clients were civil parties.

While the applicant’s remarks certainly had a negative connotation, it had to be pointed out that, notwithstanding their somewhat hostile nature and seriousness, the key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public’s attention to potential shortcomings in the justice system and the judiciary might benefit from constructive criticism.

ii. Maintaining the authority of the judiciary – Judges M. and L.L. were members of the judiciary and were therefore subject to wider limits of acceptable criticism than ordinary citizens and the impugned comments could therefore be directed against them in that capacity.



In addition, the applicant's remarks had not been capable of undermining the proper conduct of the judicial proceedings, in view of the fact that the higher court had withdrawn the case from the two investigating judges concerned by the criticisms.

For the same reasons, and taking account of the foregoing, the applicant's conviction could not serve to maintain the authority of the judiciary.

iii. Use of available remedies – The referral to the Indictments Division of the Court of Appeal had patently shown that the initial intention of the applicant and his colleague had been to resolve the matter using the available legal remedies. In reality, it was only after that remedy had been used that the problem complained of had occurred, as recorded by the investigating Judge P. in the file. At that stage the Indictments Division was no longer in a position to examine such complaints, precisely because it had withdrawn the case from Judges M. and L.L. In any event, four and a half years had already elapsed since the opening of the judicial investigation, which had still not been closed at the time of the Court's judgment. For their part, the civil parties and their lawyers had been active in the proceedings.

Moreover, the request to the Minister of Justice for an investigation into the new facts had not constituted a judicial remedy – such as to justify possibly refraining from intervention in the press – but a mere request for an administrative investigation subject to the Minister's discretion.

Lastly, neither the Principal Public Prosecutor nor the relevant Bar Council or chairman of the Bar had found it necessary to bring disciplinary proceedings against the applicant on account of his statements in the press, although such a possibility had been open to them.

iv. Conclusion as to the circumstances of the case – The impugned remarks by the applicant had not constituted gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at Judges M. and L.L. as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis".

e. Sanctions imposed – The applicant had been ordered to pay a fine of EUR 4,000 and, jointly with the other two defendants, EUR 7,500 in damages to each of the two judges who had filed the complaint as civil parties. Thus the sanction imposed on him had

not been the "lightest possible", but, on the contrary, one of some significance, and his status as a lawyer had even been relied upon to justify greater severity.

In view of the foregoing, the judgment against the applicant for complicity in defamation could be regarded as a disproportionate interference with his right to freedom of expression, and had not therefore been "necessary in a democratic society" within the meaning of Article 10 ECHR.

The Court therefore found a violation of Article 10 ECHR.

#### Cross-references:

European Court of Human Rights:

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- *Animal Defenders International v. United Kingdom* [GC], no. 48876/08, 22.04.2013, ECHR 2013;
- *Axel Springer AG v. Germany* [GC], no. 39954/08, 07.02.2012, ECHR 2012;
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- *Worm v. Austria*, no. 22714/93, 29.08.1997, *Reports of Judgments and Decisions* 1997-V.

#### Languages:

English, French.



#### Identification: ECH-2015-2-004

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 05.06.2015 / **e)** 46043/14 / **f)** Lambert and others v. France / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

Bioethic / Euthanasia / Medical treatment, discontinuation / Patient, will / Positive obligation / Legal framework, adequate / European consensus.

#### Headnotes:

While no consensus exists among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, there is nevertheless consensus as to the paramount importance of the patient's wishes in the decision-making process, however those wishes are expressed.

It is the patient who is the principal party in the decision-making process and whose consent must remain at its centre; this is true even where the patient is unable to express his or her wishes.

### Summary:

I. The applicants are the parents, a half-brother and a sister of Vincent Lambert, who sustained head injuries in a road-traffic accident in September 2008, which left him tetraplegic and in a state of complete dependency. He receives artificial nutrition and hydration which is administered eternally. In September 2013 the doctor in charge of Vincent Lambert initiated the consultation procedure provided for by the “Leonetti” Act on patients’ rights and end-of-life issues. He consulted six doctors, one of whom had been chosen by the applicants, convened a meeting with virtually all the care team, and held two meetings with the family which were attended by Vincent Lambert’s wife, parents and eight siblings. Following those meetings, Vincent Lambert’s wife Rachel and six of his brothers and sisters argued in favour of withdrawing treatment, as did five of the six doctors consulted, while the applicants opposed such a move. The doctor also held discussions with François Lambert, Vincent Lambert’s nephew. On 11 January 2014 the doctor in charge of Vincent Lambert decided to discontinue his patient’s artificial nutrition and hydration.

The *Conseil d’État*, hearing the case on the basis of an urgent application, observed that the last assessment of the patient dated back two and a half years, and considered it necessary to have the fullest information possible on Vincent Lambert’s state of health. It therefore ordered an expert medical report which it entrusted to three recognised specialists in neuroscience. Furthermore, in view of the scale and difficulty of the issues raised by the case, it requested the National Medical Academy, the National Ethics Advisory Committee, the National Medical Council and Mr Jean Leonetti to submit general observations to it as *amici curiae*, in order to clarify in particular the concepts of unreasonable obstinacy and sustaining life artificially. The experts examined Vincent Lambert on nine occasions, conducted a series of tests and familiarised themselves with the entire medical file and with all the items in the judicial file of relevance for their report. They also met all the parties concerned. On 24 June 2014 the *Conseil d’État* held that the decision taken by Vincent Lambert’s doctor on 11 January 2014 to withdraw artificial nutrition and hydration had been lawful.

Following a request for application of Rule 39 of the Rules of Court, the Court decided to indicate that execution of the *Conseil d’État* judgment should be stayed for the duration of the proceedings before it. On 4 November 2014 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

The applicants submitted in particular that the withdrawal of Vincent Lambert’s artificial nutrition and hydration was in breach of the State’s obligations under Article 2 ECHR.

#### II.a. Admissibility:

i. Standing to act in the name and on behalf of Vincent Lambert

α. Regarding the applicants – A review of the case-law revealed two main criteria: the risk that the direct victim would be deprived of effective protection of his or her rights, and the absence of a conflict of interests between the victim and the applicant. Regarding the first criterion, the Court did not discern any risk that Vincent Lambert would be deprived of effective protection of his rights since it was open to the applicants, as Vincent Lambert’s close relatives, to invoke before the Court on their own behalf the right to life protected by Article 2 ECHR. As to the second criterion, the Court noted that one of the key aspects of the domestic proceedings had consisted precisely in determining Vincent Lambert’s wishes. In those circumstances it was not established that there was a convergence of interests between the applicants’ assertions and what Vincent Lambert would have wished. Accordingly, the applicants did not have standing to raise the complaints under Article 2 ECHR in the name and on behalf of Vincent Lambert.

β. Regarding Rachel Lambert (Vincent Lambert’s wife): No provision of the European Convention on Human Rights permitted a third-party intervener to represent another person before the Court. Furthermore, according to Rule 44.3.a of the Rules of Court, a third-party intervener was any person concerned “who [was] not the applicant”. Accordingly, Rachel Lambert’s request had to be refused.

ii. Whether the applicants had victim status: The next-of-kin of a person whose death allegedly engaged the responsibility of the State could claim to be victims of a violation of Article 2 ECHR. Although Vincent Lambert was still alive, there was no doubt that if artificial nutrition and hydration were withdrawn, his death would occur within a short time. Accordingly, even if the violation was a potential or future one, the applicants, in their capacity as Vincent Lambert’s close relatives, were entitled to rely on Article 2 ECHR.

b. Merits – Article 2 ECHR: Both the applicants and the Government made a distinction between the intentional taking of life and “therapeutic abstention”, and stressed the importance of that distinction. In the context of the French legislation, which prohibited the intentional taking of life and permitted life-sustaining treatment to be withdrawn or withheld only in certain

specific circumstances, the Court considered that the present case did not involve the State's negative obligations under Article 2 ECHR, and decided to examine the applicants' complaints solely from the standpoint of the State's positive obligations.

In order to do this, the following factors were taken into account: the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2 ECHR; whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel; and the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests. The Court also took account of the criteria laid down in the Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations".

No consensus existed among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appeared to allow it. While the detailed arrangements governing the withdrawal of treatment varied from one country to another, there was nevertheless consensus as to the paramount importance of the patient's wishes in the decision-making process, however those wishes were expressed. Accordingly, States should be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as to the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy.

i. The legislative framework: The provisions of the Leonetti Act, as interpreted by the *Conseil d'État*, constituted a legal framework which was sufficiently clear, for the purposes of Article 2 ECHR, to regulate with precision the decisions taken by doctors in situations such as that in the present case, by defining the concepts of "treatment that could be withdrawn or limited" and "unreasonable obstinacy" and by detailing the factors to be taken into account in the decision-making process. Accordingly, the State had put in place a regulatory framework apt to ensure the protection of patients' lives.

ii. The decision-making process: Although the procedure under French law was described as "collective" and included several consultation phases (with the care team, at least one other doctor, the person of trust, the family or those close to the patient), it was the doctor in charge of the patient who alone took the decision. The patient's wishes had to be taken into

account and the decision itself had to be accompanied by reasons and was added to the patient's medical file.

The collective procedure in the present case had lasted from September 2013 to January 2014 and, at every stage of its implementation, had exceeded the requirements laid down by law. The doctor's decision, which ran to thirteen pages, had provided very detailed reasons and the *Conseil d'État* had held that it was not tainted by any irregularity.

French law as it currently stood provided for the family to be consulted (and not for it to participate in taking the decision), but did not make provision for mediation in the event of disagreement between family members. Likewise, it did not specify the order in which family members' views should be taken into account, unlike in some other countries. In the absence of consensus on this subject the organisation of the decision-making process, including the designation of the person who took the final decision to withdraw treatment and the detailed arrangements for the taking of the decision, fell within the State's margin of appreciation. The procedure in the present case had been lengthy and meticulous, exceeding the requirements laid down by the law, and although the applicants disagreed with the outcome, that procedure had satisfied the requirements flowing from Article 2 ECHR.

iii. Judicial remedies: The *Conseil d'État* had examined the case sitting as a full court, which was highly unusual in injunction proceedings. The expert report had been prepared in great depth. In its judgment of 24 June 2014 the *Conseil d'État* had begun by examining the compatibility of the relevant provisions of the Public Health Code with Articles 2, 8, 6 and 7 ECHR, before assessing whether the decision taken by Vincent Lambert's doctor had complied with the provisions of the Code. Its review had encompassed the lawfulness of the collective procedure and compliance with the substantive conditions laid down by law, which it considered – particularly in the light of the findings of the expert report – to have been satisfied. The *Conseil d'État* noted in particular that it was clear from the experts' findings that Vincent Lambert's clinical condition corresponded to a chronic vegetative state, that he had sustained serious and extensive damage whose severity, coupled with the period of five and a half years that had passed since the accident, led to the conclusion that it was irreversible and that there was a "poor clinical prognosis". In the view of the *Conseil d'État*, these findings confirmed those made by the doctor in charge. After stressing "the particular importance" which the doctor must attach to the patient's wishes, the *Conseil d'État* also sought to ascertain what Vincent Lambert's wishes had been.

As the latter had not drawn up any advance directives or designated a person of trust, the *Conseil d'État* took into consideration the testimony of his wife, Rachel Lambert. It noted that she and her husband, who were both nurses with experience of patients in resuscitation and those with multiple disabilities, had often discussed their professional experiences and that on several such occasions Vincent Lambert had voiced the wish not to be kept alive artificially in a highly dependent state. The *Conseil d'État* found that those remarks – the tenor of which was confirmed by one of Vincent Lambert's brothers – had been reported by Rachel Lambert in precise detail and with the corresponding dates. It also took account of the fact that several of Vincent Lambert's other siblings had stated that these remarks were in keeping with their brother's personality, past experience and views, and noted that the applicants had not claimed that he would have expressed remarks to the contrary. Lastly, the *Conseil d'État* observed that the consultation of the family, prescribed by law, had taken place.

It was the patient who was the principal party in the decision-making process and whose consent must remain at its centre; this was true even where the patient was unable to express his or her wishes. The Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations" recommended that the patient should be involved in the decision-making process by means of any previously expressed wishes, which may have been confided orally to a family member or close friend. Furthermore, in the absence of advance directives or of a "living will", a number of countries required that efforts be made to ascertain the patient's presumed wishes, by a variety of means (statements of the legal representative or the family, other factors testifying to the patient's personality and beliefs, and so forth).

In those circumstances, the *Conseil d'État* had been entitled to consider that the testimony submitted to it was sufficiently precise to establish what Vincent Lambert's wishes had been with regard to the withdrawal or continuation of his treatment.

iv. Final considerations: The Court found both the legislative framework laid down by domestic law, as interpreted by the *Conseil d'État*, and the decision-making process, which had been conducted in meticulous fashion in the present case, to be compatible with the requirements of Article 2 ECHR. As to the judicial remedies that had been available to the applicants, the Court reached the conclusion that the present case had been the subject of an in-depth examination in the course of which all points of view could be expressed and all

aspects had been carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies.

Consequently, the domestic authorities had complied with their positive obligations flowing from Article 2 ECHR, in view of the margin of appreciation left to them in the present case. Therefore, there has been no violation of Article 2 ECHR.

#### *Languages:*

English, French.



#### *Identification:* ECH-2015-2-005

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 16.06.2015 / **e)** 13216/05 / **f)** Chiragov and Others v. Armenia / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.  
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.  
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

#### *Keywords of the alphabetical index:*

Displacement, protection, positive obligation / Jurisdiction, territorial, effective control / Jurisdiction, territorial, scope / Property, enjoyment / Property, restitution, procedure / Property, claims mechanism.

#### *Headnotes:*

For the purposes of Article 1 ECHR a State will be considered to exercise effective control and therefore to have extraterritorial jurisdiction in respect of a self-proclaimed "republic" over which it has a significant and decisive influence and which survives by virtue

of the military, political, financial and other support given to it by the State.

The mere fact of participating in on-going peace negotiations on issues relating to displaced persons does not provide legal justification for interference with property rights under Article 1 Protocol 1 ECHR or absolve the State from taking other measures, especially when negotiations have been pending for a long time. Guidance as to which measures to take can be derived from relevant international standards. A particularly important step would be the establishment of a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing those concerned to have their property rights restored and to obtain compensation for the loss of their enjoyment.

### *Summary:*

I. The applicants are Azerbaijani Kurds who lived in the district of Lachin, in Azerbaijan. They stated that they were unable to return to their homes and property there, after having been forced to leave in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

At the time of the dissolution of the Soviet Union in December 1991, the Nagorno-Karabakh Autonomous Oblast ("the NKAO") was an autonomous province landlocked within the Azerbaijan Soviet Socialist Republic ("the Azerbaijan SSR"). There was no common border between the NKAO and the Armenian Soviet Socialist Republic ("the Armenian SSR"), which were separated by Azerbaijani territory, at the shortest distance by the district of Lachin. In 1989 the NKAO had a population of approximately 77% ethnic Armenians and 22% ethnic Azeris. In the district of Lachin, the majority of the population were Kurds and Azeris; only 5-6% were Armenians. Armed hostilities in Nagorno-Karabakh started in 1988. In September 1991 – shortly after Azerbaijan had declared its independence from the Soviet Union – the Regional Council of the NKAO announced the establishment of the "Nagorno-Karabakh Republic" ("NKR"), consisting of the territory of the NKAO and the Shahumyan district of Azerbaijan. Following a referendum in December 1991 – boycotted by the Azeri population – in which 99.9% of those participating voted in favour of the secession of the NKR from Azerbaijan, the "NKR" reaffirmed its independence from Azerbaijan in January 1992. Thereafter, the conflict gradually escalated into full-scale war. By the end of 1993, ethnic Armenian forces had gained control over almost the entire territory of the former NKAO as well as seven adjacent Azerbaijani regions. The conflict resulted in hundreds of thousands of internally-displaced people and refugees on both sides. In May

1994 the parties to the conflict signed a ceasefire agreement, which continued to hold. Negotiations for a peaceful solution were carried out under the auspices of the Organization for Security and Co-operation in Europe (OSCE). However, no final political settlement of the conflict had been reached. The self-proclaimed independence of the "NKR" had not been recognised by any state or international organisation. Prior to their accession to the Council of Europe in 2001, Armenia and Azerbaijan both gave undertakings to the Committee of Ministers and the Parliamentary Assembly, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict.

The district of Lachin, where the applicants lived, was attacked many times during the war. The applicants alleged that troops of both Nagorno-Karabakh and the Republic of Armenia were at the origin of the attacks. The Armenian Government maintained, however, that Armenia did not participate in the events, but that military action was carried out by the defence forces of Nagorno-Karabakh and volunteer groups. In mid-May 1992 Lachin was subjected to aerial bombardment, in the course of which many houses were destroyed. The applicants were forced to flee from Lachin to Baku. Since then they had not been able to return to their homes and properties because of Armenian occupation. In support of their claims that they had lived in Lachin for most of their lives until their forced displacement and that they had houses and land there, the applicants submitted various documents to the Court. In particular, all six applicants submitted official certificates ("technical passports") indicating that houses and plots of land in the district of Lachin had been registered in their names; birth certificates, including of their children, and/or marriage certificates; and written statements from former neighbours confirming that the applicants had lived in the district of Lachin.

### II.1. Preliminary objections

a. Exhaustion of domestic remedies – The respondent Government had not shown that there was a remedy – whether in Armenia or in the "NKR" – capable of providing redress in respect of the applicants' complaints. The legal provisions referred to by them were of a general nature and did not address the specific situation of dispossession of property as a result of armed conflict or in any other way related to a situation similar to that of the applicants. None of the domestic judgments submitted related to claims concerning the loss of homes or property by persons displaced in the context of the Nagorno-Karabakh conflict. Furthermore, given that the respondent Government had denied that their authorities had been involved in the events giving rise to the applicants' complaints or that Armenia exercised jurisdiction over

Nagorno-Karabakh and the surrounding territories, it would not have been reasonable to expect the applicants to bring claims for restitution or compensation before the Armenian authorities. Finally, as no political solution to the conflict had been reached and military build-up in the region had escalated in recent years, it was unrealistic to consider that any possible remedy in the unrecognised "NKR" could in practice provide redress to displaced Azerbaijanis.

The Court therefore dismissed the preliminary objection.

b. Victim status – The Court's case-law had developed a flexible approach regarding the evidence to be provided by applicants who claimed to have lost their property and home in situations of international or internal armed conflict. A similar approach was reflected in the UN "Principles on Housing and Property Restitution for Refugees and Displaced Persons" (Pinheiro Principles). The most significant pieces of evidence supplied by the applicants were the technical passports. Being official documents, they all contained drawings of houses and stated their sizes and measurements etc. The sizes of the plots of land in question were also indicated. The passports were dated between 1985 and 1990 and contained the applicants' names. They also included references to the respective land allocation decisions. In the circumstances, they provided *prima facie* evidence of title to property equal to that which had been accepted by the Court in many previous cases. The applicants had submitted further *prima facie* evidence with regard to property, including statements by former neighbours. The documents concerning the applicants' identities and residence also lent support to their property claims. Moreover, while all but the sixth applicant had failed to present title deeds or other primary evidence, regard had to be had to the circumstances in which they had been compelled to leave the district, abandoning it when it had come under military attack. Accordingly, the applicants had sufficiently substantiated their claims that they had lived in the district of Lachin for major parts of their lives until being forced to leave and that they had been in possession of houses and land at the time of their flight.

Under the Soviet legal system, there was no private ownership of land, but citizens could own residential houses. Plots of land could be allocated to citizens for special purposes such as farming or construction of individual houses. In such event, the citizen had a "right of use", limited to the specific purpose, which was protected by law and could be inherited. There was therefore no doubt that the applicants' rights in respect of the houses and land represented a substantive economic interest. In conclusion, at the time they had had to leave the district of Lachin, the

applicants had held rights to land and houses which constituted "possessions" within the meaning of Article 1 Protocol 1 ECHR. There was no indication that those rights had been extinguished afterwards. Their proprietary interests were thus still valid. Moreover, their land and houses also had to be considered their "homes" for the purposes of Article 8 ECHR.

The Court therefore dismissed the preliminary objection.

c. Jurisdiction of Armenia – In the Court's view, it was hardly conceivable that Nagorno-Karabakh – an entity with a population of less than 150,000 ethnic Armenians – would have been able, without the substantial military support of Armenia, to set up a defence force in early 1992 capable – against Azerbaijan and its population of seven million – of establishing control of the former NKAO and of conquering the whole or major parts of seven surrounding Azerbaijani districts. In any event, the military involvement of Armenia in Nagorno-Karabakh was, in several respects, formalised in 1994 through the "Agreement on Military Co-operation between the Governments of the Republic of Armenia and the Republic of Nagorno-Karabakh" which provided, in particular, that conscripts of Armenia and the "NKR" could do their military service in the other entity. The Court noted also that numerous reports and public statements, including from members and former members of the Armenian Government, demonstrated that Armenia, through its military presence and by providing military equipment and expertise, had been significantly involved in the Nagorno-Karabakh conflict from an early date. Statements from high-ranking officials who had played a central role in the dispute in question were of particular evidentiary value when they acknowledged facts or conduct which appeared to go against the official stance that the armed forces of Armenia had not been deployed in the "NKR" or the surrounding territories and could be construed as a form of admission. Armenia's military support had continued to be decisive for the control over the territories in question. Furthermore, it was evident from the facts established in the case that Armenia had given the "NKR" substantial political and financial support; its citizens were moreover required to acquire Armenian passports to travel abroad, as the "NKR" was not recognised by any State or international organisation. In conclusion, Armenia and the "NKR" were highly integrated in virtually all important matters and the "NKR" and its administration survived by virtue of the military, political, financial and other support given to it by Armenia. Armenia thus exercised effective control over Nagorno-Karabakh and the surrounding territories.

The Court therefore dismissed the preliminary objection.

## 2. Merits

a. Article 1 Protocol 1 ECHR: The applicants held rights to land and to houses which constituted “possessions” for the purposes of that provision. While the applicants’ forced displacement from Lachin fell outside the Court’s temporal jurisdiction, the Court had to examine whether they had been denied access to their property after the entry into force of the Convention on Human Rights in respect of Armenia in April 2002 and whether they had thereby suffered a continuous violation of their rights.

There had been no legal remedy, whether in Armenia or in the “NKR”, available to the applicants in respect of their complaints. Consequently, they had not had access to any legal means by which to obtain compensation for the loss of their property or to gain physical access to the property and homes left behind. Moreover, in the Court’s view, it was not realistic in practice for Azerbaijanis to return to Nagorno-Karabakh and the surrounding territories in the circumstances which had prevailed for more than twenty years after the ceasefire agreement. Those circumstances included in particular a continued presence of Armenian and Armenian-backed troops, ceasefire breaches on the line of contact, an overall hostile relationship between Armenia and Azerbaijan and so far no prospect of a political solution. There had accordingly been a continuing interference with the applicants’ right to peaceful enjoyment of their possessions.

As long as access to the property was not possible, the State had a duty to take alternative measures to secure property rights, as was acknowledged by the relevant international standards issued by the United Nations and the Council of Europe. The fact that peace negotiations under the auspices of the OSCE were continuing – including over issues relating to displaced persons – did not free the Government from their duty to take other measures, especially having regard to the fact that the negotiations had been on-going for over twenty years. It would therefore be important to establish a property claims mechanism which would be easily accessible and provide procedures operating with flexible evidentiary standards to allow the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of the enjoyment of their rights. While the respondent Government had had to provide assistance to hundreds of thousands of Armenian refugees and internally displaced persons, the protection of that group did not exempt the Government from their obligations towards Azerbaijani citizens as the applicants who had had to flee as a result of the conflict. In conclusion, as concerns the period under consideration, the Government had not justified denying the applicants

access to their property without providing them with compensation for that interference. There had accordingly been a continuing violation of the applicants’ rights under Article 1 Protocol 1 ECHR.

The Court therefore found a violation of Article 1 Protocol 1 ECHR.

b. Article 8 ECHR: All the applicants were born in the district of Lachin. Until their flight in May 1992 they had lived and worked there for all or major parts of their lives. Almost all of them had married and had children in the district. Moreover, they had earned their livelihood there and their ancestors had lived there. They had built and owned houses there in which they lived. It was thus clear that the applicants had long-established lives and homes in the district. They had not voluntarily taken up residence anywhere else, but had lived as internally displaced persons in Baku and elsewhere out of necessity. In the circumstances of the case, their forced displacement and involuntary absence from the district of Lachin could not be considered to have broken their link to the district, notwithstanding the length of time that had passed since their flight. For the same reasons as those which led to its findings under Article 1 Protocol 1 ECHR, the Court found that the denial of access to the applicants’ homes had constituted a continuing unjustified interference with their right to respect for their private and family lives as well as their homes.

The Court therefore found a violation of Article 8 ECHR.

c. Article 13 ECHR: The Armenian Government had failed to prove that a remedy capable of providing redress to the applicants in respect of their Convention complaints and offering reasonable prospects of success was available.

The Court therefore found a violation of Article 13 ECHR.

### *Cross-references:*

European Court of Human Rights:

- *Akdivar and Others v. Turkey*, 16.09.1996, *Reports of Judgments and Decisions* 1996-IV;
- *Al-Skeini and Others v. United Kingdom* [GC], no. 55721/07, 07.07.2011, *ECHR* 2011;
- *Catan and Others v. Moldova and Russia*, [GC], nos. 43370/04, 8252/05 and 18454/06, 19.10.2012, *ECHR* 2012 (extracts);
- *Cyprus v. Turkey* [GC], no. 25781/94, 12.05.2014, *ECHR* 2001-IV;



- *Damayev v. Russia*, no. 36150/04, 29.05.2012;
- *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 *et al.*, 26.01.1999, *ECHR* 2010;
- *Doğan and Others v. Turkey*, nos. 8811/02, 8813/02 and 8819/02, 29.06.2004, *ECHR* 2004-VI (extracts);
- *El-Masri v. the former Yugoslav Republic of Macedonia*, [GC], no. 39630/09, 13.12.2012, 08.07.2004, *ECHR* 2012;
- *Elsanova v. Russia* (dec.), no. 57952/00, 15.11.2005;
- *Ilaşcu and Others v. Moldova and Russia*, [GC], no. 48787/99, *ECHR* 2004-VII;
- *Kerimova and Others v. Russia*, nos. 17170/04 *et al.*, 03.05.2011;
- *Loizidou v. Turkey* (merits), no. 15318/89, 18.12.1996, *Reports of Judgments and Decisions* 1996-VI;
- *Lordos and Others v. Turkey*, no. 15973/90, 02.11.2010;
- *Niazi Kazali and Hakan Kazali v. Cyprus* (dec.), no. 49247/08, 06.03.2012;
- *Öneryıldız v. Turkey*, no. 48939/99, 30.11.2004, *ECHR* 2004-XII;
- *Orphanides v. Turkey*, no. 36705/97, 20.01.2009;
- *Prokopovich v. Russia*, no. 58255/00, 18.11.2004, *ECHR* 2004-XI (extracts);
- *Saveriades v. Turkey*, no. 16160/90, 22.09.2009;
- *Solomonides v. Turkey*, no. 16161/90, 20.01.2009;
- *Xenides-Arestis v. Turkey*, no. 46347/99, 22.12.2005.

#### Languages:

English, French.



#### Identification: ECH-2015-2-006

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 16.06.2015 / **e)** 40167/06 / **f)** *Sargsyan v. Azerbaijan* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

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

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

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

#### Keywords of the alphabetical index:

Jurisdiction, territorial, scope / Displacement, protection, positive obligation / Property, restitution, procedure / Property, enjoyment / Property claims mechanism.

#### Headnotes:

For the purposes of Article 1 ECHR, the exception developed in *Ilaşcu and Others v. Moldova and Russia* (dec.) [GC] limiting a State's responsibility in respect of parts of its internationally recognised territory which are occupied or under the effective control of another entity cannot be extended to disputed areas of the State's territory where it has not been established that they are occupied by the armed forces of another State or are under the control of a separatist regime. Any difficulties the State may encounter at a practical level in exercising its authority in the areas concerned will have to be taken into account in the assessment of the proportionality of the acts or omissions complained of.

Where access to property is not possible owing to safety considerations, the State has a duty under Article 1 Protocol 1 ECHR to take alternative measures in order to secure the applicant's property rights, irrespective of whether or not the State can be held responsible for his or her displacement. Which measures need to be taken will depend on the circumstances of the case. A particularly important step would be the establishment of a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing those concerned to have their property rights restored and to obtain compensation for the loss of their enjoyment.

#### Summary:

I. The applicant and his family, ethnic Armenians, used to live in the village of Gulistan, in the Shahumyan region of the Azerbaijan Soviet Socialist Republic ("the Azerbaijan SSR"), where he had a house and a plot of land. According to his submissions, his family was forced to flee from their home in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

At the time of the dissolution of the Soviet Union in December 1991, the Nagorno-Karabakh Autonomous Oblast ("the NKAO") was an autonomous province landlocked within the Azerbaijan SSR. In 1989 the NKAO had a population of approximately 77% ethnic Armenians and 22% ethnic Azeris. The Shahumyan region shared a border with the NKAO and was situated north of it. According to the applicant, prior to the conflict, 82% of the population of Shahumyan were ethnic Armenians.

For a presentation of conflict see [ECH-2015-2-006].

Shahumyan, where Mr Sargsyan's family lived, did not form part of the NKAO, but was later claimed by the "NKR" as part of its territory. In 1991 special-purpose militia units of the Azerbaijan SSR launched an operation in the region with the stated purpose of "passport checking" and disarming local Armenian militants in the region. However, according to various sources, the Azerbaijan SSR militia units used this as a pretext to expel the Armenian population from a number of villages in the region. In 1992, when the conflict escalated into war, the Shahumyan region came under attack by Azerbaijani forces. The applicant and his family fled Gulistan following heavy bombing of the village. He and his wife subsequently lived as refugees in Yerevan, Armenia.

In support of his claim that he had lived in Gulistan for most of his life until his forced displacement, the applicant submitted a copy of his former Soviet passport and his marriage certificate. He also submitted a copy of an official certificate ("technical passport") indicating that a two-storey house in Gulistan and more than 2,000 square metres of land were registered in his name, photographs of the house, and written statements from former officials of the village council and former neighbours confirming that he had a house and a plot of land in Gulistan.

## II.1. Preliminary objections

a. Exhaustion of legal remedies at domestic level – In view of the conflict and the resulting absence of diplomatic relations between Armenia and Azerbaijan and the closing of the borders there could be considerable practical difficulties in the way of a person from one country in bringing legal proceedings in the other. The Government of Azerbaijan had failed to explain how the legislation on the protection of property would apply to the situation of an Armenian refugee who wished to claim restitution or compensation for the loss of property left behind in the context of the conflict. They had not provided any example of a case in which a person in the applicant's situation had been successful before the Azerbaijani courts. The Government had thus failed

to prove that a remedy capable of providing redress in respect of the applicant's complaints was available. Therefore, the preliminary objection was dismissed.

b. Jurisdiction and responsibility of Azerbaijan – It was undisputed that Gulistan was situated on the internationally recognised territory of Azerbaijan. Accordingly, a presumption arose under the Court's case-law that Azerbaijan had jurisdiction over the village. It was therefore for the respondent Government to show that exceptional circumstances existed which would limit their responsibility under Article 1 ECHR. Gulistan and the Azerbaijani military forces were located on the north bank of a river while the "NKR" positions were located on the south bank. On the basis of the material before the Court it was not possible to establish whether there had been an Azerbaijani military presence in Gulistan – although there were a number of indications – throughout the period falling within its temporal jurisdiction which had commenced in April 2002, when Azerbaijan ratified the European Convention on Human Rights. It was significant to note, however, that none of the parties had alleged that the "NKR" had any troops in the village.

The Court was not convinced by the respondent Government's argument that, since the village was located in a disputed area, surrounded by mines and encircled by opposing military positions, Azerbaijan had only limited responsibility under the European Convention on Human Rights. In contrast to other cases in which the Court had found that a State had only limited responsibility over part of its territory due to occupation by another State or the control by a separatist regime, it had not been established that Gulistan was occupied by the armed forces of another State.

Taking into account the need to avoid a vacuum in European Convention on Human Rights protection, the Court did not consider that the respondent Government had demonstrated the existence of exceptional circumstances of such a nature as to qualify their responsibility under the European Convention on Human Rights. The situation in the instant case was more akin to that which had existed in *Assanidze v. Georgia* in that from a legal standpoint the respondent Government had jurisdiction as the territorial state and full responsibility under the European Convention on Human Rights, even though they might encounter difficulties at a practical level in exercising their authority in the area of Gulistan. Such difficulties would have to be taken into account when it came to assessing the proportionality of the acts or omissions complained of by the applicant. Therefore, the preliminary objection was dismissed.

## 2. Merits

a. Article 1 Protocol 1 ECHR: The Court's case-law had developed a flexible approach regarding the evidence to be provided by applicants who claimed to have lost their property and homes in situations of international or internal armed conflict. A similar approach was reflected in the UN "Principles on Housing and Property Restitution for Refugees and Displaced Persons" (Pinheiro Principles).

In the instant case, the applicant had submitted a technical passport established in his name and relating to a house and land in Gulistan, including a detailed plan of the house. It was not contested that a technical passport was, as a rule, only issued to the person entitled to the house. It thus constituted, in the Court's view, *prima facie* evidence that he held title to the house and the land, which evidence had not convincingly been rebutted by the Government. Moreover, the applicant's submissions as to how he had obtained the land and permission to build a house were supported by statements from a number of family members and former villagers. While those statements had not been tested in cross-examination, they were rich in detail and demonstrated that the people concerned had lived through the events described. Last but not least, the Court had regard to the circumstances in which the applicant had been compelled to leave when the village had come under military attack. It is hardly astonishing that he had been unable to take complete documentation with him. Accordingly, taking into account the totality of the evidence presented, the Court found that the applicant had sufficiently substantiated his claim that he had a house and a plot of land in Gulistan at the time of his flight in 1992.

In the absence of conclusive evidence that the applicant's house had been completely destroyed before the entry into force of the European Convention on Human Rights in respect of Azerbaijan, the Court proceeded on the assumption that it still existed, though in a badly damaged state. In conclusion, there was no factual basis for the Government's objection *ratione temporis*.

Under the Soviet legal system, there was no private ownership of land, but citizens could own residential houses. Plots of land could be allocated to citizens for special purposes such as farming or the construction of individual houses. In such cases, the citizen had a "right of use" limited to the specific purpose which was protected by law and could be inherited. There was therefore no doubt that the applicants' rights in respect of the houses and land represented a substantive economic interest. Having regard to the autonomous meaning of Article 1 Protocol 1 ECHR,

the applicant's right to personal property of the house and his "right of use" in respect of the land constituted "possessions" under that provision.

While the applicant's forced displacement from Gulistan fell outside the Court's temporal jurisdiction, the Court had to examine whether the respondent Government had breached his rights in the ensuing situation, which had continued after the entry into force of the European Convention on Human Rights in respect of Azerbaijan.

At the date of the Court's judgment, more than one thousand individual applications lodged by persons who had been displaced during the conflict were pending before the Court, slightly more than half of which were directed against Armenia and the remainder against Azerbaijan. While the issues raised fell within the Court's jurisdiction as defined in Article 32 ECHR, it was the responsibility of the two States involved to find a political settlement of the conflict. Comprehensive solutions to such questions as the return of refugees to their former places of residence, repossession of their property and/or payment of compensation could only be achieved through a peace agreement. Indeed, prior to their accession to the Council of Europe, Armenia and Azerbaijan had given undertakings to resolve the Nagorno-Karabakh conflict through peaceful means. The Court could not but note that compliance with the above accession commitment was still outstanding.

The instant case was the first in which the Court had had to rule on the merits of a complaint against a State which had lost control over part of its territory as a result of war and occupation, but which at the same time was alleged to be responsible for refusing a displaced person access to property in an area remaining under its control.

The Court examined whether the respondent Government had complied with their positive obligations under Article 1 Protocol 1 ECHR and whether a fair balance between the demands of the public interest and the applicant's fundamental right of property had been struck. The applicant's complaint raised two issues: firstly, whether the respondent Government were under an obligation to grant him access to his house and land in Gulistan and, secondly, whether they were under a duty to take any other measures to protect the applicant's property right and/or to compensate him for the loss of its use.

International humanitarian law did not appear to provide a conclusive answer to the question whether the Government were justified in refusing the applicant access to Gulistan. Having regard to the fact that Gulistan was situated in an area of military

activity and at least the area around it was mined, the Court accepted the respondent Government's argument that refusing civilians, including the applicant, access to the village was justified by safety considerations. However, as long as access to the property was not possible, the State had a duty to take alternative measures in order to secure property rights – and thus to strike a fair balance between the competing public and individual interests concerned – as was acknowledged by the relevant international standards issued by the United Nations (Pinheiro Principles) and the Council of Europe. The Court underlined that the obligation to take alternative measures did not depend on whether or not the State could be held responsible for the displacement itself.

The fact that peace negotiations under the auspices of the OSCE were on-going – which included issues relating to displaced persons – did not free the respondent Government from their duty to take other measures, especially having regard to the fact that the negotiations had been on-going for over twenty years. It would therefore be important to establish a property claims mechanism which would be easily accessible and provide procedures operating with flexible evidentiary standards to allow the applicant and others in his situation to have their property rights restored and to obtain compensation for the loss of the enjoyment of their rights. While the respondent Government had had to provide assistance to hundreds of thousands of internally displaced persons (Azerbaijanis who had had to flee from Armenia and from Nagorno-Karabakh and the surrounding districts) the protection of that group did not exempt the respondent Government entirely from its obligations towards Armenians such as the applicant who had had to flee as a result of the conflict. In that connection, the Court referred to the principle of non-discrimination laid down in Article 3 of the above-mentioned Pinheiro Principles.

In conclusion, the impossibility for the applicant to have access to his property in Gulistan without the Government taking any alternative measures in order to restore his property rights or to provide him with compensation had placed an excessive burden on him. There had accordingly been a continuing violation of his rights under Article 1 Protocol 1 ECHR.

b. Article 8 ECHR: The applicant's complaint encompassed two aspects: lack of access to his home in Gulistan and lack of access to his relatives' graves. Having regard to the evidence submitted by the applicant (a copy of his former Soviet passport and his marriage certificate, and a number of witness statements), the Court found it established that he had lived in Gulistan for the major part of his life until being forced to leave. He thus had had a "home"

there. His prolonged absence could not be considered to have broken the continuous link with his home. Furthermore, as the applicant must have developed most of his social ties in Gulistan, his inability to return to the village also affected his "private life". Finally, his cultural and religious attachment with his late relatives' graves in Gulistan could also fall within the notion of "private and family life".

Referring to its findings under Article 1 Protocol 1 ECHR, the Court held that the same considerations applied in respect of the applicant's complaint under Article 8 ECHR. His lack of access to his home and his relatives' graves in Gulistan without the respondent Government taking any measures in order to address his rights or at least provide compensation had placed a disproportionate burden on him. There had accordingly been a continuing violation of Article 8 ECHR.

c. Article 13 ECHR: The respondent Government had failed to prove that a remedy capable of providing redress to the applicant in respect of his European Convention on Human Rights complaints and offering reasonable prospects of success was available. Moreover, the Court's findings under Article 1 Protocol 1 ECHR and Article 8 ECHR related to the State's failure to create a mechanism which would allow him to have his rights in respect of property and home restored and to obtain compensation for the losses suffered. There was therefore a close link between the violations found under Article 1 Protocol 1 ECHR and Article 8 ECHR on the one hand and the requirements of Article 13 ECHR on the other. There had accordingly been a continuing breach of Article 13 ECHR.

#### Cross-references:

European Court of Human Rights:

- *Ilasçu and Others v. Moldova and Russia* [GC], no.48787/99, 08.07.2004, *Reports of Judgments and Decisions* 2004-VII;
- *Assanidze v. Georgia* [GC], no. 71503/01, 08.04.2004, *ECHR* 2004-II;
- *Chiragov and Others v. Armenia* [GC], no. 13216/05, 16.06.2015, *ECHR* 2015.

#### Languages:

English, French.



*Identification:* ECH-2015-2-007

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 16.06.2015 / **e)** 64569/09 / **f)** Delfi AS v. Estonia / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Internet, news portal, user's comments, portal, liability / Internet, host, civil and criminal liability, unlawful comments / Internet, content responsibility / Internet, anonymity, right / Hate speech / Violence, incitement.

*Headnotes:*

In order to resolve the question whether domestic courts' decisions holding an Internet news portal liable for comments posted by third parties are in breach of its freedom of expression, the following aspects are relevant: the context of the comments, the measures applied by the portal to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the portal's liability, and the consequences of the domestic proceedings for the portal. The rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 ECHR, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.

*Summary:*

I. The applicant company owned one of the largest Internet news portals in Estonia. In 2006, following the publication of an article on the applicant's portal concerning a ferry company, a number of comments containing personal threats and offensive language directed against the ferry-company owner were posted under the article. Defamation proceedings were instituted against the applicant company, which was ultimately ordered to pay 320 euros in damages.

II. This was the first case in which the Court had to examine a complaint concerning user-generated expressive activity on the Internet. Acknowledging important benefits that could be derived from the Internet in the exercise of freedom of expression, the Court reiterated that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights. Moreover, the Court observed that, in the present case, the impugned comments constituted hate speech and direct incitement to violence, that the applicant company's news portal was one of the biggest Internet media in the country and that there had been public concern about the controversial nature of the comments it attracted. Therefore, the scope of examination of the case was limited to the assessment of the "duties and responsibilities" of Internet news portals, in the light of Article 10.2 ECHR, when they provided for economic purposes a platform for user-generated comments on previously published content and some users engaged in clearly unlawful forms of speech.

The Court was satisfied that domestic legal instruments made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments on its news portal. As a professional publisher, the applicant company was in fact in a position to assess the risks related to its activities and must have been able to foresee the legal consequences which these could entail. Therefore, the interference in issue was "prescribed by law" within the meaning of Article 10 ECHR.

As regards the necessity of the interference with the applicant company's freedom to impart information, the Court attached particular weight to the professional and commercial nature of the news portal, and to the fact that the applicant company had an economic interest in the posting of comments. Moreover, only the applicant company had the technical means to modify or delete the comments published on the news portal. Against this background, its involvement in making public the comments on its articles on the portal went beyond that of a passive, purely technical service provider.

As to whether the liability of the actual authors of the comments could serve as an alternative to the liability of the Internet news portal, the Court recalled that anonymity on the Internet, although an important value, had to be balanced against other rights and interests. In reaching this conclusion, it was mindful of the interest of Internet users in not disclosing their identity, but also pointed to the sometimes very negative effects of an unlimited

dissemination of information on the Internet. In this regard, the Court referred to a judgment in which the Court of Justice of the European Union found that the individual's fundamental rights, as a rule, overrode the economic interests of the search engine operator and the interests of other Internet users (Joined Cases C 236/08 to C 238/08, *Google France and Google* [2010] ECR I 2417.) Moreover, the Internet allowed for different degrees of anonymity, with providers sometimes being the only ones able to identify Internet users that wished to remain anonymous *vis à vis* the public. In the present case, the uncertain effectiveness of measures allowing the establishment of the identity of the authors of the comments, coupled with the lack of instruments put in place by the Internet portal with a view to making it possible for a victim of hate speech to effectively bring a claim against the authors of the comments, supported the domestic courts' view that the injured person had to have the choice of bringing a claim against the applicant company or the authors of the comments.

As to the measures taken by the applicant company to tackle the publication of unlawful comments on its portal, an obligation for large news portals to take effective measures to limit the dissemination of hate speech and speech inciting violence could not be equated to "private censorship". In fact, the ability of a potential victim of such speech to continuously monitor the Internet was more limited than the ability of a large commercial Internet news portal to prevent or remove unlawful comments. Notwithstanding the fact that mechanisms had been in place on the applicant company's website to deal with comments amounting to hate speech or speech inciting to violence that and that in many cases these mechanisms could function as an appropriate tool for balancing the rights and interests of all involved, they had been insufficient in the specific circumstances of the case, as the unlawful comments had remained online for six weeks.

Finally, a sanction of 320 Euros could by no means be considered disproportionate to the breach established by the domestic courts. It also did not appear that the applicant company had had to change its business model as a result of the domestic proceedings. It followed from the above that the domestic courts' imposition of liability on the applicant company had been based on relevant and sufficient grounds and had not constituted a disproportionate restriction on its right to freedom of expression. Therefore, there has been no violation of Article 10 ECHR.

### Cross-references:

European Court of Human Rights:

- *Krone Verlag GmbH & Co. KG v. Austria* (no. 4), no. 72331/01, 09.11.2006;
- *Cornif v. Romania*, no. 42872/02, 11.01.2007;
- *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18.12.2012, ECHR 2012.

Court of Justice of the European Union:

- *Google France and Google*, Joined Cases C 236/08 to C 238/08, [2010] ECR I 2417.

### Languages:

English, French.



### Identification: ECH-2015-2-008

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 30.06.2015 / **e)** 41418/04 / **f)** Khoroshenko v. Russia / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

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

### Keywords of the alphabetical index:

Prisoner, visit, limitation / Prisoner, visit, physical contact, ban / Prisoner, family, contact / Prisoner, reintegration.

### Headnotes:

The application, over an extremely long period and solely on account of the gravity of the sentence, of a regime characterised by a low frequency of authorised

visits, as well as by various rules on the arrangements for prison visits, such as the ban on direct physical contact, separation by a glass wall or metal bars, the continuous presence of prison guards during visits, and the limit on a maximum number of adult visitors, preventing him from maintaining contacts with his child and elderly parents and not consistent with the need for rehabilitation and reintegration of long-sentence prisoners, had breached the prisoner's right to protection of his private and family life, in violation of Article 8 ECHR.

### Summary:

I. The applicant is currently serving a sentence of life imprisonment. During the first ten years of detention in a special-regime correctional colony, he was placed under the strict regime, implying, *inter alia*, restrictions on the frequency and length of visits and a limitation on the number of visitors, and various surveillance measures in respect of those meetings. The applicant could correspond in writing with the outside world, but there was a complete ban on telephone calls except in an emergency.

II. The measures in respect of the visits to which the applicant was entitled during the ten years spent in prison under a strict regime amounted to interference with his right to respect for his "private life" and his "family life" within the meaning of Article 8 ECHR.

The applicant's detention under the strict regime within the special-regime correctional colony had a clear, accessible and sufficient legal basis.

For ten years, the applicant had been able to maintain contact with the outside world through written correspondence, but all other forms of contact had been subject to restrictions. He had been unable to make any telephone calls other than in an emergency, and could receive only one visit from two adult visitors every six months, and then for four hours. He was separated from his relatives by a glass partition and a prison guard had been present and within hearing distance at all times.

The restrictions, imposed directly by law, had been applied to the applicant solely on account of his life sentence, irrespective of any other factors. The regime had been applicable for a fixed period of ten years, which could be extended in the event of bad behaviour, but could not be shortened. The restrictions had been combined within the same regime for a fixed period and could not be altered.

A sentence of life imprisonment could only be handed down in Russia for a limited group of extremely reprehensible and dangerous actions and, in the case

at hand, the authorities had had, among other things, to strike a delicate balance between a number of private and public interests. The Contracting States enjoyed a wide margin of appreciation in questions of penal policy. It could not therefore be excluded, in principle, that the gravity of a sentence could be tied, at least to some extent, to a type of prison regime.

According to the regulations at European level on the visiting rights of prisoners, including life-sentence prisoners, the national authorities were under an obligation to prevent the breakdown of family ties and to provide life-sentence prisoners with a reasonably good level of contact with their families, with visits organised as often as possible and in as normal a manner as possible. Although there was a considerable variation in practices regarding the regulation of prison visits, those in the Contracting States set out a minimum frequency of prison visits for life-sentence prisoners of no lower than once every two months. Further, the majority of the Contracting States did not draw any distinction between prisoners on the basis of their sentence and a generally accepted minimum frequency of visits was not less than once a month. In this context, the Russian Federation appeared to be the only jurisdiction within the Council of Europe to regulate the prison visits of all life-sentence prisoners as a group by combining an extremely low frequency of prison visits and the lengthy duration of such a regime.

That situation had the consequence of narrowing the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private and family life in this sphere.

In contrast to the Russian Constitutional Court in its decision of June 2005, the European Court considered that the regime had involved a combination of restrictions which considerably worsened the applicant's situation compared with that of an average Russian prisoner serving a long-term sentence. Those restrictions could not be seen as inevitable or inherent in the very concept of a prison sentence.

The Government submitted that the restrictions were aimed at "the restoration of justice, reform of the offender and the prevention of new crimes". The applicant had been able to have only one cell mate throughout the relevant period and had belonged to a group of life-sentence prisoners who served their sentences separately from other detainees. The Court was struck by the severity and duration of the restrictions in the applicant's case and, more specifically, by the fact that, for an entire decade, he had been entitled to only two short visits a year.

The Court's case-law had consistently taken the position that, in general, prisoners continued to enjoy

all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention fell expressly within the scope of Article 5 ECHR, and that a prisoner did not forfeit his or her Convention rights merely because he or she had been detained following conviction.

Thus, the relevant Russian legislation did not take the interests of the convict and his or her relatives and family members adequately into account, as required by Article 8 ECHR, the content of other international-law instruments concerning family visits and the practice of international courts and tribunals, which invariably recognised as a minimum standard for all prisoners, without drawing any distinction between life-sentence and other types of prisoners, the right to an “acceptable” or “reasonably good” level of contact with their families.

Referring to the Constitutional Court’s decisions, the Government had contended that the restrictions served to reform the offender. The applicant’s prison regime did not pursue the aim of reintegration, but was rather aimed at isolating him. However, the Code of Execution of Criminal Sentences mentioned the possibility for a life-sentence prisoner to request release on parole after serving a period of twenty-five years. The very strict nature of the applicant’s regime prevented life-sentence prisoners from maintaining contacts with their families and thus seriously complicated their social reintegration and rehabilitation instead of fostering and facilitating it. This was also contrary to the recommendations of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) in this area and to Article 10.3 of the International Covenant on Civil and Political Rights, in force with respect to Russia since 1973, and also several other instruments.

Thus, the interference with the applicant’s private and family life resulting from the application for a long period, solely on account of the gravity of his sentence, of a regime characterised by such a low frequency of authorised visits, had been, as such, disproportionate to the aims invoked by the Government. The effect of this measure had been intensified by the long period of time it was applied, and also by various rules on the practical arrangements for prison visits, such as the ban on direct physical contact, separation by a glass wall or metal bars, the continuous presence of prison guards during visits, and the limit on the number of adult visitors. This had made it especially difficult for the applicant to maintain contact with his child and elderly parents during a time when maintaining family relationships had been particularly crucial for all the parties involved. In addition, certain of his relatives

and members of the extended family had simply been unable to visit him in prison throughout this entire period.

Having regard to the combination of various long-lasting and severe restrictions on the applicant’s ability to receive prison visits and the fact that the regime in question failed to give due consideration to the principle of proportionality and to the need for rehabilitation and reintegration of long-sentence prisoners, the measure in question had not struck a fair balance between the applicant’s right to the protection of his private and family life, on the one hand, and the aims referred to by the respondent Government on the other. It followed that the respondent State had overstepped its margin of appreciation in this regard.

The Court therefore found a violation of Article 8 ECHR.

#### Cross-references:

European Court of Human Rights:

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- *Aleksandra Dmitriyeva v. Russia*, no. 9390/05, 03.11.2011;
- *Aliiev v. Ukraine*, no. 41220/98, 29.04.2003;
- *Bastone v. Italy* (dec.), no. 59638/00, 11.07.2006, ECHR 2005-II (extracts);
- *Benediktov v. Russia*, no. 106/02, 10.05.2007;
- *Boulois v. Luxembourg* [GC], no. 37575/04, 03.04.2012, ECHR 2012;
- *Boyle and Rice v. United Kingdom*, nos. 9659/82 and 9658/82, 27.04.1988, Series A, no. 131;
- *Dickson v. United Kingdom* [GC], no. 44362/04, 04.12.2007, ECHR 2007-V;
- *Enea v. Italy* [GC], no. 74912/01, 17.09.2009, ECHR 2009;
- *Epnens Gefners v. Latvia*, no. 37862/02, 29.05.2012;
- *Estrikh v. Latvia*, no. 73819/01, 18.01.2007;
- *Gouliyev v. Russia*, no. 24650/02, 19.06.2008;
- *Hagyó v. Hungary*, no. 52624/10, 23.04.2013;
- *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, 08.07.2014, ECHR 2014 (extracts);
- *Hirst v. United Kingdom* (no. 2) [GC], no. 74025/01, 06.10.2005, ECHR 2005-IX;
- *Horych v. Poland*, no. 13621/08, 17.04.2012;
- *Igor Ivanov v. Russia*, no. 34000/02, 07.06.2007;
- *Indelicato v. Italy* (dec.), no. 31143/96, 06.07.2000;
- *Iorgov v. Bulgaria*, no. 40653/98, 11.03.2004;
- *Kalashnikov v. Russia* (dec.), no. 47095/99, 15.07.2002, ECHR 2002-VI;



- *Klamecki v. Poland* (no. 2), no. 31583/96, 03.04.2003;
- *Kučera v. Slovakia*, no. 48666/99, 17.07.2007;
- *Laduna v. Slovakia*, no. 31827/02, 13.12.2011, ECHR 2011;
- *Lavents v. Latvia*, no. 58442/00, 28.11.2002;
- *Lorsé and Others v. the Netherlands*, no. 52750/99, 04.02.2003;
- *Maiorano and Others v. Italy*, no. 28634/06, 15.12.2009;
- *Maltabar and Maltabar v. Russia*, no. 6954/02, 29.01.2009;
- *Mastromatteo v. Italy* [GC], no. 37703/97, 24.10.2002, ECHR 2002-VIII;
- *Messina v. Italy* (no. 2), no. 25498/94, 28.09.2000, ECHR 2000-X;
- *Moiseyev v. Russia*, no. 62936/00, 09.10.2008;
- *Nazarenko v. Latvia*, no. 76843/01, 01.02.2007;
- *Nowicka v. Poland*, no. 30218/96, 03.12.2002;
- *Öcalan v. Turkey* (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, 18.03.2014;
- *Ospina Vargas v. Italy*, no. 40750/98, 14.10.2004;
- *Piechowicz v. Poland*, no. 20071/07, 17.04.2012;
- *Płoski v. Poland*, no. 26761/95, 12.11.2002;
- *Rotaru v. Romania* [GC], no. 28341/95, 04.05.2000, ECHR 2000-V;
- *Schemkamper v. France*, no. 75833/01, 18.10.2005;
- *Trosin v. Ukraine*, no. 39758/05, 23.02.2012;
- *Valeriy Lopata v. Russia*, no. 19936/04, 30.10.2012;
- *Van der Ven v. the Netherlands*, no. 50901/99, 04.02.2003, ECHR 2003-II;
- *Vinter and Others v. United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, 09.07.2013, ECHR 2013 (extracts).

#### Languages:

English, French.



#### Identification: ECH-2015-2-009

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 27.08.2015 / **e)** 46470/11 / **f)** *Parrillo v. Italy* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

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

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

#### Keywords of the alphabetical index:

Bioethic / *In vitro* fertilisation / Embryo, *in vitro* fertilised, donation, prohibition / Private life, core right / Embryo, possession.

#### Headnotes:

The concept of “private life” within the meaning of Article 8 ECHR applied to a woman’s wish to have released into her possession embryos obtained from her IVF treatment and destined not to be implanted but donated to research. That ability to exercise a conscious and considered choice regarding the fate of her embryos concerned an intimate aspect of her personal life that related to her right to self-determination.

Although an important one, the right to donate embryos to scientific research was not one of the core rights attracting the protection of Article 8 ECHR as it did not concern a particularly important aspect of the applicant’s existence and identity. Consequently, the respondent State should be afforded a wide margin of appreciation in that respect.

#### Summary:

I. In 2002 the applicant had recourse to assisted reproduction techniques, undergoing *in vitro* fertilisation (“IVF”) treatment with her partner in a centre for reproductive medicine (“the centre”). The five embryos obtained from the IVF treatment were placed in cryopreservation, but the applicant’s partner died before the embryos could be implanted. After deciding not to have them implanted, the applicant sought to donate them to scientific research and thus contribute to promoting advances in treatment for diseases that were difficult to cure.

Accordingly, she made a number of unsuccessful verbal requests for release of the embryos at the centre where they were being stored. In a letter of 14 December 2011, the applicant asked the director of the centre to release the five cryopreserved embryos to her so that they could be used for stem-cell research. The director refused to comply with her request on the grounds that this type of research was banned and punishable as a criminal offence in Italy under Section 13 of Law no. 40 of 19 February 2004 (hereinafter, the “Law”).

The embryos in question are currently stored in the cryogenic storage bank at the centre.

II.a.i. Applicability – The Court was called upon for the first time to rule on the question whether the “right to respect for private life” guaranteed by Article 8 ECHR could encompass the right invoked before it, namely, to make use of embryos obtained from *in vitro* fertilisation for the purposes of donating them to scientific research.

The subject matter of the case concerned the restriction of the right asserted by the applicant to decide the fate of her embryos, a right which at the very most related to “private life”. In the cases examined by the Court that had raised the particular question of the fate of embryos obtained from assisted reproduction, the Court had had regard to the parties’ freedom of choice. The Italian legal system also attached importance to the freedom of choice of parties to *in vitro* fertilisation regarding the fate of embryos not destined for implantation.

In the instant case the Court also had to have regard to the link existing between the person who had undergone *in vitro* fertilisation and the embryos thus conceived, and which was due to the fact that the embryos contained the genetic material of the person in question and accordingly represented a constituent part of that person’s genetic material and biological identity.

Accordingly, the applicant’s ability to exercise a conscious and considered choice regarding the fate of her embryos concerned an intimate aspect of her personal life and accordingly related to her right to self-determination. Article 8 ECHR, from the standpoint of the right to respect for private life, was therefore applicable in the present case.

ii. Merits – The statutory ban on donating to scientific research embryos obtained from an *in vitro* fertilisation and not destined for implantation constituted an interference with the applicant’s right to respect for her private life. At the time when the applicant had had recourse to *in vitro* fertilisation there had been no legal provisions regulating the donation of non-implanted embryos obtained by that technique. Consequently, before the Law came into force the applicant had not in any way been prevented from donating her embryos to scientific research.

The Court acknowledged that the “protection of the embryo’s potential for life” could be linked to the aim of protecting morals and the rights and freedoms of others. However, this did not involve any assessment by the Court as to whether the word “others”

extended to human embryos, in the terms in which this concept was meant by the Government, namely, according to which, in the Italian legal system, the human embryo was considered as a subject of law entitled to the respect due to human dignity.

Whilst the right invoked by the applicant to donate embryos to scientific research was important, it was not one of the core rights attracting the protection of Article 8 ECHR as it did not concern a particularly important aspect of the applicant’s existence and identity. Consequently, and having regard to the principles established in its case-law, the Court considered that the respondent State should be afforded a wide margin of appreciation in the present case.

Furthermore, the question of the donation of embryos not destined for implantation clearly raised delicate moral and ethical questions. There was no European consensus on the subject, with some States permitting research on human embryonic cell lines, others expressly prohibiting it and others permitting this type of research only under certain strict conditions, requiring for example that the purpose be to protect the embryo’s health or that the research use cells imported from abroad.

The international instruments confirmed that the domestic authorities enjoyed a broad margin of discretion to enact restrictive legislation where the destruction of human embryos was at stake. The limits imposed at European level aimed rather to temper excesses in this area.

The drafting of the domestic Law in question had given rise to substantial discussion that had taken account of the different scientific and ethical opinions and questions on the subject. It had been the subject of several referendums, which had been declared invalid for failure to reach the required threshold of votes cast. Accordingly, during the drafting process of the Law the legislature had already taken account of the different interests at stake, particularly the State’s interest in protecting the embryo and that of the persons concerned in exercising their right to individual self-determination in the form of donating their embryos to research.

The applicant alleged that the Italian legislation on medically assisted reproduction was inconsistent, in support of her submission that the interference complained of was disproportionate. The Court’s task was not to review the consistency of the Italian legislation in the abstract. In order to be relevant for the purposes of the Court’s analysis, the inconsistencies complained of by the applicant had to relate to the subject of the complaint that she raised before the

Court, namely, the restriction of her right to self-determination regarding the fate of her embryos.

With regard to the research carried out in Italy on imported embryonic cell lines taken from embryos that had been destroyed abroad, whilst the right asserted by the applicant to decide the fate of her embryos related to her wish to contribute to scientific research, that could not however be seen as a circumstance directly affecting her. Furthermore, the embryonic cell lines used in Italian laboratories for research purposes were never produced at the request of the Italian authorities. Accordingly, the deliberate and active destruction of a human embryo could not be compared with the use of cell lines obtained from human embryos destroyed at an earlier stage.

Even supposing that there were inconsistencies in the legislation as alleged by the applicant, these were not capable of directly affecting the right invoked by her in the instant case.

Lastly, the choice to donate the embryos in question to scientific research emanated from the applicant alone, since her partner was dead. There was no evidence certifying that her partner, who had had the same interest in the embryos in question as the applicant at the time of fertilisation, would have made the same choice. Moreover, there were no regulations governing this situation at domestic level.

Accordingly, the Government had not overstepped the wide margin of appreciation enjoyed by them in the present case and the ban in question had been necessary in a democratic society.

The Court therefore found no violation of Article 8 ECHR.

b. With regard to the applicability of Article 1 Protocol 1 ECHR to the facts of the case, the parties had diametrically opposed views on the matter, especially regarding the status of the human embryo in vitro. However, it was not necessary to examine here the sensitive and controversial question of when human life began as Article 2 ECHR was not in issue in the instant case.

With regard to Article 1 Protocol 1 ECHR, it did not apply to the present case. Having regard to the economic and pecuniary scope of that Article, human embryos could not be reduced to "possessions" within the meaning of that provision. This part of the application was therefore rejected as incompatible *ratione materiae*.

The Court therefore declare inadmissible the Article 1 Protocol 1 ECHR.

### Cross-references:

European Court of Human Rights:

- *A, B and C v. Ireland* [GC], no. 25579/05, 16.12.2010, *ECHR* 2010;
- *Ali Koçintar v. Turkey* (dec.), no. 77429/12, 01.07.2014;
- *Beyeler v. Italy* [GC], no. 33202/96, 05.01.2000, *ECHR* 2000-I;
- *Broniowski v. Poland* [GC], no. 31443/96, 28.09.2005, *ECHR* 2004-V;
- *Brozicek v. Italy*, no. 10964/84, 19.12.1989, Series A, no. 167;
- *C.G.I.L. and Cofferati v. Italy*, no. 46967/07, 24.02.2009;
- *Christine Goodwin v. United Kingdom* [GC], no. 28957/95, 11.07.2002, *ECHR* 2002-VI;
- *Çınar v. Turkey*, no. 17864/91, 05.09.1994, decision of the Commission;
- *Costa and Pavan v. Italy*, no. 54270/10, 28.08.2012;
- *Dickson v. United Kingdom* [GC], no. 44362/04, 04.12.2007, *ECHR* 2007-V;
- *Dudgeon v. United Kingdom*, no. 7525/76, 22.10.1981, Series A, no. 45;
- *Evans v. United Kingdom* [GC], no. 6339/05, 10.04.2007, *ECHR* 2007-I;
- *Fretté v. France*, no. 36515/97, 26.02.2002, *ECHR* 2002-I;
- *Gratzinger and Gratzingerova v. the Czech Republic* (dec.), no. 39794/98, 28.09.2004, *ECHR* 2002-VII;
- *Grišankova and Grišankovs v. Latvia* (dec.), no. 36117/02, 30.11.2000, *ECHR* 2003-II (extracts);
- *Hasan Uzun v. Turkey* (dec.), no. 10755/13, 30.04.2013;
- *Iatridis v. Greece* [GC], no. 31107/96, 01.11.1998, *ECHR* 1999-II;
- *Immobiliare Saffi v. Italy* [GC], no. 22774/93, 28.07.1999, *ECHR* 1999-V;
- *K. and T. v. Finland* [GC], no. 25702/94, 12.07.2001, *ECHR* 2001-VII;
- *Knecht v. Romania*, no. 10048/10, 02.10.2012;
- *Kopecký v. Slovakia* [GC], no. 44912/98, 28.09.2004, *ECHR* 2004-IX;
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- *Leandro Da Silva v. Luxembourg*, no. 30273/07, 11.02.2010;
- *M.C. and Others v. Italy*, no. 5376/11, 03.09.2013;
- *McFarlane v. Ireland* [GC], no. 31333/06, 10.09.2010;
- *Melnītis v. Latvia*, no. 30779/05, 28.02.2012;
- *Mifsud v. France* (dec.) [GC], no. 57220/00, 29.03.2006, *ECHR* 2002-VIII;

- *Norris v. Ireland*, no. 10581/83, 26.10.1988, Series A, no. 142;
- *Olsson v. Sweden* (no. 1), no. 10465/83, 24.03.1988, Series A, no. 130;
- *P., C. and S. v. United Kingdom*, no. 56547/00, 16.07.2002, ECHR 2002-VI;
- *Pretty v. United Kingdom*, no. 2346/02, 29.04.2002, ECHR 2002-III;
- *S.A.S. v. France* [GC], no. 43835/11, 01.07.2014, ECHR 2014 (extracts);
- *S.B. and Others v. Belgium* (dec.), no. 63403/00, 06.04.2004;
- *S.H. and Others v. Austria* [GC], no. 57813/00, 03.11.2011, ECHR 2011;
- *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, 17.09.2009;
- *Union Alimentaria Sanders SA v. Spain*, no. 11681/85, 11.12.1987, DR 54, pp. 101 and 104;
- *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, 07.11.2013, ECHR 2013 (extracts);
- *Vučković and Others v. Serbia* [GC], no. 17153/11, 25.03.2014;
- *W. v. Germany*, no. 10785/84, 18.07.1986, *Reports of Judgments and Decisions* (DR) 48, p. 104;
- *X, Y and Z v. United Kingdom*, no. 21830/93, 22.04.1997, *Reports of Judgments and Decisions* 1997-II.

#### Languages:

English, French.



#### Identification: ECH-2015-2-010

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 28.09.2015 / **e)** 23380/09 / **f)** Bouyid v. Belgium / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

Investigation, effective / Police, treatment, cruel, inhumane, degrading / Police, physical force.

#### Headnotes:

Any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of Article 3 ECHR. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question.

#### Summary:

I. The applicants, two brothers, one of whom was a minor at the material time, were questioned separately by the police concerning unrelated incidents. They each alleged that they had been slapped in the face once by police officers. They lodged complaints and applied to intervene as civil parties, but their suits were unsuccessful.

II.a.i. Establishment of the facts – In order to benefit from presumptions of fact, individuals claiming to be victims of a violation of Article 3 ECHR must demonstrate that they display marks of ill-treatment inflicted when they were under the control of the police or a similar authority.

The medical certificates provided by the applicants, which had been drawn up on the day in question shortly after the applicants' departure from the police station, mention erythema and bruising which could have been caused by slaps to the face. Furthermore, it was not disputed that the applicants had not displayed such marks when they had entered the police station.

Finally, while the police officers in question had, throughout the domestic proceedings, consistently denied having slapped the applicants, the latter had equally consistently stated the opposite. Moreover, given the major shortcomings in the criminal investigation conducted, the truthfulness of the police officers' statements cannot be inferred solely from the fact that the investigation failed to provide information to the contrary. Nor is there any evidence to corroborate the theory put forward by the Government at the hearing (but not before the national courts) that the applicants might have slapped themselves in order to create a case against the police.

The Court therefore deemed it sufficiently established that the bruising described in the certificates provided by the applicants had been caused while they were under the control of the officers in the police station.

ii. Classification of the treatment inflicted on the applicants – The Government simply denied that any slaps had ever been administered. It appeared from the case file that each slap had been an impulsive act in response to an attitude perceived as disrespectful, which was certainly insufficient to establish the necessity of using such physical force. Consequently, the applicants' dignity had been undermined and there had therefore been a violation of Article 3 ECHR.

The Court emphasised that the administration of a slap by a police officer to a person who is completely under his control constitutes a serious attack on the latter's dignity.

A slap to the face has a considerable impact on the person receiving it, because it affects the part of the person's body which expresses his individuality, manifests his social identity and constitutes the centre of his senses – sight, speech and hearing – which are used for communication with others.

Given that it may well suffice that the victim is humiliated in his own eyes for there to have been degrading treatment within the meaning of Article 3 ECHR, a slap – even if it is isolated, not premeditated and devoid of any serious or lasting effect on the person receiving it – may be perceived as a humiliation by the person receiving it.

When the slap is administered by police officers to individuals who are under their control, it highlights the superiority/inferiority relationship. The fact that the victims know that such an act is unlawful, constitutes a breach of moral and professional ethics by the officers and is unacceptable, may furthermore arouse in them a feeling of arbitrary treatment, injustice and powerlessness.

Moreover, persons who are held in police custody or are even simply taken or summoned to a police station for an identity check or questioning – as in the applicants' case – and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability. The authorities who are under a duty to protect them flout this duty by inflicting the humiliation of a slap.

The fact that the slap may have been administered thoughtlessly by an officer who was exasperated by the victim's disrespectful or provocative conduct was irrelevant. The Grand Chamber therefore departed

from the Chamber's approach on this point. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. In a democratic society ill-treatment is never an appropriate response to problems facing the authorities. The police, specifically, must "not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances" (European Code of Police Ethics). Furthermore, Article 3 ECHR imposes a positive obligation on the State to train its law-enforcement officials in such a manner as to ensure their high level of competence in their professional conduct so that no one is subjected to torture or treatment that runs counter to that provision.

Lastly, the first applicant had been a minor at the material time. It is vital for law-enforcement officers who are in contact with minors in the exercise of their duties to take due account of the vulnerability inherent in their young age. Police behaviour towards minors may be incompatible with the requirements of Article 3 ECHR simply because they are minors, whereas it might be deemed acceptable in the case of adults. Therefore, law-enforcement officers must show greater vigilance and self-control when dealing with minors.

In conclusion, the slap administered to each of the applicants by the police officers while they were under their control in the police station did not correspond to recourse to physical force that had been made strictly necessary by their conduct, and had thus diminished their dignity.

Given that the applicants referred only to minor bodily injuries and had not demonstrated that they had undergone serious physical or mental suffering, the treatment in question could not be described as inhuman or, a fortiori, torture. The Court therefore found that the present case involved degrading treatment.

The Court therefore found a violation of Article 3 ECHR.

b. The investigating authorities had failed to devote the requisite attention to the applicants' allegations, despite their being substantiated by the medical certificates which they had submitted for inclusion in the case file, or to the nature of the act, involving a law-enforcement officer slapping an individual who was completely under his control. Furthermore, the Court notes the unusual length of the investigation. Almost five years elapsed between the first applicant's complaint and the Court of Cassation judgment marking the close of the proceedings, and a

period of over four years and eight months had elapsed in the second applicant's case. Therefore, the applicants had not benefited from an effective investigation.

The Court therefore found a violation of Article 3 ECHR.

#### Cross-references:

European Court of Human Rights:

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- *Aksoy v. Turkey*, no. 21987/93, 18.12.1996, *Reports of Judgments and Decisions* 1996-VI;
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- *Darraj v. France*, no. 34588/07, 04.11.2010;
- *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, 01.07.2010;
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- *Egmez v. Cyprus*, no. 30873/96, 21.12.2000, CEDH 2000-XII;
- *El-Masri v. former Yugoslav Republic of Macedonia* [GC], no. 39630/09, 13.12.2012, ECHR 2012;
- *Gäfgen v. Germany* [GC], no. 22978/05, 01.06.2010, ECHR 2010;
- *Georgia v. Russia (I)* [GC], no. 13255/07, 03.07.2014, ECHR 2014 (extracts);
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- *Jalloh v. Germany* [GC], no. 54810/00, 11.07.2006, ECHR 2006-IX;
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- *S.W. v. United Kingdom*, no. 42750/09, 22.11.1995, § 44, Series A, no. 335-B;
- *Salman v. Turkey* [GC], no. 21986/93, 27.06.2000, ECHR 2000-VII;
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- *Selmouni v. France* [GC], no. 25803/94, 28.07.1999, ECHR 1999-V;
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#### 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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<sup>1</sup> 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.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> For example, rules of procedure.

<sup>4</sup> For example, age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> For example, State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>10</sup> For example, assessors, office members.

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<sup>11</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>12</sup> Including questions on the interim exercise of the functions of the Head of State.

<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.



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<sup>21</sup> 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).

<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

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<sup>30</sup> For the withdrawal of proceedings, see also 1.4.10.4.

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<sup>32</sup> May be used in combination with Chapter 1.2. Types of claim.

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<sup>34</sup> Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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<sup>36</sup> Only for issues concerning applicability and not simple application.

<sup>37</sup> 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.).

<sup>38</sup> Including its Protocols.

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<sup>39</sup> Presumption of constitutionality, double construction rule.

<sup>40</sup> Including the principle of a multi-party system.

<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

<sup>43</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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<sup>44</sup> Including maintaining confidence and legitimate expectations.

<sup>45</sup> Principle according to which general sub-statutory acts must be based on and in conformity with the law.

<sup>46</sup> Prohibition of punishment without proper legal base.

<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.

<sup>52</sup> Including the body responsible for revising or amending the Constitution.

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<sup>54</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>55</sup> For example, the granting of pardons.

<sup>56</sup> For regional and local authorities, see Chapter 4.8.

<sup>57</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>58</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>59</sup> In particular, commissions of enquiry.

<sup>60</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

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<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>64</sup> Including their creation, composition and terms of reference.

<sup>65</sup> State budgetary contribution, other sources, etc.

<sup>66</sup> For the publication of laws, see 3.15.

<sup>67</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>68</sup> For local authorities, see 4.8.

<sup>69</sup> Derived directly from the Constitution.

<sup>70</sup> See also 4.8.

<sup>71</sup> 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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<sup>73</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>74</sup> Other than the body delivering the decision summarised here.

<sup>75</sup> Positive and negative conflicts.

<sup>76</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>77</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

<sup>78</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

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<sup>80</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>81</sup> See also keywords 5.3.41 and 5.2.1.4.

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<sup>84</sup> For questions of jurisdiction, see keyword 1.3.4.6.

<sup>85</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>86</sup> For example, *Panachage*, voting for whole list or part of list, blank votes.

<sup>87</sup> For aspects related to fundamental rights, see 5.3.41.2.

<sup>88</sup> For the creation of political parties, see 4.5.10.1.

<sup>89</sup> For example, names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>90</sup> Tracts, letters, press, radio and television, posters, nominations, etc.

<sup>91</sup> For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

<sup>92</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>93</sup> For example, signatures on electoral rolls, stamps, crossing out of names on list.

<sup>94</sup> For example, in person, proxy vote, postal vote, electronic vote.

<sup>95</sup> This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

<sup>96</sup> For example, Auditor-General.

<sup>97</sup> Includes ownership in undertakings by the state, regions or municipalities.

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<sup>98</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

<sup>99</sup> For example, Court of Auditors.

<sup>100</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>101</sup> *Staatszielbestimmungen*.

<sup>102</sup> Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

<sup>103</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

<sup>104</sup> Positive and negative aspects.

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<sup>105</sup> For rights of the child, see 5.3.44.

<sup>106</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

<sup>107</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>108</sup> Including all questions of non-discrimination.

<sup>109</sup> Taxes and other duties towards the state.

<sup>110</sup> "One person, one vote".

<sup>111</sup> 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).

<sup>112</sup> For example, discrimination between married and single persons.

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<sup>113</sup> This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

<sup>114</sup> Detention by police.

<sup>115</sup> Including questions related to the granting of passports or other travel documents.

<sup>116</sup> May include questions of expulsion and extradition.

<sup>117</sup> 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.

<sup>118</sup> In the meaning of Article 6.1 of the European Convention on Human Rights.

<sup>119</sup> This keyword covers the right of appeal to a court.

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<sup>122</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>123</sup> This keyword also includes the right to freely communicate information.

<sup>124</sup> Militia, conscientious objection, etc.

<sup>125</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>126</sup> Including compensation issues.

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<sup>127</sup> This keyword also covers "Freedom of work".

<sup>128</sup> This should also cover the term freedom of enterprise.

<sup>129</sup> Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.



## **Keywords of the alphabetical index \***

\* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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