

THE BULLETIN

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

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

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

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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

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

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

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Kosovo	V. Dula		

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

Strasbourg, June 2016

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

Luxembourg, Ukraine.

Précis of important decisions of the reference period 1 September 2015 – 31 December 2015 will be published in the next edition, *Bulletin* 2016/1, for the following countries:

Azerbaijan, Bulgaria, Kyrgyz Republic, Monaco, Montenegro, South Africa, Slovakia, Sweden.

Armenia

Constitutional Court

Statistical data

1 May 2015 – 31 August 2015

- 59 applications have been filed, including:
 - 13 applications filed by the President
 - 42 applications as individual complaints
 - 1 application by a domestic court
 - 1 application by the Prosecutor General
 - 2 applications filed by the Human Rights Defender
- 25 cases have been admitted for review, including:
 - 19 applications on the compliance of obligations stipulated in international treaties with the Constitution
 - 1 case on the basis of the application filed by the Human Rights Defender
 - 2 cases on the basis of the application of a domestic court
 - 3 cases on the basis of individual complaints concerning the constitutionality of certain provisions of laws.
- 22 cases heard and 22 decisions delivered including:
 - 15 decisions on the compliance of obligations stipulated in international treaties with the Constitution
 - 3 decisions on cases initiated on individual complaints concerning the constitutionality of certain provisions of laws
 - 2 cases on the basis of the application of the deputies of National Assembly
 - 2 cases on the basis of the application of a domestic court

Statistical data

1 September 2015 – 31 December 2015

- 71 applications have been filed, including:
 - 13 applications, filed by the President
 - 55 applications as individual complaints
 - 2 applications by the Prosecutor General
 - 1 application filed by the Human Rights Defender
- 26 cases have been admitted for review, including:
 - 13 applications on the compliance of obligations stipulated in international treaties with the Constitution
 - 13 applications on the constitutionality of certain provisions of laws, including:
 - 1 case on the basis of the application filed by the Human Rights Defender
 - 2 cases on the basis of the application of the Prosecutor General
 - 10 cases on the basis of individual complaints concerning the constitutionality of certain provisions of laws
- 24 cases heard and 24 decisions delivered including:
 - 17 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
 - 7 decisions the constitutionality of certain provisions of laws, including:
 - 4 decisions on cases initiated on individual complaints concerning the constitutionality of certain provisions of laws
 - 2 decisions on the basis of the application of the Human Rights Defender
 - 1 decision on the application of a national court.



Austria

Constitutional Court

Important decisions

Identification: AUT-2015-3-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 08.10.2015 / **e)** G 264/2015 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

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

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

Keywords of the alphabetical index:

Internet, evaluation, opinion, publish experience / Request, delete, erase / Balance, public interest, data subject, controller.

Headnotes:

In case of a request to erase personal data used in a public data application, the interests of the data subject, the controller of the data application and the general public must be weighed into the decision.

Summary:

I. According to Article 28.2 of the Data Protection Act (*Datenschutzgesetz*), if personal data are used in a public data application, the data subject has the right to object to this use at any time without the need to give reasons. If such an objection is raised, the controller of the application must erase the data within eight weeks.

The applicant before the Constitutional Court runs an Internet portal listing practising doctors in Austria. Each doctor has a site that covers the name, practice address and telephone number, contractual

relationship with health insurance funds, office hours, and certificates of the Austrian General Medical Council (*Ärztelkammer*). Users can search for these data and can publish evaluations and reports of their experiences with the individual doctor.

In a proceeding before the civil courts, a medical doctor had brought an action against the applicant, seeking the omission of the publication on the applicant's website or any other processing of further specified data as well as the erasure of these data from the applicant's website.

The applicant (as defendant in this proceeding) filed a complaint with the Constitutional Court. He claimed that Article 28.2 of the Data Protection Act contradicted Article 10 ECHR.

II. The Constitutional Court held that Article 28.2 of the Data Protection Act interfered with the right to freedom of expression and information as laid down in Article 10 ECHR.

The obligation to erase personal data upon objection aimed at protecting the rights of the person concerned; thus, it served a legitimate aim under Article 10 ECHR. However, Article 28.2 of the Data Protection Act granted the person concerned the absolute right to object to a data application without allowing the courts to strike a fair balance between the rights of the person and the interests of the controller of the application or those of the recipients. In particular, the provision at issue did not permit the consideration of the individual circumstances of the case (e.g., whether the information to be erased concerned the role of the data subject in public life). However, Article 10.2 ECHR requires the weighing of conflicting interests.

As a result, the Constitutional Court repealed Article 28.2 of the Data Protection Act as being contrary to Article 10 ECHR and, therefore, unconstitutional.

Cross-references:

European Court of Human Rights:

- *Sunday Times v. United Kingdom*, no. 6538/74, 26.04.1979, Series A, no. 30; *Special Bulletin – Leading Cases* [ECH-1979-S-001];
- *Leander v. Sweden*, no. 9248/81, 26.03.1987, Series A, no. 116; *Special Bulletin – Leading Cases* ECH-1987-S-002].

Court of Justice the European Union:

- C-131/12, *Google Spain SL et al. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13.05.2014.

Languages:

German.



Belarus Constitutional Court

Important decisions

Identification: BLR-2015-3-004

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 27.11.2015 / **e)** D-1004/2015 / **f)** On Legal Regulation of Initiation of Private Criminal Prosecutions / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2015; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

- 3.10 General Principles – **Certainty of the law.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.13 General Principles – **Legality.**
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law.**
- 5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

Keywords of the alphabetical index:

Prosecution, private / Criminal prosecution.

Headnotes:

The State shall provide access to justice for every victim of crime and if the victim dies, the State shall guarantee judicial protection of his or her honour and dignity. Where no rules exist to address the initiation of private criminal prosecution, the legislator must address the gaps concerning criminal proceedings and the examination of criminal cases in private prosecution in the Criminal Procedure Code.

Summary:

I. This case, concerned a legal gap in the legislation regulating the initiation by a prosecuting body of private criminal prosecution in the absence of information about a person who committed a crime as well as the initiation of private criminal prosecution in

case of the death of the victim of the crime on the basis of submissions by his or her next of kin. The proceedings were initiated *ex officio* by the Constitutional Court in accordance with Article 158 of the Law “On the Constitutional Proceedings”.

The Constitution stipulates that everyone shall be guaranteed protection of his or her rights and freedoms by a competent, independent and impartial court within the time limits specified by law (Article 60 of the Constitution).

The Criminal Procedure Code (hereinafter, the “CPC”) establishes a list of offences that result in initiation of private prosecutions (Article 26.2).

A criminal case of private prosecution shall be initiated by an individual affected by the crime, his or her legal representative or a representative of a legal entity by submitting an application on the offence committed against him or her to the district (city) court. This application shall contain, among others, information about the person who has committed the offence. In the absence of such information, the Court shall return the application to the applicant (Articles 426.1, 426.2, 427.1 of the CPC).

II. When considering the case, the Constitutional Court proceeded from the following.

After examining the CPC, the Constitutional Court confirmed the lack of constitutional and legal requirements for the prosecuting body to initiate private criminal prosecutions in absence of information about the person who committed the crime and to possibly initiate such criminal proceedings where the victim dies per the applications submitted by his or her next of kin.

According to the Court, the power granted to individuals to initiate private criminal prosecutions and to execute criminal proceedings shall be considered as an additional guarantee of protection of the victims’ legitimate rights and interests. This does not exempt the State from carrying out the constitutional functions and obligations to ensure the rule of law and legal order, human rights and freedoms and the realisation of the right to judicial protection guaranteed to everyone. In this context, the State shall be obliged to provide access to justice for every victim of crime and where the victims dies, guarantee judicial protection of his or her honour and dignity.

In order to ensure the constitutional principles of the rule of law and exercise the constitutional right of everyone to judicial protection, the Constitutional Court has recognised the need to address the aforementioned legal gap in constitutional and legal

regulation. The Council of Ministers shall prepare a draft law on making amendments and addenda to the CPC and submit it to the House of Representatives of the National Assembly, in accordance with the established procedure.

Languages:

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



Identification: BLR-2015-3-005

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 16.12.2015 / **e)** D-1006/2015 / **f)** On the conformity of the Law of the Republic of Belarus “On Making Alterations and Addenda to the Law of the Republic of Belarus “On the Citizenship of the Republic of Belarus” to the Constitution of the Republic of Belarus / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2015; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality**.

Keywords of the alphabetical index:

Citizenship, acquisition, conditions.

Headnotes:

The sovereign right of the State to regulate citizenship provides the legislator free discretion to determine the principles, grounds, terms and procedures for the acquisition and loss of Belarusian citizenship. The constitutional principle of the rule of law becomes crucial to legislation on citizenship, which should be developed on the basis of the Constitution and in line with the generally recognised principles of international law and international obligations of the State. The legislator’s application of the *jus sanguinis* principle in granting citizenship to a child in respect of whom Belarusian parenthood has

been established is recognised by the Constitutional Court. This approach aims to avoid conflicts of law and promotes uniform law enforcement.

Summary:

I. This case concerned the constitutionality of the Law “On Making Alterations and Addenda” to the Law “On the Citizenship of the Republic of Belarus” (hereinafter, the “Law”). Obligatory preliminary review (i.e., abstract review) is required for any law adopted by Parliament before the President signs it.

II. The Constitutional Court underlined, first, that citizenship represents constitutional and legal regulation of a specific political and legal bond between a citizen and the State. That bond determines the scope of their reciprocal rights and obligations, which, taken together, constitute the political and legal status of a citizen.

The Court noted that the Law under review is consistent with the basic international legal acts on human rights that enshrine, *inter alia*, the right to citizenship. It is referred to in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Nationality of 6 November 1997, the Helsinki Document 1992 “The Challenges of Change”, adopted by the Conference for Security and Co-operation in Europe, etc.

In the Report on Consequences of State Succession for Nationality, adopted by the European Commission for Democracy through Law (Venice Commission) on 13-14 September 1996, it is underlined that the subject of nationality – an essential prerogative of state sovereignty in the determination and identity of its population – requires a distinct reference to the notion of the rule of law (§ 36). The concept of the rule of law involves in particular: codifying the nationality issue with legislation accessible and comprehensible to the citizen; removing any discriminatory elements in terms of human rights and fundamental freedoms from the definition of nationals; observing the proportionality principle in granting, refusing or changing nationality; providing an effective judicial remedy for acts involving deprivation of nationality; seeking the optimum solution for compliance with the principles of the Constitution and the fundamental rights in implementing and interpreting the law (§ 39).

Based on the supremacy of the Constitution, the Court believes that the sovereign state has the right to regulate citizenship. As such, the legislator has been granted free discretion to establish the principles, grounds, terms and procedures for acquiring and terminating citizenship. At that moment,

the constitutional principle of the rule of law becomes crucial: it suggests that legal regulation in this area be based on the provisions of the Constitution and be in line with the generally recognised principles of international law and international obligations of the state.

Second, the Law develops the list of grounds for citizenship to be acquired at birth. So, an alteration introduced by Article 1.4.2 of the Law to Article 13 of the Law on the Citizenship stipulates that a child shall acquire Belarusian citizenship at birth if on the day of his or her birth, the child’s parents (or a single parent) who are (is) temporarily or permanently resident in the Republic of Belarus, are stateless provided that the child was born in the territory of the Republic of Belarus.

Thus, the legislator lawfully applied the *jus soli* principle in establishing a legal mechanism for citizenship to be acquired by a child who was born in the territory of the Republic of Belarus and whose parents reside in the Republic of Belarus and are stateless.

The Court noted that in introducing the mentioned alteration to the Law on Citizenship, the legislator adhered to the principle of law generally recognised with regard to statelessness of persons residing in the territory of the State, which should be reduced. The Court was also guided by the nationality principle, expressing the country’s commitment to avoid statelessness (Article 3.6 of the Law on the Citizenship).

Third, in its decisions, the Constitutional Court repeatedly noted that the rule of law includes a number of elements, such as legal certainty, which implies clarity, accuracy, consistency and logical coherence of legal rules. In order to implement the principle of legal certainty relating to the period of continuous residence in the Republic of Belarus (residence requirement), which is among citizenship requirements, the Law clarifies the concept of continuous period of permanent residence (Article 1.5.5). Thus, in accordance with the addition to Article 14.1.4 of the Law on Citizenship, the period of residence shall be considered to be continuous if, before applying for admission to citizenship, a person has left the country for no longer than three months of each year during the last seven years.

The principle of legal certainty is also adhered to in Article 1.11 of the Law, according to which Chapter 5 of the Law on Citizenship (Articles 23-27) has been restated.

Therefore, the new version of Article 27.4 of the Law on Citizenship provides that a child, who is a foreign national or stateless, shall become a citizen if it has been established that one of his or her parents is a Belarusian citizen; the child acquires Belarusian citizenship from the day of such establishment.

This approach by the legislator in regulating the mentioned relationship is based on the primacy of the *jus sanguinis* principle and is aimed at avoiding conflicts of law and to develop uniform law-enforcement when the citizenship of a child is determined and the Belarusian citizenship of one of his or her parents has been established.

In view of the revealed constitutional and legal meaning of the Law, the Court deems that the contents of the Law aims to improve the legal mechanism for the exercise of constitutional provisions on citizenship. The rules of the Law under review are also based on the generally recognised principles of international law and treaties to which the Republic of Belarus is a party.

The Constitutional Court therefore recognised as constitutional the Law “On Making Alterations and Addenda to the Law of the Republic of Belarus “On the Citizenship of the Republic of Belarus”.

Languages:

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



Belgium Constitutional Court

Important decisions

Identification: BEL-2015-3-009

a) Belgium / b) Constitutional Court / c) / d) 01.10.2015 / e) 132/2015 / f) / g) *Moniteur belge* (Official Gazette), 22.10.2015 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies.**
 3.16 General Principles – **Proportionality.**
 3.17 General Principles – **Weighing of interests.**
 3.18 General Principles – **General interest.**
 5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**
 5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture.**
 5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Cultural heritage, protection / Cultural heritage, preservation / Equality, equality of citizens before the law, general principle / Environment, protection, archaeological sites / Environment, protection, cultural heritage / Environment, protection, property, right, restriction / Home, notion, commercial premises / Private property, protection / Property, right, restriction / Domiciliary visit, authorisation, court, *ex parte* proceedings / Constitution and treaty, combination / Constitution and treaty, similar provisions.

Headnotes:

Any interference in property rights must strike a fair balance between the demands of the general interest

of the community and the need to protect individuals' right to peaceful enjoyment of their possessions.

In accordance with the principle of equality of citizens with regard to public burdens, the authorities may not, in the absence of compensation, impose burdens in excess of those that individuals must bear in the public interest.

To determine whether local arrangements for protecting the built heritage are compatible with the right to respect for private life, it has to be established whether the authority issuing the decree has struck a fair balance between all the rights and interests concerned. The right to enter a building with the authorisation of the court, but after *ex parte* proceedings only, constitutes a disproportionate infringement of the right to the inviolability of the home (Article 15 of the Constitution).

Summary:

I. The non-profit association "*Koninklijke Vereniging der Historische Woonsteden en Tuinen van België*" and other persons requested the Court to set aside the Flemish Region Decree of 12 July 2013 on the built heritage.

The decree required the holders of rights *in rem* (including the owners) over fixed properties classified by the public authorities as "protected monuments", or the users of these properties, to maintain them in a satisfactory state and to seek authorisation from the Flemish built environment agency for any work carried out on them, even if it was not subject to a building permit. This protection also included the prohibition on principle of the partial or total demolition of such properties, disfiguring, damaging or destroying them or carrying out work that reduced their heritage value.

In their first complaint, the applicant parties maintained that the decree did not provide for adequate compensation for the heavy financial burdens imposed on owners or for an obligation to purchase on the part of the public authorities. The applicants argued that this was incompatible with Articles 10 and 11 of the Constitution, combined with Article 1 Protocol 1 ECHR, and with the principle of equality of citizens with regard to public burdens.

In a second complaint, the applicant parties argued that the right of access to private homes and commercial premises granted to public officials appointed by the Flemish Government and the photographic records made of the physical state of the buildings concerned, authorised by the impugned decree, breached the right to the protection of private life, as embodied in Articles 10, 11, 15 and 22 of the

Constitution, combined with Articles 6 and 8 ECHR and Article 1 Protocol 1 ECHR.

II. Regarding the restrictions on property rights, the Court first referred to the right to compensation in the event of expropriation, laid down in Article 16 of the Constitution, and the right to the peaceful enjoyment of one's possessions in Article 1 Protocol 1 ECHR.

The Court considered that this provision of international law was similar in scope to Article 16 of the Constitution and that the body of safeguards it established was indivisible from those embodied in this Article of the Constitution. The Court therefore took account of the former when considering the impugned provisions.

Compensation was only required when and to the extent that the effects of the public servitude or the restriction of the property rights of the group of citizens or institutions concerned exceeded the burden that could be imposed on an individual in the public interest.

The Court considered that as a matter of principle it was for the ordinary courts to determine, after regarding all the public and private aspects of each case, whether the burden arising from the imposition of a protection order on the holders of rights *in rem* over protected assets or the owners of cultural assets that they contend justified compensation, and to determine the level of that compensation.

In the current setting-aside application, the Court must nevertheless establish whether the lack of any compensation, which would entail a limitation on access to the courts, was reasonably justifiable.

The Court found that the impugned decree did not provide for any direct compensation, either for the restriction imposed on the right to the peaceful enjoyment on one's possessions and the right to dispose freely of the protected asset, or for the potential reduction in its market value as a result of the protective measure.

The Court referred to Article 23.3.4 of the Constitution, which required regional elected authorities to safeguard the right to the protection of a healthy environment. The Court had to abide by these authorities' assessment of what constituted the public interest, unless this assessment was unreasonable. The framers of the Constitution had interpreted the right to the protection of a healthy environment in broad terms. It encompassed the right to effective land use planning, including respect for nature and the heritage.

The Court noted that the decree made no provision for any compensation scheme but did not prevent the courts from considering whether, in any specific case involving a protection order, compensation should be granted, according to the principle of equality of citizens with regard to public burdens. The Court found that the first complaint was unfounded, subject to the proviso that the decree must be interpreted as authorising the courts, in accordance with this principle, to take account of all the concrete evidence submitted and of citizens' reasonable expectations concerning the solidarity they are expected to display.

Regarding the alleged violation of the right to respect for private life, the subject of the second complaint, the Court referred firstly to the right to protection of the home (Article 15 of the Constitution) and the right to respect for private life (Article 22 of the Constitution and Article 8 ECHR). It also referred to the case-law of the European Court of Human Rights.

According to this case-law, when formulating policies that entailed public interference in private lives, the public authorities enjoyed a margin of appreciation with regard to the balance to be struck between the competing interests of individuals and of society as a whole. However, this margin of appreciation was not unlimited: to determine whether a legal rule was compatible with the right to respect for private life, it must be established whether the authority issuing the decree had struck a fair balance between all the rights and interests concerned. The Court had to consider whether the power granted to officials responsible for the built heritage to enter private homes and commercial premises was a disproportionate infringement of the inviolability of the home enshrined in Article 15 of the Constitution, as interpreted in the light of Article 8.1 ECHR.

The Court stated that entitlement to respect for the home was a civil right within the meaning of Article 6.1 ECHR. Since the exercise of the right to enter inhabited premises constituted interference with the right to respect for the home, related disputes must be dealt with in the light of the safeguards embodied in this provision.

According to the Court, which also took account of the case-law of the European Court of Human Rights, the prior involvement of an independent and impartial judge offered a major safeguard for ensuring compliance with the conditions governing breaches of the inviolability of the home. However, the absence of prior judicial authorisation could be offset in certain circumstances by *ex post* judicial scrutiny, which was thus an essential safeguard for ensuring that the interference in question was compatible with Article 8 ECHR.

The Court took account of the fact that in this case the buildings were not entered for the purposes of detecting or investigating offences or any other breaches of the law or for monitoring compliance with legislation. The examination took place prior to and in the context of the issuing of a protective measure.

It found that in this case, heritage officials' right to enter private homes and commercial premises – which admittedly could only take place with the authorisation of the President of the Court – was incompatible with the right to inviolability of the home. The reason is that the court's authorisation had to be sought through a unilateral application and not after proceedings involving both parties.

Languages:

French, Dutch, German.



Identification: BEL-2015-3-010

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 01.10.2015 / **e)** 133/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 30.11.2015 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Right to social assistance, *standstill* obligation / Social assistance, exclusion / Foreign national, legal residence, work permit / Foreign national, legal residence, paid occupation / Foreign national, social assistance.

Headnotes:

By denying the eligibility of social assistance to a category of foreign nationals who are lawfully residing in the country, the impugned legislative provision significantly reduces the level of protection available to persons in this category. To be compatible with Article 23 of the Constitution, this significant reduction must be justified on grounds of public interest.

While the legitimate objective of combating fraud may justify certain measures, such as refusal to grant social assistance to foreign nationals who can be shown to be trying to obtain it unjustifiably or terminating the right of residence of foreign nationals who have obtained it unlawfully, this cannot justify denying social assistance eligibility to an abstractly defined category of foreign nationals lawfully residing in the country in cases where a social welfare centre has confirmed their state of destitution, thus denying them the right to lead a life in keeping with human dignity. The impugned measure is disproportionate to the objectives pursued.

Summary:

I. The Court was asked to rule on two preliminary questions submitted by the Liège labour court concerning the entitlement to social assistance of foreign nationals authorised to reside in Belgium under a type-B work permit or a professional card. The provision in question, which had been incorporated into the Public Social Welfare Offices Institutional Act by a programme act of 28 June 2013, deprived these foreign nationals of entitlement to social assistance. The labour court therefore asked whether this was in breach of the *standstill* principle embodied in Article 23 of the Constitution, whether or not taken in conjunction with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution).

II. In its judgment, the Constitutional Court noted first that, until the provision in question came into force, the only categories of persons excluded from entitlement to social assistance, which did not prevent them from receiving urgent medical assistance, were foreign nationals residing illegally in Belgium, together with, for a limited period, certain European nationals and their family members.

Regarding Article 23 of the Constitution, which enshrined the right to lead a life in keeping with human dignity and its associated economic, social and cultural rights, the Court observed that these rights included the right to social assistance. Article 23 of the Constitution did not specify what form

these rights should take in practice, but only laid down the principle. Each legislative body was then responsible for applying them, pursuant to the second paragraph of this Article, taking into account the corresponding obligations.

It then noted from the provision's preparatory documents of this provision that in establishing the right to social assistance, the framers of the Constitution had in mind the right embodied in the Public Social Welfare Offices Institutional Act. Article 23 of the Constitution contained a *standstill* obligation, which, in the absence of any grounds of public interest for so doing, prevented the relevant legislative bodies from reducing significantly the level of protection.

The Court then considered whether the relevant provision, which reduced significantly the level of protection afforded to this category of foreign nationals by excluding them from entitlement to social assistance, could be justified on grounds of public interest. It was clear from the parliamentary proceedings that Parliament's justification for this provision was, first, the specific reasons for which the foreign nationals concerned had been granted residence permits. Second, Parliament reasoned justified the need to combat fraud in the fields of social assistance and the acquisition of residence rights. Reference had also been made to a financial objective.

It noted that, pursuant to Section 1 of the Public Social Welfare Offices Institutional Act, social assistance was granted to applicants who, without this assistance, would be unable to lead a life in keeping with human dignity and was conditional on their being assessed as destitute. It also noted that the issuing of type-B work permits and professional cards was subject to several strict conditions and that residence permits were granted on a temporary basis and were inextricably linked to undertaking paid employment. It could therefore be reasonably assumed that the vast majority of foreign nationals who had been granted a temporary residence permit for this reason had sufficient income to avoid destitution, which, as a rule, resulted in them not satisfying the conditions of eligibility for social assistance.

The Court thought that the lawmakers' concern to prevent social assistance fraud, with a view to ensuring that, by definition, the limited resources available went to those who genuinely needed them, was quite legitimate. This objective could justify certain measures, including a refusal to grant social assistance to foreign nationals who could be shown to be trying to obtain it unjustifiably or terminating the

right of residence of foreign nationals who had obtained it unlawfully. However, this objective could not be justification for denying an abstractly defined category of foreign nationals lawfully residing in the country eligibility for social assistance in cases where a social welfare centre had confirmed their state of destitution, thus denying them the right to lead a life in keeping with human dignity. The measure was therefore disproportionate to the objectives sought and the significant reduction caused by the impugned provision in the eligibility for social assistance of foreign nationals authorised to reside lawfully in the country under a type-B work permit or a professional card could not be justified on any grounds of public interest.

The Court found that there had been a violation of Article 23 of the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2015-3-011

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 15.10.2015 / **e)** 138/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.11.2015 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
 1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**
 3.4 General Principles – **Separation of powers.**
 4.7.4 Institutions – Judicial bodies – **Organisation.**
 4.7.4.1.6.3 Institutions – Judicial bodies – Organisation – Members – Status – **Irremovability.**
 4.7.4.5 Institutions – Judicial bodies – Organisation – **Registry.**
 4.7.4.6 Institutions – Judicial bodies – Organisation – **Budget.**
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

Keywords of the alphabetical index:

Judicial branch, independence / Judiciary, independence / Judicial branch, self-government / Judicial branch, organisation, decentralisation, management contract / Judicial branch, financing / Judicial branch, registrars, status / Judge, workload measurement / Judge, irremovability, geographical mobility.

Headnotes:

The independence of judges (Article 151 of the Constitution) and the requirement for independent and impartial tribunals in Article 6 ECHR do not apply to court registrars.

The independence of judges, embodied in the Constitution (Article 151 of the Constitution) and in the general principle of separation of powers, is functional in nature and does not, as a matter of principle, prevent the legislative and executive branches, within the limits of their authority under the Constitution, from taking measures to secure the proper functioning of the judicial branch, particularly with regard to its management and financing.

Geographical transfers of judges must be accompanied by a series of measures to safeguard their independence, including entitlement to an adequate remedy against transfer decisions.

Summary:

I. Three non-profit associations [the national federation of court registrars (and others), the judges' professional association (and others) and the judges' trade union] had lodged an application with the Court, asking it to set aside the Act of 18 February 2014 on the introduction of autonomous management of the judiciary.

The purpose of the legislation was to decentralise and transfer management responsibility of the judicial budget and staffing. Other than in the case of the Court of Cassation, the level of funding and other resources of the judiciary were laid down by the Minister of Justice, in consultation with, on the one hand, the college of court judges and, on the other, the college of prosecutors, based on management contracts. The colleges were then responsible for apportioning the financial and other resources concerned between the judicial entities within their remit, based on management plans drawn up at local level. Parliament thereby sought to ensure that the independence of the courts *vis-à-vis* the prosecution service, and vice versa, was maintained.

The national federation of court registrars complained that the legislation did not provide for management structures for registrars and that they were subject to the court judges' management arrangements. The judges complained that the legislation allowed the executive branch to become involved in the organisation of the judiciary.

II. The Court considered that there were differences between court registrars and judges. In light of these differences, it was not unreasonable for distinct management arrangements to be established for court judges and judges of the prosecution service but not for registrars. In connection with its examination of the case, the Court found that Article 151 of the Constitution, which safeguarded the independence of judges, did not apply to registrars and that Article 6 ECHR, which referred to an independent and impartial tribunal, did not concern the independence and impartiality of registrars. The applicants could not, therefore, validly rely on a violation of these provisions.

The Court found that there had been no violation of the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution).

It considered the fact that the judiciary was not financed by a grant, as were the Constitutional Court and other institutions. Also, it was neither incompatible with the legal rules relied on that safeguarded judicial independence (Article 151 of the Constitution, Article 6 ECHR, Article 14 of the International Covenant on Civil and Political Rights and Article 47 of the Charter of Fundamental Rights of the European Union) nor with the general principle of the separation of powers.

The independence of judges, which was enshrined in the Constitution, was functional in nature and did not, as a matter of principle, prevent other branches of government, within the limits of their authority under the Constitution, from taking measures to secure the proper functioning of the judicial branch. Judicial independence, which was protected by the general principle of the separation of powers, was concerned with judges' functional independence. There were no provisions of the Constitution or international conventions stipulating that the judicial branch must enjoy financial and budgetary autonomy. No such provision could be inferred from the general principle of the separation of powers.

The obligation to enter into a management contract was not incompatible with the cited provisions of the Constitution and international conventions concerning the principles governing and means of securing judicial independence and the separation of powers.

Although the impugned legislation granted the Minister of Finance and the Minister for the Budget a certain number of supervisory powers, it was not incompatible with the cited provisions of the Constitution and international conventions concerning the principles governing and means of securing judicial independence and the separation of powers. Parliament had considered that this supervision could not be dissociated from the fact that granting the organs of the judicial branch management autonomy had to be considered to be an "evolving" process, during which these bodies could acquire the necessary management knowledge and experience. Parliament's objectives were not, as such, invalid, particularly as the relevant ministries were responsible to the House of Representatives for judicial policy and its financing and other resources.

In its 108-page-judgment, the Court dismissed a whole series of other allegations concerning the impugned legislative provisions, which were considered by the applicant parties to infringe on the independence of the judicial branch.

One of these complaints was that "workload measurement" was calculated on the basis of "national standard times" for each category of court and prosecution service, with the aim of achieving a more objective system of allocating senior staff. The Court found that these provisions were compatible with the Constitution, in so far as they were interpreted in the manner laid down by the Court. The preparatory documents showed that Parliament had sought to base this provision on the method already being used for measuring workload. National standard times had to take account of the volume and complexity of cases, the specific nature of the disputes dealt with and the composition of chambers. By describing these standards as "national", Parliament was clarifying that they had to be uniform across the country and could not, therefore, vary from one judicial district to another, though they could differ according to category of court and prosecution service.

The Court did annul a provision of the legislation, which made it possible to require judges, without an adequate remedy, to perform their duties in another district. While a remedy was available against a transfer measure that could be interpreted as a disguised disciplinary sanction, this was not the case with one intended to secure greater geographical flexibility. Civil servants were entitled to appeal to a judicial body when such a measure had a detrimental effect on their employment situation. The Court considered that this constituted unjustified difference in treatment. The remedy provided for in law did not meet the constitutional requirements of an independent and impartial tribunal.

Since setting aside the provision relating to appeals would reduce the level of judges' legal protection, the Court decided that it would continue to have effect until 31 August 2016. This would enable Parliament to enact new provisions without reducing judges' existing legal protection, which was in any case inadequate. The setting aside decision had consequences for Judgment no. 139/2015 of the same date, which also concerned, in particular, judges' transfer arrangements.

Cross-references:

See also the explanatory notes on Judgments nos. 138/2015 and 139/2015 on the Court's web site (www.const-court.be), under the headings 'publications' (French and Dutch).

Languages:

French, Dutch, German.



Identification: BEL-2015-3-012

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 29.10.2015 / **e)** 153/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.01.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 3.19 General Principles – **Margin of appreciation.**
 5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Patient, right to self-determination / State, duty to protect life / Euthanasia, under-age child / Right to die / Personal autonomy / Euthanasia, under-age child, capacity of discernment.

Headnotes:

When Parliament authorises the euthanasia of minors in a hopeless medical condition, it must provide for increased protection to avoid any abuses, in order to safeguard their right to life and their right to physical integrity.

Having regard to the safeguards it contains, the impugned legislation strikes a fair balance between everyone's right to choose to end his/her life to avoid an undignified and distressing death, based on the right to respect for private life, and minors' entitlement to measures to prevent abuses of the practice of euthanasia, based on the right to life and to physical integrity.

However, one of the impugned provisions has to be interpreted to mean that a medical practitioner cannot perform euthanasia on an underage child, subject to the conditions provided for by law, unless that minor's capacity of discernment has been certified in writing by a child psychiatrist or psychologist.

Summary:

I. Several associations, including the non-profit association "*Pro Vita*" and two individuals, had filed a setting aside application with the Court against the Act of 28 February 2014 amending the Euthanasia Act of 28 May 2002, which would extend euthanasia to minors.

The Court noted that by decriminalising the euthanasia of minors in a hopeless medical condition with constant, unbearable and intractable suffering, Parliament had sought to respond to demands from paediatricians and other care providers.

Parliament, which had not wished to apply the criterion of the child's age, considered that he or she could have sufficient capacity for discernment to appreciate the consequences of a euthanasia request and that this capacity for discernment must be assessed on a case by case basis. This view is reflected in the position of the national medical association, whereby for medical purposes, "more account should be taken of patients' mental rather than their actual age".

II. The Court first considered the impugned legislation from the standpoint of compliance with the right to life embodied in several articles of the Constitution and in Article 2 ECHR. The European Court of Human Rights left States a wide margin of appreciation when regulating euthanasia, on the grounds that there was no European consensus on this ethical issue. Nevertheless, the European Court had ruled that the right to life imposed a duty on lawmakers to take the necessary measures to “protect vulnerable persons, even against actions by which they endanger their own lives”. This applied to legislation on the euthanasia of minors.

The Constitutional Court stated that it had to take account of the fact that in ethical matters lawmakers must assess the choices that had to be made and that, in connection with this power of appreciation, it had to determine whether the law in question struck a fair balance between the right to decide to end one’s life, which was an aspect of the right to respect for one’s private life, to avoid an undignified and distressing end to life, and vulnerable persons’ right to additional legal protection, based on the right to life and to physical integrity. The Court therefore had to ensure that Parliament had fulfilled its positive obligation to provide for effective safeguards against abuses of the euthanasia of dependant minors.

It considered the measures taken by the Belgian Parliament to comply with Article 2 ECHR, and noted, with reference not just to the wording of the legislation but also to the preparatory documents, that it was quite clear that, as was not the case with adults and emancipated minors, euthanasia was not authorised when minors’ suffering was psychological and would not clearly result in their death in the near future. In cases of constant and unbearable suffering, without hope of improvement, the law required medical practitioners to ensure that this was the patient’s wish following several consultations with the minor concerned at reasonable intervals. The doctor must also inform patients of their state of health and life expectancy and discuss with them the therapeutic options still available and the possibilities offered by palliative care. Euthanasia requests must be voluntary, informed and repeated and must not result from external pressure. Patients must be aware of the consequences of their actions when formulating the request. Minors could not submit advanced requests. Minors’ legal representatives were also required to give their consent to euthanasia requests.

Minors’ capacity for discernment concerned their ability to appreciate what their euthanasia request really entailed and its consequences. Euthanasia could not therefore be applied to newborn and young children.

Finally, medical practitioners were required to consult a child psychiatrist or a psychologist, who must also confirm the patient’s capacity for discernment and submit this opinion in written form. The child psychiatrist or psychologist concerned must be independent of the medical practitioner, the patient and his or her legal representatives, in accordance with the rules of medical ethics. The Court entered a reservation about how this form of intervention was to be interpreted. It considered that the provision requiring consultation of a child psychiatrist or psychologist could not be reasonably understood to mean that the medical practitioner could perform euthanasia on an under-age patient when the child psychiatrist or psychologist consulted considered that this patient lacked the required capacity of discernment. Consulting a child psychiatrist or psychologist was intended to offer an additional safeguard for the proper application of the law. According to the Court, the opinion issued by the child psychiatrist or psychologist was therefore binding on the medical practitioner.

The Court dismissed the setting aside application, subject to the interpretation that had to be given to the provision on the assessment of minors’ capacity of discernment, which had to be certified in writing by a child psychiatrist or psychologist.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2015-3-005

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Grand Chamber / **d)** 28.04.2010 / **e)** AP 3376/07 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 95/10 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

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

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

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

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

Keywords of the alphabetical index:

Search warrant, description, particularity, name, address, occupant, owner / Search, commencement, justification / Evidence, collect, destroy / Circumstance, extraordinary, attorney.

Headnotes:

The right to inviolability of the home is violated when an official person, contrary to law, executes a search warrant at an apartment, but fails to present it to the occupant, who is not identified in the search warrant, prior to commencing the search.

Summary:

I. In this case, the Police of the Brčko District had obtained a search warrant against the applicant's husband (hereinafter, "O.L."), following an order of the Supervisor of the Brčko District that implicated several officials, including O.L., for a number of failures and unlawful acts. To collect evidence, the

order justified the need to search the apartments and other premises used by the removed officials. The pre-trial judge issued the search warrant, persuaded there was reasonable suspicion that in the apartment used by O.L. and in the family house in Gornje Dubrave, the items relevant to the commission of the criminal offence could be found and that these items have been sufficiently listed and described in the search warrant.

The applicant (V.L.) alleged her right to inviolability of the home under Article II.3.f of the Constitution and Article 8 ECHR was violated due to the unlawful search of her house. She challenged that the search warrant failed to identify her name, but only referred to O.L. Moreover, the search was conducted at "her" home, though she is not registered at the address, and O.L. does not live there. She also challenged provisions of the Criminal Procedure Code, specifically whether an authorised official may commence the search before presentation of the warrant; and whether the instruction in the search warrant entitling suspects the right to inform their defence counsels and whether the search may be conducted without the presence of the defence counsel as required by extraordinary circumstances, would apply to her.

II. The Constitutional Court noted that the search of the applicant's home was based on Article 51 of the Criminal Procedure Code, which provides for the search of "other person's premises". The term "other person" may imply the person known to the suspect, but may also be a person unknown to him or her. As such, a search may be conducted at places of persons (e.g., potential witnesses) linked to the suspect through family relation or other close relations. The requirement for the search warrant for other persons' premises is the likelihood that a criminal offense has been committed and that there are sufficient grounds for suspicion that the perpetrator, the accomplice, traces of a criminal offense or objects relevant to the criminal proceedings might be found there. Furthermore, the apartment, other premises and movables and objects of search may be either owned by the suspect, the accused or other person or may be in their possession or in other form related to real and legal affairs or property and legal relations. Article 58 of the Criminal Procedure Code stipulates that the search warrant must describe the dwellings, premises or person to be searched, indicating the address, ownership, name or any other data essential for identification.

In the instant case, the pre-trial judge of the Basic Court considered the grounds for the search and issued the search warrant requested by the Police of

the Brčko District's, believing that a criminal offence was likely to have been committed and there were sufficient grounds that the traces of a criminal offence or objects relevant to the criminal proceedings might be found at the premise. The search warrant limited the search to the apartment used by O.L. and in the family house in Gornje Dubravice, which is used by O.L. The applicant's son and her husband O.L. confirmed both addresses and that the family house was designated for O.L.'s use.

Hence, the Constitutional Court determined it was not necessary to establish the owner of the house per Article 58 of the Criminal Procedure Code, as the description in the search warrant was sufficient to identify the data of the place to be searched, including the address and ownership. Finally, given that the search of the premises of other person may be conducted even if the suspect is unknown, it is irrelevant whether or not that person lives in the premises of the other person being searched (i.e., whether or not that person is registered on that address). Hence, the Constitutional Court concluded that the requirement of lawfulness of interference with the applicant's right to respect for home was met.

Furthermore, regarding the applicant's claim that she was prevented from calling her lawyer to be present during the search, the Constitutional Court noted that Article 58 of the Criminal Procedure Code stipulates that the search warrant shall contain instruction for the suspect that he or she is entitled to notify his or her defence counsel and that the search may be executed without the presence of the defence counsel if extraordinary circumstances require it. However, the Criminal Procedure Code does not contain a provision granting such right to "another person"; hence, the right does not apply to the applicant during the search of her home. Based on the aforementioned, the Constitutional Court ruled that the applicants' allegations are ill-founded.

The applicant also claimed that prior to the search, she was not presented the search warrant. The Constitutional Court pointed to Article 60 of the Criminal Procedure Code, which stipulates that prior to commencing a search, an authorised official must present his or her credentials and the purpose of his or her arrival and show the warrant to the person whose property is to be searched or who himself or herself is to be searched.

In the appeal, the Prosecutor's Office of the Brčko District did not challenge this allegation. From the search record, the applicant, prior to the commencement of the search, was informed about the capacity of the official person and the reasons for his visit. However, it is not possible to conclude,

based on the record, whether she was presented the search warrant prior to the commencement of the search. In light of the above and the principles under Article 8 ECHR, the Constitutional Court held that the interference with the applicant's right to respect for her home occurred because the officials failed to satisfy the requirement of Article 60 of the Criminal Procedure Code.

The Constitutional Court noted that the search of an apartment may represent an investigative action by which public authorities restrict the rights to privacy and inviolability of the apartment in the interest of the efficiency of the relevant criminal proceedings. Given that this action (search) is taken at an early stage of the criminal proceedings, when the suspicion that the criminal offence is committed is the lowest and since it presents a measure of coercion which ensures the presence of the suspect or the traces or objects of the offence, the public authorities are obliged to provide guarantees that the search will be undertaken and executed only under the conditions and in a manner prescribed by law.

As to the instant case, the Constitution Court deemed that the search warrant was issued in accordance with the relevant provisions of the Criminal Procedure Code and the aim of the search was legitimate, namely to collect traces of criminal offence at the premise where the criminal offence was likely committed. However, in order for an action to constitute "interference" in accordance with law, within the meaning of Article 8.2 ECHR, it is necessary that the mentioned action is undertaken in a manner and in a procedure explicitly defined under Article 60 of the Criminal Procedure Code. Given the aforesaid, the imperative legal norm was breached as the norm regulates the procedure of undertaking search-related actions and is a condition for the lawfulness of the undertaken action when the search warrant had been issued. Hence, the search action did not satisfy the criterion of "interference" in accordance with the law, within the meaning of Article 8.2 ECHR.

Languages:

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



Identification: BIH-2015-3-006

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 26.11.2015 / **e)** U 3/13 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 100/15 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

2.1.1.4.7 Sources – Categories – Written rules – International instruments – **International Convention on the Elimination of all Forms of Racial Discrimination of 1965.**

3.3 General Principles – **Democracy.**

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

3.21 General Principles – **Equality.**

4.2.2 Institutions – State Symbols – **National holiday.**

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

5.5.4 Fundamental Rights – Collective rights – **Right to self-determination.**

Keywords of the alphabetical index:

Constituent people, national holiday, discrimination / Equality, collective / Holiday, national, discrimination / Secularism, principle.

Headnotes:

Article 3.b of the Law on Holidays, which designated the observance of the Day of the Republic on 9 January, underlies a preferential treatment of members of the Serb people as compared to Bosniacs and Croats, others and citizens of the *Republika Srpska*. This date honours a historical heritage and the observance of the Saint Patron's Day, both of which are connected to the tradition and customs of only the Serb people.

Summary:

I. The applicant requested the Constitutional Court to review Article 3.b of the Law on Holidays of *Republika Srpska*, which stipulates that one of the republic holidays is the Day of the Republic, which is observed on 9 January. The applicant claimed that the selected date to observe this holiday does not conform to Articles 14 ECHR, Article 1 Protocol 12 ECHR, and Article II.4 of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1, 2.a and 2.c of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter, the "ICERD").

The applicant alleged that the contested Article 3.b or the favourable treatment of Serb people over the other two constituent peoples and others is contrary to the principle of equality. The first argument is that the Day of the Republic is linked to the Declaration Proclaiming the Republic of the Serb People of Bosnia and Herzegovina, which was adopted by the Assembly of the Serb People in Bosnia and Herzegovina on 9 January 1992 and without the participation of Bosniacs, Croats and others. Therefore, in his opinion, the date of 9 January marks a historical moment exclusively significant for Serb people regarding their right to self-determination, self-organisation and association, demanding territorial demarcation from other peoples. Moreover, this date has been negatively received by all non-Serbs in *Republika Srpska*. The reason is that it reflects the philosophy of the identity of territory and nations, namely ethnic nationalism, exclusion of others and those who are different from all decision making, denial of pluralism and tolerance, multiculturalism and promotion of the medieval principle *cuius regio, eius religio*. The second argument is that the Patron Saint's Day of the *Republika Srpska* – St. Stefan – is also observed on the same day. No coincidence exists that a secular date overlaps with "a religious Orthodox holiday or as a traditional Orthodox custom that applies exclusively to the Serb people.

II. In the present case, the Constitutional Court considered two issues:

- a. whether 9 January represents a historical heritage of only one people in the *Republika Srpska*; and
- b. whether the practice of observing the holiday on 9 January constitutes a privilege exclusive only to one people.

Regarding the first issue on historical heritage, in the opinion of the Venice Commission, the selection of 9 January to observe the Day of the Republic as a holiday may raise difficulties, *inter alia*, due to the fact that the Declaration represents a unilateral act not supported by other, non-Serb peoples living in the *Republika Srpska*.

It is undisputable that the selection of 9 January to observe the Day of the Republic in the contested Article 3.b of the Law on Holidays is inspired by 9 January 1992 when the Assembly of the Serb People in Bosnia and Herzegovina was held. During this session, there was no participation of Bosniacs, Croats and others. At that time, the Declaration was adopted as an expression of political will of only one people – the Serb people.

Therefore, the Constitutional Court held that the selection of 9 January to observe the Day of the Republic does not symbolise collective, shared remembrance contributing to strengthening the collective identity, which are significant values for a multiethnic, modern, democratic society based on the respect for diversity. In this connection, the selected date fails to represent all citizens of the *Republika Srpska*, who are guaranteed equal rights in the Constitution. Because the date privileges the Serb people over others and was selected by representatives who did not include Bosniacs, Croats and others, the selection of the date to observe the Day of the Republic gives rise to a unilateral act.

As such, the Constitutional Court, as echoed in the Venice Commission's position in its *amicus curiae* brief, ruled that it is unconstitutional, violating basic values of "respect for human dignity, freedom and equality, national equality, democratic institutions, rule of law, social justice, pluralistic society, guarantees for and protection of human freedoms and rights, as well as the rights of minority groups in line with the international standards, ban on discrimination" (Preamble).

Regarding the second issue regarding whether the challenged law privileges the Serb people, the Constitutional Court, *inter alia*, noted that both the Day of the Republic and the Patron Saint's Day are celebrated on 9 January in the *Republika Srpska* by political officials among the Serb people in Bosnia and Herzegovina and the *Republika Srpska*, and by political officials from the Republic of Serbia. The Patron Saint's Day of the *Republika Srpska* is observed by the high church officials of the Serb Orthodox Church that lead the liturgy and break the traditional bread Slavski Kolac ("Slava cake") in the Orthodox Church.

It is undisputable that the Eastern Orthodox Christianity is predominant among the Serb people and that the Patron Saint is a specific and unique feature of the St. Sava's Orthodoxy (*Svetosavsko pravoslavlje*) that is preached by the Serb Orthodox Church. Therefore, the observance of the Patron Saint's Day without a doubt gives superior prominence to the Eastern Orthodox Christianity as a religion of the majority in the *Republika Srpska* and to the Serb Orthodox Church (i.e., the Serbs as people who recognise this religion as the most dominant).

Therefore, by observing the holiday on 9 January, notwithstanding whether it is a separate or a single celebration of both Patron Saint's Day of the *Republika Srpska* and the Day of the Republic, the public authorities appear to create a public atmosphere where the religious heritage, tradition

and customs of only the Serb people are prioritised over others. As such, the Constitutional Court found that such unequal treatment violates the public official's constitutional obligations not only to exercise their functions in a neutral and unbiased manner, but also to ensure equality for different religions, faiths and beliefs as well as religious compatibility and tolerance in a democratic society.

Also, the established practice and the public atmosphere are inconsistent with the principle of secularism proclaimed by Article 14 of the Law on Freedom of Religions, which in terms of Article III.3.b of the Constitution represents a "decision of the institutions of Bosnia and Herzegovina". The entities and all their respective administrative units are obligated to uphold it, as consistent with democratic principles set out in Article I.2 of the Constitution. Namely, in exercising its functions, the public authority selected 9 January to observe the holiday for the Day of the Republic and the Patron Saint's Day of the *Republika Srpska*. Regardless of whether it involves a separate or a single celebration, it includes liturgy and breaking the traditional bread *slavski kolac* ("Slava cake") in the Orthodox Church led by high church officials of the Serb Orthodox Church and the presence of church officials during the rest of the ceremony. As such, the Court deemed that the proclaimed principle of the separation of church and state is violated.

Finally, the Constitutional Court recognised that, as indicated in the Venice Commission *amicus curiae* brief, no obligation has been imposed on persons to participate in the formal celebration of the Day of the Republic. However, the very fact that the law imposes the celebration on all the inhabitants by introducing it as a day off, namely for them to refrain from work on that day, under a threat of sanction of a relatively high fine, may be problematic. The application of the penalty may disproportionately impact individuals/members of certain ethnic communities living in the *Republika Srpska* and the communities concerned (see the *Amicus curiae* brief, paragraph 55).

Therefore, the Constitutional Court found the practice of observance of 9 January and the Patron Saint's Day of the *Republika Srpska* as an Orthodox Religious Holiday afforded a preferential treatment exclusive to Serbs and hence, the public authorities acted in "violation of the constitutional obligation of non-discrimination in terms of the rights of groups". Therefore, Constitutional Court concluded that the contested Article 3.b of the Law on Holidays violates Articles I.2 and II.4 of the Constitution, in conjunction with Articles 1.1, 2.a and 2.c of the ICERD and Article 1 Protocol 12 ECHR.

The Constitutional Court emphasised that this decision in no way brings into question the right of the citizens of Bosnia and Herzegovina of Orthodox religion (or similar rights of citizens of any other religious community in Bosnia and Herzegovina) to freely, in a traditional fashion, or any other appropriate fashion, observe their holidays, including the Patron Saint's Day of St. Stefan. Such freedoms and rights, especially their free manifestation, only confirm the multi-confessional and multi-cultural character of Bosnia and Herzegovina as a state and society. Therefore, such a decision of the Constitutional Court in that context can in no way be understood differently.

III. Pursuant to Article 43.1 of the Rules of the Constitutional Court, Separate Dissenting Opinions of the Vice-President Zlatko M. Knežević and Judge Miodrag Simović shall make an annex of this Decision.

Cross-references:

Constitutional Court:

- U 4/04, 31.03.2006, Partial Decision I, *Bulletin* 2006/1 [BIH-2006-1-002];
- U 4/04, 18.11.2006, Partial Decision II, *Bulletin* 2006/3 [BIH-2006-3-007].

Amicus curiae brief on the compatibility with the non-discrimination principle of the selection of the Republic Day of the *Republika Srpska* (CDL-AD(2013)027).

Languages:

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



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2015-3-026

a) Brazil / **b)** Federal Supreme Court / **c)** First Panel / **d)** 06.08.2013 / **e)** Extraordinary Appeal 458181 / **f)** Corporate liability for environmental crimes / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 213, 30.10.2014 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Environment, protection / Legal person, criminal liability / Legal person, criminal responsibility, act committed by a natural person.

Headnotes:

Corporate liability for environmental crimes does not depend on the simultaneous legal responsibility of individuals. The Constitution does not establish a limit for the criminalisation of conduct, nor for the definition of who can be the perpetrator of a crime. The introduction of corporate criminal liability derived from the perceived insufficiency and difficulty of holding individuals liable, in order to prevent the perpetration of crimes by corporations. Corporations have complex and decentralised organisations, a fact which makes it difficult to individualise conducts.

Summary:

I. This case refers to an extraordinary appeal in which the First Panel of the Supreme Court analysed the possibility of corporate criminal liability, when individuals are not simultaneously accused. In the case, the company *Petróleo Brasileiro SA* (Petrobras) was accused of environmental crime, together with two directors. One of them made a successful *habeas corpus* application before the Supreme Court. Hence, the company filed a request for a writ of *mandamus* before the Federal Regional Court of the 4th Region, arguing that the other director should also be favoured

by the writ of *habeas corpus* and that the penal action should be barred, because this type of action could not be brought against a company, unless individuals were simultaneously accused.

The Federal Regional Court denied the request for the writ of *mandamus*, but, after an appeal, the Superior Court of Justice accepted the arguments of Petrobras and, consequently, barred the penal action, on the grounds that there is no crime without an act of an individual. The Federal Prosecutors' Office filed an extraordinary appeal against this decision, claiming a breach of Article 225.3 of the Constitution (which obliges the state to define environmental areas requiring special protection), because this norm does not provide that an action against a company depends on a concurring action against an individual.

II. The First Panel of the Supreme Court, by majority, granted the extraordinary appeal, since Article 225.3 of the Constitution does not establish the responsibility of the individual as a prerequisite for the criminal responsibility of a corporation. The Justice Rapporteur presented a summary of the historical evolution of the techniques of corporate criminal liability in the world. She highlighted that the majority of Brazilian jurists are against this kind of criminal liability on the grounds that corporations and legal entities cannot commit crimes. Notwithstanding this, she explained that the theoretical arguments and the abstract concepts of traditional penal science, grounded on individual acts, did not convince the framers of the Constitution, and are, as a consequence, irrelevant to grounding the necessity of a simultaneous charge.

Moreover, the Justice Rapporteur explained that the Constitution had not established a limit for the criminalisation of conduct, nor for the definition of who can be the perpetrator of a crime. Only lawmakers could assess the convenience and opportunity to regulate the criminal liability of corporations and legal entities, which they did through Law 9605/1998. The Justice Rapporteur reasoned that, even though lawmakers did not completely establish the criteria to hold a corporation criminally liable, the paradigms of individual liability must not be applied to corporations. Finally, she emphasised that corporate criminal liability derived from the perception of the insufficiency and difficulty of holding individuals liable, in order to prevent the perpetration of crimes by corporations. Corporations have complex and decentralised organisations, a fact which makes it difficult to individualise conducts. Consequently, the Panel ordered the criminal action against Petrobras to be regularly processed.

III. In separate opinions, dissenting Justices alleged that Article 225.3 of the Federal Constitution does not establish corporate criminal liability, only civil liability. They emphasised that the penalty aims at rehabilitation, which is not compatible with the criminal liability of corporations, because corporations cannot be rehabilitated.

Cross-references:

- Articles 5.LXXIV and 134 of the Federal Constitution;
- Article 5.II of the Law 7347/1985, changed for the Law 11448/2007.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-3-027

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 13.11.2014 / **e)** Extraordinary appeal with interlocutory appeal 709.212 / **f)** Statute of limitation to plead uncollected amounts for the Unemployment Guarantee Fund (FGTS) / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 32, 18.02.2015 / **h)**.

Keywords of the systematic thesaurus:

1.4.3 Constitutional Justice – Procedure – **Time-limits for instituting proceedings.**
5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

Keywords of the alphabetical index:

Limitation period, time-bar, setting / Social security, right, contribution / Time limit, statutory provision, unconstitutional, bringing into conformity with Constitution / Worker, protection.

Headnotes:

The statute of limitations for employees to recover uncollected contributions for the Unemployment Guarantee Fund runs to five years. The Supreme Court's previously prevailing case-law, which

applied a thirty-year term, is incompatible with the principle of reasonableness.

Summary:

I. This case refers to an extraordinary appeal in which the Court discussed whether the thirty-year period of limitation to recover uncollected contributions into the Unemployment Guarantee Fund (hereinafter, "FGTS", in the Portuguese acronym) is constitutional.

A Bank of Brazil employee filed a labour complaint in 2007 requiring uncollected amounts for the FGTS, from May 2001 to December 2003, when she had worked for the bank abroad. The Superior Labour Court affirmed the decision of the Labour Court of Appeals. The Superior Court understood that the employee was entitled to the values that had not been paid, to be calculated over all salary nature instalments, applying the thirty-year period of limitation.

The employer, Bank of Brazil, filed an extraordinary appeal against that decision, arguing that the period of limitation should run for five years under Article 7.XXIX of the Federal Constitution. According to the Bank, the FGTS is within the employment context and such constitutional provision expressly provides that the period of limitation to "credits arising from employment relationships" runs for five years.

II. The Supreme Court, by majority, considered that the period of limitation to recover amounts owed by employers to the FGTS runs for five years. The Court pointed out that its previously prevailing case-law, which applied a thirty-year term, is incompatible with the principle of reasonableness. The Court stressed that the discussion core revolves around the Fund's legal nature: tax, social security, social or labour nature. After the analysis of the evolution of the Court's case-law, the Justices observed that the Court had already acknowledged that the FGTS is an autonomous right, of a social and a labour nature. However, the Court was still applying the thirty-year term as a privilege granted by law.

Accordingly, Article 23.5 of Law 8036/1990 and Article 55 of the FGTS Regulation, approved by Decree 99684/1990, which provides for the thirty-year privilege period of limitation, were declared unconstitutional. Since the Court found that the Fund has a labour nature, such period is incompatible with the one set under Article 7.XXIX of the Federal Constitution. However, due to the substantial change in the Court's case-law, the Justices, by majority, decided to grant *ex nunc* effects to this declaration of unconstitutionality.

III. In dissenting opinions, the Justices found that the FGTS has two different legal relations: the first one, established between the Fund and the employer, in which the FGTS is neither salary nor labour-related payment, ousting the application of the constitutional term. The second one, established between the Fund and the employee, in which there is a substantial labour legal nature, allowing, thus, the application of the constitutional term. Therefore, there are two different periods of limitation. As such, the traditional jurisprudence can be applied due to both the principle of protection to workers and the principle of applying the most beneficial rule.

Supplementary information:

"Unemployment Guarantee Fund (hereinafter, "FGTS") is a pecuniary fund composed of mandatory deposits by the employer in restricted bank account of the employee. The money in this fund can be withdrawn only under special circumstances, such as unemployment" (CASTRO, Marcilio Moreira de. *Dictionary of law, economics and accounting: Portuguese-English / English-Portuguese*. 3 ed. Rio de Janeiro: Forense, 2010).

This case corresponds to no. 608 of the General Repercussion theme: statute of limitations applicable to the collection of amounts which were not deposited in the Unemployment Guarantee Fund – FGTS.

- Article 7.XXIX of the Federal Constitution:

The following are rights of urban and rural workers, among others that aim to improve their social conditions: (...) XXIX – legal action, with respect to credits arising from employment relationships, with a limitation of five years for urban and rural workers, up to the limit of two years after the end of the employment contract.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-3-028

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 04.12.2014 / **e)** Extraordinary Appeal with Internal Interlocutory Motion 664.335 / **f)** Personal Protective Equipment / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 29, 12.02.2015 / **h)**.

Keywords of the systematic thesaurus:

5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Employee, health protection / Noise, control / Retirement, right, fundamental / Social security, funding.

Headnotes:

The right to special retirement requires the worker's actual exposure to hazards. Thus, the worker is not entitled to such benefit if the Personal Protective Equipment completely neutralises the harmful agents. In case of exposure to noise above the legal tolerance limits, the employer's statement regarding the effectiveness of the hearing protectors in the Professional Profile for Social Security Purposes or its equivalent does not mischaracterise the special time of service for retirement.

Summary:

I. This case refers to an extraordinary appeal with internal interlocutory motion brought against a decision that granted special retirement to a worker who was exposed to noise above the tolerance limits, even though he had worn effective Personal Protective Equipment (hereinafter, "EPI" as in the Portuguese acronym).

The appellant (the National Social Security Institute) claimed that Articles 201.1 and 195.5 of the Federal Constitution were breached. The institution asserted that the use of EPI by the employee eliminates harmful agents in the workplace or reduces them to tolerable levels. As such, the special service time for retirement was mischaracterised, because there was no effective exposure to hazards. Furthermore, the appellant stated that the contested decision violated the principle of preserving the financial and actuarial balance by granting pension benefits without setting their source of funding.

II. The Supreme Court decided to hear the motion and converted it into an extraordinary appeal. The Court understood that, besides the requirements for admissibility being fulfilled, the issue under discussion dealt with the fundamental right to social security, affecting the constitutional rights to life, health, human dignity and to a balanced work environment. The Court pointed out that the elimination of harmful industrial activities should be a greater goal of society as a whole.

On the merits, the Court unanimously dismissed the extraordinary appeal and set, by majority, two theses on the subject. Regarding the first one, the Court established that the right to special retirement requires the worker's actual exposure to harmful agents. So, if the hearing protectors completely neutralise the hazard, there is no constitutional right to special retirement. The Court stressed that the Public Administration may assess the information provided by enterprises when inspecting them. Such inspection is subject to judicial review. In case of doubt concerning the effectiveness of the EPI, the right to special retirement shall be granted, since the EPI may not be sufficient to bar the damaging agent.

In the second thesis, the Court asserted that, in case of the worker's exposure to noise above the legal tolerance limits, the employer's statement concerning the effectiveness of the EPI in the Professional Profile for Social Security Purposes or its equivalent does not mischaracterise the special time of service for retirement. That is because hearing protectors do not guarantee the complete elimination of the noise hazardous effects, which can cause: loss of auditory functions, communication disorders, sleep alteration, neurological, behavioural and cardiovascular disorders, etc. In this case, the Court adopted the extreme protection theory.

The Court held that special retirement (Article 201.1 of the Constitution) is a benefit of preventive nature, so different requirements for admissibility are justified. The period of contribution cannot be the same for those who work in hazardous conditions and those who do not work exposed to harmful agents.

The Court found no violation of Article 195.5 of the Constitution, which prohibits the creation, increase or extension of benefits without a corresponding source of funding, because such rule does not apply to cases in which the benefit was provided for by the Constitution itself. In addition, there are constitutional and legal provisions regarding the resources destined to finance special retirement.

Supplementary information:

The Professional Profile for Social Security Purposes is the document which contains, for example, administrative data, activities performed, conditions and measures of occupational health control, evidence of exposure to hazards and eventual neutralisation due to the use of Personal Protective Equipment.

Cross-references:

- Articles 195.5 and 201.1 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2015-3-029

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 30.04.2015 / **e)** Extraordinary Appeal 590415 / **f)** Collective bargaining agreement, voluntary dismissal plan / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 101, 29.05.2015 / **h)**

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Collective agreement / Collective agreement, legally binding / Labour negotiations, autonomy / Dismissal, right to appeal, extra-judicial dispute settlement procedure / Worker, collective bargaining.

Headnotes:

Workers may engage in companies' voluntary dismissal plans and end their employment contracts. As such, they may sign an extrajudicial agreement, which shall lead to comprehensive and unrestricted discharge of all severance payments, as long as this condition is expressly provided in the collective bargaining agreement, which approved the dismissal plan, as well as in other documents signed by them.

Summary:

I. This case discusses the validity and the effects of a voluntary dismissal plan, approved by a collective bargaining agreement, whereby the employee who willingly engages in such a plan gives up potential pending amounts from his or her employment contract in return for receiving immediate compensation.

The appellant, Bank of Brazil (*Banco do Brasil S.A.*), filed an extraordinary appeal against a decision of the Superior Labour Court, which disregarded the comprehensive debt discharge from the appellee's employment contract, pursuant to Article 477.2 of the Consolidation of Labour Laws (hereinafter, "CLT", in the Portuguese acronym). Such provision establishes that the term of termination of an employment contract or its receipt must discriminate each severance payment due to the employee and specify its amount. In such case, the discharge is valid only in respect of those described items. According to the lower Court, extrajudicial transactions of labour rights must be restrictively interpreted, because the employee is the weaker party and the worker's rights are inalienable.

Bank of Brazil claimed that the appellee engaged in the Voluntary Dismissal Plan 2001 (PDI/2001), approved by a collective agreement, which expressly provided comprehensive and unrestricted discharge of any possible debts arising from the employment contract. The bank said that the term of termination was signed without qualification and approved by the Regional Labour Authority. Finally, the appellant pointed out the violation to both the legal act and the collective agreements, provided for by Articles 5.XXXVI and 7.XXVI of the Federal Constitution.

II. The Supreme Court unanimously upheld the extraordinary appeal. The Court stated that the Federal Constitution honours the collective freedom of choice and the dispute resolution by the parties themselves, following the global trend that acknowledges collective bargaining mechanisms. Such mechanisms enable the very economic and professional categories to participate in the formulation of standards by which they will abide.

The Court stated that collective labour law is governed by its own principles. There is not the same imbalance of power among parties or the same limits which exist within individual employment relationships. Thus, the non-waiver of labour rights and Article 477.2 of the CLT, both aimed at protecting the worker within employer-employee relationships, are inapplicable to collective relations.

The Court stressed that voluntary dismissal plans reduce the social impact of mass layoffs, ensuring favourable economic conditions for those who choose to engage in them. The employees' appeals in labour courts, pleading severance payments, which were already paid off, breach the agreement and undermine the seriousness of such adjustments. Therefore, safeguarding the credibility of such plans is important in order to preserve their protective function and not discourage their use.

In this case, the individual freedom of choice was exercised within the limits allowed by labour law, leaving the employee the right to decide whether to engage in the plan or not. In doing so, the worker did not give up unavailable severance payments, which were at a "minimum civilising level". In addition, the worker was not subjected to degrading working conditions nor to conditions, which could be prejudicial to health or safety. The worker chose to transact pecuniary rights under the conditions expressly provided in the collective agreement, negotiated with the effective participation of the employees' category.

On these grounds, the Court held that an extrajudicial transaction that entails termination of employment contract due to the employee's engagement in voluntary dismissal plan leads to comprehensive and unrestricted discharge of all contractual severance payments, as long as this condition is expressly provided in the collective bargaining agreement, which approved the dismissal plan, as well as in other documents signed by the employee.

Supplementary information:

This case corresponds to no. 152 of the General Repercussion theme: general rights waiver by engaging in voluntary layoff plan.

Cross-references:

- Articles 5.XXXVI and 7.XXVI of the Federal Constitution;
- Article 477.2 of the Consolidation of Labour Laws.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-3-030

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 07.05.2015 / **e)** Direct Action of Unconstitutionality 3943 / **f)** Standing of the Public Defenders' Office to file Civil Action in the Public Interest / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 154, 06.08.2015 / **h)**.

Keywords of the systematic thesaurus:

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

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

1.4.9.3 Constitutional Justice – Procedure – Parties – **Representation.**

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:

Judicial assistance, civil proceedings / Interest, collective / Interest in bringing legal proceedings, specific.

Headnotes:

The Public Defenders' Office has standing to file Civil Action in the Public Interest, in order to safeguard transindividual and homogeneous individual interests.

Summary:

I. This case refers to a direct action of unconstitutionality, in which the judges discussed the constitutionality of Article 5.II of the Law 7347/1985 (Civil Action in the Public Interest Act), amended by Law 11448/2007. This amendment allowed the filing of Civil Action in the Public Interest (hereinafter, "ACP" in the Portuguese acronym) by the Public Defenders' Office (hereinafter, "DP", in the Portuguese acronym), in order to safeguard diffuse, collective or homogeneous individual interests.

The National Association of Prosecutors (hereinafter, "CONAMP" in the Portuguese acronym) alleged that the rule was substantially unconstitutional, because it included the DP in the list of bodies with standing to file ACP. CONAMP argues that the DP was instituted to safeguard poor litigants and to provide legal counselling to them. Consequently, the DP should not safeguard collective rights, nor homogeneous individual rights, through ACP, because its tasks required the identification of those who proved their

poverty. Lastly, CONAMP requested the declaration of unconstitutionality of the challenged article or the declaration of the interpretation that saves the constitutionality of the article whereby the standing of the DP to file ACP to safeguard diffuse interests should be excluded.

II. The Brazilian Supreme Court unanimously acknowledged the standing of the DP to file ACP in order to safeguard transindividual and homogeneous individual rights. Initially, the Court explained that, since the enactment of the Law 7347/1985, several laws to regulate the ACP were approved, dealing with several topics, such as disabled people, child and juvenile, elderly, consumers, defence of honesty in the public administration and antitrust enforcement. Hence, it was necessary to create mechanisms to enforce such laws, which led to the movement for the enlargement of the list of bodies with standing to file ACP.

The Court emphasised that, in a society marked by social inequalities, the lack of access to justice is one of the barriers to the enforcement of democracy and citizenship. Accordingly, the denial of the standing of the DP hinders the use of an important procedural mean which is able to ensure the effectiveness of fundamental rights. On the other hand, no rule restricts the standing for the ACP to the Prosecutors' Office.

The Court understood, moreover, that the restriction of the standing of the DP, according to the proof of poverty, contradicts the new procedural system of masses, which allows that one judgment, without risk of conflicting decisions, applies to as many people as possible, fulfilling the principle of procedural economy. Finally, the Court concluded that the denial of the safeguard of the rights of a specific collectiveness, because this could hypothetically provide a safeguard, as well, the rights of rich citizens would have a higher social cost than the financial cost of the proceeding by the DP.

Cross-references:

- Articles 5.LXXIV and 134 of the Federal Constitution;
- Article 5.II of the Law 7347/1985.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2015-3-031

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 27.05.2015 / **e)** Claim of non-compliance with a fundamental precept 341 – Referendum / **f)** FIES and retroactive alteration of rules / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 156, 10.08.2015 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Education, state, duty / Education, higher, access / Education, university, financing.

Headnotes:

The new financing requirements to apply for the Fund for Financing Higher Education, which require a minimum score in the High School National Exam both in the multiple-choice part and in the composition, shall neither be applied to those who are already enrolled in the programme and requested a contract renewal, nor to those who signed up for the programme before such requirements were in force.

Summary:

I. This case refers to a claim of non-compliance with a fundamental precept, filed by the Brazilian Socialist Party (hereinafter, “PSB” in the Portuguese acronym), to challenge the retroactive application of new financing requirements to apply for the Fund for Financing Students of Higher Education (hereinafter, “FIES” in the Portuguese acronym).

The applicant emphasised that on 26 December 2014, the Ministry of Education (hereinafter, “MEC” in the Portuguese acronym) issued the Normative Ordinance 21/2014, which amended Article 19 of the Normative Ordinance 10/2010, establishing new financing requirements to apply for the programme and to renew the programme contracts. The ordinance established a minimum score in the High School National Exam both in the multiple-choice part as well as in the composition. Since the norm was supposed to enter into force on 30 March 2015, and the enrolment proceeding to FIES started on 23 February 2015, a legal vacuum period was created.



The applicant also argued that retroactive application of the requirements infringed the principle of legal certainty, the acquired rights and the legitimate expectations of the students who failed to renew the financing programme for not having met the new criteria, and of those who took the exam before the ordinance entered into force and did not score the minimum required.

The Ministry of Education clarified that the new requirements applied only to those who had not yet signed a financing agreement with FIES, excluding cases of mere contract renewal. The General Counsel to the Federal Government argued that the principle of legal certainty was not violated, since the requirements change occurred before the period of enrolment to the programme concerning the first semester of 2015.

The Judge-Rapporteur had partially granted the requested preliminary injunction, *ad referendum* of the Full Court, to determine that the new requirements do not apply to the students who had already enrolled in the FIES and to those who had requested their contracts renewal, observing the principle of legal certainty.

The Brazilian Socialist Party (“PSB” in the Portuguese acronym) filed a motion for clarification, questioning whether the students who had enrolled in the legal vacuum, between 23 February 2015 and 29 March 2015, may join the financing programme under the former requirements. Although the motion had no legal provision in this case, it was brought to the Full Court due to reasonable doubt on the scope of the injunction.

II. The Full Court, by majority, endorsed the preliminary injunction, determining that the requirements shall not be retroactively applied to those who:

- a. had already entered in FIES and had requested the renewal of their contracts;
- b. had enrolled in the programme up to 29 March 2015, i.e. before the enactment of the new Ordinance.

In regard to the principle of legal certainty, the Court held that the former rules shall apply to both groups. The other students, who had enrolled after 29 March 2015, shall be submitted to the Normative Ordinance 21/2014, as there are no vested rights to previous legal regime. The Court considered that the new selection criteria are legitimate, given the limited number of vacancies and the large number of candidates. The Court remarked that public resources must be allocated to those who have better conditions

of using them, in compliance with the principles of morality, impartiality and efficiency.

III. In a dissenting opinion, one Justice argued that greater scope should be granted to the preliminary injunction in order to preclude the application of the new financing requirements to all students who enrol in FIES in 2015. The Justice considered that the new requirements should only apply to those who will take the National High School Exam as of 2015, as they will be aware of the new standards in force. Otherwise, the legal certainty and equality principle would be breached. The Justice also highlighted the inadequacy of the case to developing the Court’s jurisprudence. The Court’s existing decisions clearly establish that there is no vested right to a particular legal framework, which permits legal frameworks to be changed. However, this case does not specifically discuss a legal framework, but a State-student public service relationship, once financing students is in fact a public policy to expand access to higher education.

Supplementary information:

Normative Ordinance (*Portarias Normativas*) 10/2010 and 21/2014 of the Ministry of Education.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-3-032

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 27.05.2015 / **e)** Direct action of unconstitutionality 5081 / **f)** Disqualification due to party switching and the majority system / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 32, 19.08.2015 / **h)**.

Keywords of the systematic thesaurus:

- 3.3.1 General Principles – Democracy – **Representative democracy.**
- 3.3.2 General Principles – Democracy – **Direct democracy.**
- 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

Keywords of the alphabetical index:

Constitutional system, allegiance / Election, disqualification / Political party, succession.

Headnotes:

Disqualification from elected office due to party switching does not apply to candidates who were elected by the majority electoral system, because it violates popular sovereignty and the choices of the voter. In the majority electoral system, used to elect mayors, governors, senators and the president, the identity of the candidate is more important than party affiliation. This differentiates it from the proportional electoral system used to elect City Council members, State and Federal Representatives, where party affiliation is central to the voter's choice.

Summary:

I. This case refers to a direct action of unconstitutionality filed by the Prosecutor General of the Republic against Articles 10 and 13 of Resolution 22610/2007 of the Superior Electoral Court. The applicant alleged that the disqualification of someone who was elected by the majority electoral system, in case of party disaffiliation, offends against popular sovereignty, breaches the constitutional features of the majority system and violates the cases of parliamentary disqualification (Articles 14.*caput*, 46.*caput*, 55 and 77 of the Federal Constitution).

The Federal Attorney General argued, preliminarily, that the claim should not be heard, as this subject had already been judged in other direct actions of unconstitutionality (hereinafter, "ADI 3999" and "ADI 4086" in the Portuguese acronym). On the merits, he held that the duty of party loyalty and the obligation of party affiliation as a condition of eligibility are rules set forth in Articles 14.3.V and 17.1 of the Federal Constitution, respectively. Both provisions regulate elections ruled by the proportional and majority electoral systems.

II. Preliminarily, the Supreme Court, by unanimous vote, stated that the question raised in this action is different from the one discussed in ADI 3999 and ADI 4086; namely, party loyalty from the standpoint of proportional system. On the merits, the Full Court, unanimously and in accordance with the vote of the Justice Rapporteur, upheld the request and set the following thesis: disqualification due to party switching does not apply to candidates who were elected by the majority electoral system, because it violates popular sovereignty and the choices of the voter.

The core of the discussion focused on the different characteristics of both electoral systems adopted in Brazil: majority and proportional. The Court emphasised that, in the majority system, which is applied to elections of mayors, governors, senators and the president, the candidate is considered elected if he or she wins the most votes. In this case, the votes received by other candidates are dismissed. However, in the proportional system, which rules the elections for City Council members, State and Federal Representatives, the election will be defined quite differently, taking into account the total number of valid votes received by all candidates and political parties. This number is divided by the number of seats to be filled in Parliament, an operation from which the electoral quotient is obtained. Afterwards, the number of votes received by each party or coalition is divided by the electoral quotient. The result is the party quotient, which is equivalent to the number of candidates elected for each party.

The Court explained that the proportional system emphasises political parties, i.e., the voter elects the party and not the candidate. On the other hand, in the majority system, the focus is on the candidate. Therefore, disqualifying a candidate who has switched parties frustrates the will of the voter and undermines popular sovereignty (Articles 1, sole paragraph, and 14.*caput* of the Federal Constitution).

III. In a concurring vote, a Justice pointed out that applying the rule of party loyalty to majority system elections would create a new hypothesis of losing seat in an elective office which is not foreseen in the Federal Constitution.

Supplementary information:

- Articles 14.*caput* and 14.3.V and 17.1 of the Federal Constitution;
- Articles 10 and 13 of Resolution 22610/2007 of the Superior Electoral Court:

"Article 10 – Judging the relief sought, the court shall order the removal from office, communicating the decision to the president of legislative body so they may swear in, as appropriate, a substitute or vice, within ten (10) days.

(...)

Article 13 – This Resolution shall come into force on the date of its publication and it applies only to disaffiliations consummated after 27 March of this year, concerning the representatives elected by the proportional system, and after sixteen (16) of current October, concerning the candidates elected by the majority system."

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2015-3-033

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 28.05.2015 / **e)** Extraordinary appeal 795567 / **f)** Effects of a plea bargain / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 177, 09.09.2015 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Plea bargain / Sentence, automatic effect.

Headnotes:

The decision relating to a plea bargain is a confirmatory decision; hence, it does not assess the responsibility of the accused. Therefore, it cannot produce the same effects as a conviction, such as the loss of goods, which were used in the criminal act or acquired with the profits of the crime, except if such effects are stipulated in the plea bargain agreement.

Summary:

I. This case refers to an extraordinary appeal, with general repercussion, in which the Court discussed whether non-penal effects of convictions can be applied to plea bargains. In this case, the applicant was accused of exploiting gambling games or performing an act related to their exploitation (a misdemeanour described in Article 58 of Decree

Law 3668/1941). The applicant's motorcycle was seized, because it was allegedly used for committing the offence. The prosecution proposed a plea deal, according to the Law of Small-Claims Courts (Law 9099/1995), which the defendant accepted. The provisions were, then, fulfilled. However, the final sentence, which extinguished the defendant's criminal liability, ordered confiscation of the applicant's vehicle, based on Article 91.II.a of the Criminal Code. The applicant filed an appeal against this penalty, which was rejected.

The applicant, then, filed an extraordinary appeal, stating that only a conviction could result in the confiscation of seized goods. He also argued that the right to property was breached, because he was punished without due process of law. He claimed, at last, that applying the effects of the confession to a plea bargain violated the principle of presumption of innocence.

II. The Supreme Court granted the appeal and established, under the general repercussion system (through which the Court sets down principles with binding *erga omnes* effects), the thesis that the decision in a plea agreement is a confirmatory decision, without any judgment concerning the penal responsibility of the accused. Hence, it does not produce the same effects of a conviction, which are established in Article 91 of the Penal Code. Furthermore, the Court decided that the consequences of a plea bargain are those consensually stipulated in the agreement.

The Justice Rapporteur explained that the Law of Small-Claims Courts, which established the possibility of a plea bargain, relativises the mandatory filing of penal actions and ensures penal procedural safeguards to the investigated individual. The Justice Rapporteur stated that the punishment derived from the plea deal is not a judgment about the accused's culpability, because it is only a confirmatory decision of the agreement between the prosecution and the accused.

Moreover, the Justice Rapporteur asserted that the non-penal effects of the conviction, such as the confiscation of goods, set forth in Article 91 of the Penal Code, cannot be applied to plea bargains, because in such cases there is no criminal proceeding, in which the rights to a defence are safeguarded. Hence, the safeguard of the due process of law is breached. The confiscation of goods also violates the substantive due process, because this measure is more severe than the punishment against the accused in the plea agreement.

III. Such grounds were accepted by all other Justices, except for one. He also granted the appeal, but for another reason. He argued that the vehicle had to be given back to the applicant, because it was legally possessed. He argued that the decision of the plea bargain is like a conviction and results in the enforcement of a penal sanction. Once the Law of the Small-Claims Courts did not expressly exclude the confiscation of goods as an effect of the sanction derived from a plea deal, the loss of seized goods is an automatic consequence of this kind of procedure. He argued that the principle of due process, full defence, the adversarial system and the presumption of innocence were not breached, because a simplified proceedings was followed to result in the plea bargain.

Supplementary information:

This case refers to number 187 of the General Repercussion: enforcement of the effects of convictions to cases of plea bargains under Law 9099/1995.

Cross-references:

- Article 58 of Decree Law 3668/1941;
- Article 91 of the Criminal Code;
- Law 9099/1995 – Law of Special Courts.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2015-3-034

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 17.06.2015 / **e)** Extraordinary Appeal 673707 / **f)** *Habeas data* and information related to tax payment / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 195, 29.09.2015 / **h)**.

Keywords of the systematic thesaurus:

- 3.3.1 General Principles – Democracy – **Representative democracy.**
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**
 5.3.25 Fundamental Rights – Civil and political rights – **Right to administrative transparency.**

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

Keywords of the alphabetical index:

Fiscal register, public access / Record, administrative, access / Taxpayer.

Headnotes:

Habeas data, a specific constitutional mechanism for seeking information held by the State, is the adequate constitutional remedy to ensure that the taxpayer can access tax-payment data stored in private computerised systems, which grant support to tax collection by State organs.

Summary:

I. This case refers to an extraordinary appeal in which the Court discussed the viability of *habeas data*, a specific constitutional mechanism for seeking information held by the State, as a means to obtain information related to debts and payments registered under the taxpayer name in computerised systems, which grant support to tax collection by state organs.

The Court of Appeals (Federal Regional Tribunal for the 1st Region) denied the request, stating the remedy was not suitable to obtain access to information stored in databanks that have no public character.

The company-appellant filed the extraordinary appeal against this decision, explaining that it is the taxpayer's right to obtain access to any register under their name in computerised systems used by the Federal Revenue Service of Brazil. The appellant also argued that the administrative activity has to be transparent, otherwise it is in breach of Article 5.LXXII.a of the Federal Constitution.

The Federal Government argued that the *habeas data* was inappropriate, since the databanks that give support to the federal collection are computerised systems of the Federal Revenue Service internal control and, therefore, are not of a public nature. Furthermore, the Federal Government argued that the appellant had no interest in bringing proceedings, as the requested information would be the same as that which the appellant itself had already provided to the tax authority. Besides, the data is provisional, as it demands validation of the tax auditor. Thus, it would not serve as evidence to recover undue payment. Finally, the government highlighted the risk of a multiple effect to the administrative order in case the *habeas data* is accepted in such hypotheses.

II. The Supreme Court, unanimously, granted the extraordinary appeal, stating that *habeas data* is the adequate constitutional remedy to ensure that the taxpayer can access tax-payment data stored in the computerised systems, which give support to tax collection by state organs.

The Full Court considered to be unequivocal the public character of registers or databanks containing information of third parties or that might be transmitted to them, or that are not of private use of the organ or entity which maintains such data (Article 1 of Law 9507/1997). Therefore, the data register shall be understood in a broad sense, embracing everything that is related to the person of interest (individual or legal person, national or foreign), in a direct or indirect way.

The Court stressed that taxpayers have the right to know the information contained in public databanks or databanks of public character, which is related to them in order to preserve their name, business planning or investment strategy and to recover undue tax payments. Thus, the confidential information must be protected from the society in general, but not from those whom the information concerns, due to the right of information (Article 5.XXXIII of the Federal Constitution). The only exception is the confidentiality, which is indispensable to national and society security.

The Court considered that the fact the appellant has the data in his accounting records, by itself, does not withdraw his interest to access the information in the systems, since it may want to have control over debts and payments and strictly assess its duties, especially because inconsistencies can occur due to the computerised process of data. Furthermore, information transparency does not imply the right to recover taxes. Such right must be fulfilled by suitable evidence. Lastly, the Court stated the argument of risk to the administrative order shall not prevail, as it is due to the National Treasury to adapt in order to comply with the constitutional commands, even if it may cost expenses to the organ.

Supplementary information:

This case refers to no. 582 of the General Repercussion: whether the *habeas data* is adequate to provide access to the information stored in the databank named SINCOR – current account system of legal person, from the Federal Revenue Service of Brazil.

Cross-references:

- Article 5.XXXIII and 5.LXXII.a of the Federal Constitution;
- Article 1 of Law 9507/1997.

Languages:

Portuguese, English (translation by the Court).



Canada

Supreme Court

Important decisions

Identification: CAN-2015-3-008

a) Canada / **b)** Supreme Court / **c)** / **d)** 16.10.2015 / **e)** 35864 / **f)** Goodwin v. British Columbia (Superintendent of Motor Vehicles) / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 46, [2015] 3 S.C.R. 250 / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; 476 *National Reporter* 3; 23 *Criminal Reports* (7th) 1; [2015] 11 *Western Weekly Report* 1; 75 *British Columbia Law Reports* (5th) 213; [2015] S.C.J. no. 46 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Impaired driving, provincial scheme, driving prohibition / Competence, legislative, province, property and civil rights / Unreasonable search and seizure / Breath sample, roadside analysis.

Headnotes:

A provincial scheme imposing licence suspensions, penalties and remedial programmes to impaired drivers falls within the provincial constitutional power over property and civil rights in the province. Although provincial drunk driving programmes and the criminal law will often be inter-related, a provincial statute will not invade the federal power over criminal law merely because its purpose is to target conduct that is also captured by the Criminal Code.

Such a scheme does not create an offence engaging the right to be presumed innocent guaranteed by Article 11.d of the Canadian Charter of Rights and Freedoms, since it is a proceeding of an administrative nature. However, the branch of the

scheme applicable when a driver fails the breath sample analysis infringes the right to the protection of Article 8 of the Charter against unreasonable search and seizure. The serious consequences for a driver who fails the test, combined with an inability to challenge the basis on which these consequences are imposed, render the scheme unreasonable.

Summary:

I. In 2010, the province of British Columbia created the Automatic Roadside Prohibition (hereinafter, “ARP”) scheme, which imposes driver’s licence suspensions, penalties and remedial programmes to impaired drivers. The scheme calls for roadside analysis of drivers’ breath samples using an approved screening device (hereinafter, “ASD”). A “fail” reading and a driver’s refusal to provide a sample result in a 90-day licence suspension. A “warn” reading results in a shorter suspension of between 3 and 30 days. There is a process for review of suspensions by the Superintendent of Motor Vehicles, but it only permits the Superintendent to consider whether the applicant was a “driver” and whether the ASD registered a “fail”, “warn”, or the driver refused to provide a sample.

These appeals ask whether the ARP scheme oversteps the bounds of provincial legislative competence and invades the federal government’s exclusive jurisdiction over criminal law. They also ask whether the scheme engages and infringes two Charter rights: the protection against unreasonable search and seizure found in Article 8, and the presumption of innocence guaranteed by Article 11.d. The chambers judge found that the ARP scheme is *intra vires* the province and that Article 11.d of the Charter is not engaged. However, he concluded that the ARP scheme violates Article 8 when the ASD registers a “fail”, though not when a driver refuses to provide a breath sample. His decision was upheld on appeal.

II. The Supreme Court dismissed the appeals. According to the Court, the province’s purpose in enacting the ARP scheme was not to oust the criminal law, but rather to prevent death and serious injury on its roads by removing drunk drivers and deterring impaired driving. The pith and substance (i.e. a legal doctrine in Canadian constitutional interpretation used to determine under which head of power a given legislation falls) of the ARP scheme is the licensing of drivers, the enhancement of traffic safety and the deterrence of persons from driving while impaired by alcohol. The matter of the scheme therefore falls within the provincial power over property and civil rights in the province and the legislation is valid from a constitutional division of powers standpoint.

The Court is also of the opinion that the ARP scheme does not create an offence within the meaning of Article 11.d of the Charter, because it is not concerned with addressing harm done to society in a public forum, instead, its focus is on the regulation of drivers and licensing, and the maintenance of highway safety. Although it has a relationship with the criminal law, in the sense that it relies on Criminal Code seizure powers and is administered by police, the scheme is a proceeding of an administrative nature. It does not impose true penal consequences. The consequences imposed are not sufficient to engage the rights embodied by Article 11.

According to six judges of the Court, the ARP scheme infringes Article 8 of the Charter. The demand to breathe into an ASD constitutes a seizure that engages the protection of Article 8. The compelling purpose of the breath demand, namely to protect residents of the province from death and serious injuries caused by impaired drivers, weighs heavily in favour of the reasonableness of the seizure. However, the breath seizure has certain criminal-like features, such as its administration by a police officer pursuant to Criminal Code authorisation. The consequences that follow a “fail” reading or the failure to provide a sample are not criminal, but they are immediate and serious. There can also be serious issues concerning the accuracy of the ASD’s blood-alcohol readings. This raises concerns that undermine the reasonableness of the seizure. In addition, the absence of meaningful review of the accuracy of the result of the seizure raises concerns about the reasonableness of the ARP scheme. Absent such review, a driver could find herself facing serious administrative sanctions without the precondition for the sanctions being met, and without any mechanism redress. Accordingly, the ARP scheme is unreasonable.

The objective of the scheme is pressing and substantial, and the automatic driving prohibitions are rationally connected to that objective. However, the ARP scheme does not minimally impair the right of a driver to be free of unreasonable search and seizure. There are less impairing measures that can feasibly be put into place without undermining the province’s objective. Therefore, the “fail” branch of the ARP scheme is not saved under Article 1 of the Charter.

III. In a dissenting opinion on the issue of Article 8 of the Charter, the Chief Justice is of the opinion that the ARP scheme does not infringe this provision and that the three requirements of a reasonable search and seizure are met. First, the state’s purpose is important and capable of justifying intrusion into the private sphere of the individual’s bodily substances. Second, the seizure does not go further than reasonably

necessary to achieve the state purpose. The scheme here is regulatory and not criminal. With respect to the third requirement, namely the availability of judicial supervision, the Superintendent’s decision is subject to judicial supervision by way of judicial review. The administrative nature of the scheme and the nature of the driver’s interest at play justify the administrative nature of the review, as do the less stringent provisions to ensure accuracy of the sample. The review provisions of the ARP scheme offers reasonable protection against abusive exercise of the state power to intrude on the individual’s private sphere.

Languages:

English, French (translation by the Court).



Identification: CAN-2015-3-009

a) Canada / **b)** Supreme Court / **c)** / **d)** 19.11.2015 / **e)** 35755, 35873, 35946 / **f)** R. v. Moriarity / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 55, [2015] x S.C.R. xxx / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; [2015] S.C.J. no. 55 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

4.7.11 Institutions – Judicial bodies – **Military courts**.
5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel**.

Keywords of the alphabetical index:

Military prosecution, constitutionality / Armed forces, control, competence / Military, access to civil courts / Legislation, overbreadth.

Headnotes:

The prosecution under military law of members of the military engaging in the full range of conduct covered by Sections 130.1.a and 117.f of the National Defence Act (hereinafter, the “Act”) is rationally connected to the maintenance of discipline, efficiency and morale regardless of the circumstances of the commission of the offence.

Summary:

I. The four military accused were convicted of offences punishable under the Criminal Code and/or the Controlled Drugs and Substances Act, which are service offences by virtue of Section 130.1.a of the Act. The accused argued that Section 130.1.a was broader than necessary to achieve its purpose and hence violated Section 7 of the Canadian Charter of Rights and Freedoms. The first two accused, M and H, appealed unsuccessfully to the Court Martial Appeal Court (hereinafter, the “CMAC”), which held that, properly interpreted as requiring a military nexus, Section 130.1.a is not overbroad. The third accused also raised the Section 7 overbreadth argument before the CMAC, but the argument was dismissed based on the ruling regarding M and H. On appeal to the CMAC, the final accused also argued that Section 130.1.a violates Section 7. In addition, he raised a similar argument with respect to Section 117.f of the Act. The CMAC unanimously rejected the Section 7 argument holding that the ruling regarding M and H was binding precedent with respect to Section 130.1.a and that the challenge to Section 117.f was moot. The four accused appealed to the Supreme Court raising the issue of whether Sections 130.1.a and 117.f of the Act infringe Section 7 of the Charter, because they create service offences that do not directly pertain to military discipline, efficiency and morale, and thus are overbroad.

II. The Supreme Court unanimously dismissed the appeals. Both Sections 130.1.a and 117.f of the Act engage the liberty interest of individuals subject to the Code of Service Discipline. Therefore, in order for these provisions to comply with Section 7 of the Charter, this deprivation of liberty must be done in accordance with the principles of fundamental justice, namely the principle against overbroad laws. At the outset of an overbreadth analysis, it is critically important to identify the law’s purpose and effects, because overbreadth is concerned with whether there is a disconnect between the two. With respect to both purpose and effects, the focus is on the challenged provision, understood within the context of the legislative scheme of which it forms a part.

The objective of the challenged provision may be more difficult to identify and articulate than its effects. The objective is identified by an analysis of the provision in its full context. The Court observed that in general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms. An unduly broad statement of purpose will almost always lead to a finding that the

provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth. Moreover, the overbreadth analysis does not evaluate the appropriateness of the objective. Rather, it assumes a legislative objective that is appropriate and lawful.

The Court found that Parliament’s objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military. That objective, for the purposes of the overbreadth analysis, should not be understood as being restricted to providing for the prosecution of offences which have a direct link to those values. The challenged provisions are broad laws which have to be understood as furthering the purpose of the system of military justice. Both Sections 130.1.a and 117.f’s purpose is to maintain discipline, efficiency and morale in the military. The real question is whether there is a rational connection between that purpose and the effects of the challenged provisions.

The challenged provisions make it an offence to engage in conduct prohibited under an underlying federal offence and to engage in fraudulent conduct. The Court explained that those offences apply regardless of the circumstances of the commission of the offence and their effect is to subject those who have committed these offences to the jurisdiction of service tribunals. It cannot be said that the fact that these offences apply in instances where the only military connection is the status of the accused is not rationally connected to the purpose of the challenged provisions. To conclude otherwise implies too narrow a view of the meaning of “discipline, efficiency and morale” and of how the effects of the provisions are connected to that purpose. The objective of maintaining “discipline, efficiency and morale” is rationally connected to dealing with criminal actions committed by members of the military even when not occurring in military circumstances. The Court accordingly concluded that behaviour of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base.

Languages:

English, French (translation by the Court).



Identification: CAN-2015-3-010

a) Canada / **b)** Supreme Court / **c)** / **d)** 27.11.2015 / **e)** 35958 / **f)** R. v. Appulonappa / **g)** *Canada Supreme Court Reports* (Official Digest), 2015 SCC 59, [2015] x S.C.R. xxx / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; [2015] A.C.S. no. 59 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.
 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
 5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum**.

Keywords of the alphabetical index:

Immigration, offence, people smuggling / Legislation, overbreadth / Charter of rights, principles of fundamental justice / Constitutional right, violation, remedy.

Headnotes:

Under Section 117 of the Immigration and Refugee Protection Act (hereinafter, “IRPA”), it is an offence to “organise, induce, aid or abet” the unauthorised entry of other people into Canada. Insofar as Section 117 permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members, it unjustifiably infringes Section 7 of the Canadian Charter of Rights and Freedoms. Under Section 7 of the Charter, “[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”.

Summary:

I. In 2009, a vessel was apprehended off the west coast of Canada. Seventy-six people were aboard, amongst the four appellants. All passengers were Tamils from Sri Lanka, which they claimed to have fled because their lives were endangered. The passengers asked for refugee status in Canada. None had the required legal documentation. As for the four appellants, they are alleged to have been the point persons for a transnational for-profit operation to smuggle undocumented passengers from Southeast Asia to Canada. The majority of passengers each paid, or promised to pay, \$30,000 to \$40,000 for the

voyage. The appellants are said to have been responsible for organising the passengers in Indonesia and Thailand prior to boarding the freighter, and serving as the chief crew of the ship on the voyage to Canada. The appellants were charged under Section 117 of the IRPA. Consequences of conviction could include lengthy imprisonment and disqualification from consideration as a refugee. Before their trial, the appellants challenged the constitutionality of Section 117 of the IRPA, on the ground that it infringes the right to life, liberty and security of person enshrined in Section 7 of the Charter. The trial judge ruled the provision was unconstitutional. The Court of Appeal reversed that decision, found the provision to be constitutional and remitted the matter for trial. Afterwards, the question of the constitutionality of Section 117, as it was at the time of the offences, came before the Supreme Court (the current Section 117 was not before the Court).

II. In a unanimous decision, the Supreme Court allowed the appeals on the ground that Section 117 infringed Section 7 of the Charter and remitted the charges for trial. Firstly, the Court held that the purpose of Section 117 is to criminalise the smuggling of people into Canada in the context of organised crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada. A broad punitive goal that would prosecute persons with no connection to and no furtherance of organised crime is not consistent with Parliament’s purpose as evinced by the text of Section 117 read together with Canada’s international commitments, Section 117’s role within the IRPA, the IRPA’s objects, the history of Section 117, and the parliamentary debates.

Secondly, the Court held that the scope of Section 117 is overbroad and interferes with conduct that bears no connection to its objective. The overbreadth problem cannot be avoided by interpreting Section 117.1 as not permitting prosecution of persons providing humanitarian, mutual or family assistance. Such an interpretation would require the Court to ignore the ordinary meaning of the words of section 117.1, which unambiguously make it an offence to “organise, induce, aid or abet” the undocumented entry. To adopt this interpretation would violate the rule of statutory interpretation that the meaning of the words of the provision should be read in their grammatical and ordinary sense. It would also require statements from the legislative debate record suggesting Parliament knew in advance that the provision was overbroad to be ignored.

Therefore, the Court concluded that Section 117's overbreadth cannot be justified under Section 1 of the Charter. While the objective of Section 117 is clearly pressing and substantial and some applications of Section 117 are rationally connected to the legislative object, the provision fails the minimal impairment branch of the Section 1 analysis. It follows that Section 117 is of no force or effect to the extent of its inconsistency with the Charter.

In this case, according to the Court, the preferable remedy is to read down Section 117 of the IRPA, as it was at the time of the alleged offences, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the Charter. This remedy reconciles the former Section 117 with the requirements of the Charter while leaving the prohibition on human smuggling for the relevant period in place.

Supplementary information:

The above appeals relate to the first consequence of participating in the unauthorised entry of other people into Canada – prosecution under Section 117 of the IRPA. The companion appeals, *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, relate to the second consequence – inadmissibility to Canada under Section 37.1.b of the IRPA.

In the companion appeals, the Immigration and Refugee Board found the five appellants inadmissible to Canada. This decision was reversed in part by the Federal Court on judicial review, but on appeal the Federal Court of Appeal reinstated the Board's decision. The Supreme Court allowed the five appeals and remitted the cases to the Board for reconsideration. The Court held that Section 37.1.b applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organised crime. In addition, the Court held that Section 7 of the Charter is not engaged at the stage of determining admissibility to Canada under Section 37.1.

Languages:

English, French (translation by the Court).



Chile Constitutional Court

Important decisions

Identification: CHI-2015-3-006

a) Chile / **b)** Constitutional Court / **c)** / **d)** 10.09.2015 / **e)** 2684-2014 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
3.22 General Principles – **Prohibition of arbitrariness.**
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Arbitrariness, prohibition / Arbitrary acts / Economic action, freedom / Law, ambiguous / Law, definition / Law, precision, need.

Headnotes:

A law permitting mayoral decrees ordering the relocation of industries, on the grounds that they are “wrongfully located” and on the grounds of “disturbance and harm”, is insufficiently precise and provides a basis for arbitrary decisions, and is therefore unconstitutional.

Summary:

I. The Law on Urbanism and Housing provides a faculty to the mayor to issue an order to move industries “wrongfully located and that provoke disturbance and harm to the neighbourhood”. This change of location must be operated by the industry within a year.

The applicant is a tanning company located within a populated neighbourhood. The mayor ordered its relocation, using the faculty provided by law. The applicant requested review of this administrative measure before the courts. Pending this decision by the Supreme Court, the plaintiff issues a constitutional action before the Constitutional Tribunal in order to declare it inapplicable to the pending trial, because it breaches the legal certainty on its property rights.

II. The Constitutional Tribunal declared that the relocation faculty granted to the mayor infringes the constitutional rights of the applicant. The Tribunal considered that the rule is vague and gives the authorities a broad field of discretion that does not guarantee sufficiently that the mayor has decided on the basis of just standards. Although the legal precept may be applicable to several cases, the indeterminacy of the language in the law and its vagueness in expressions like “wrongfully located” and “disturbance and harm” does not permit an assessment as to whether an authority is making a decision to relocate considering sufficient environment factors rather than issuing an arbitrary decision.

Languages:

Spanish.



Identification: CHI-2015-3-007

a) Chile / b) Constitutional Court / c) / d) 08.10.2015 / e) 2744-2014 / f) / g) / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Civil debt, imprisonment / Crime, elements / Crime, gravity, punishment / Criminal responsibility.

Headnotes:

Writing a post-dated cheque as a guarantee for future payment cannot be considered to equate to the felony of writing a check with insufficient funds. The definition of a crime must be sufficient in a way that the language is understandable for any person. The principle of criminal liability, which originates from human dignity, demands that a criminal definition shall make clear which elements are required in order to declare a person guilty. Accordingly, the ban on imprisonment for civil debts precludes such punishment for a situation that has

a contractual origin. In addition, the proportionality principle means that the sanction shall correspond to the severity of the crime.

Summary:

I. The Law on Bank Accounts and Checks establishes a felony for the act of writing a cheque with insufficient funds. This law also provides that issuing a post-dated cheque is not exoneration for criminal liability.

The applicant had been prosecuted for issuing a cheque without sufficient funds. This cheque, he argued, was issued during his presidential campaign in order to pay communication services on a different date. He argued that this cheque was issued as a guarantee for future payment, but this argument was not admitted in the criminal procedure. In order to challenge the rules on the issuance of cheques, he initiated a constitutional action in order to declare inapplicable the legal provision in question. He argued that this legal provision breaches constitutional principles such as the principle of legality in criminal matter or *nullum crimen, nulla poena sine lege*; the principle of criminal liability; the ban on imprisonment for civil debts, and the principle of proportionality.

II. The Constitutional Tribunal declared the legal provision as inapplicable insofar as it has unconstitutional effects in this particular case.

Regarding the principle of legality in criminal matters, the Tribunal recalled that the definition of a crime shall be sufficient in a way that the language is understandable for any person. The principle of criminal liability, which originates from human dignity, demands that a criminal definition shall make clear which elements are required in order to declare a person as guilty. Accordingly, the ban on imprisonment for civil debts precludes such punishment for a situation that has a contractual origin. Finally, the proportionality principle means that the sanction shall correspond to the severity of the crime.

In consideration of those principles, as understood by the Tribunal, the legal provision in this concrete case shall be declared as inapplicable, given the absence of the element of criminal gross negligence concerning issuance of a post-dated cheque. The issue here is that the plaintiff had the intention to write a guaranteed cheque, there was no gross intention in this action, and the law presumes his liability beyond a tolerable limit and therefore breaches the principles described above and expressed in the Constitution.

Languages:

Spanish.

*Identification:* CHI-2015-3-008

a) Chile / **b)** Constitutional Court / **c)** / **d)** 12.11.2015 / **e)** 2694-2014 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**

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

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

Keywords of the alphabetical index:

Bye-law / Freedom to choose one's profession / Freedom to work for remuneration / Retirement, age.

Headnotes:

A bye-law provision that revokes authorisation to nautical pilots after reaching the age of 65 years is not arbitrary, considering the necessary health conditions for the job and that the retirement age of all men is legally established at 65.

Summary:

I. The Law on Navigation provides that nautical services, such as other pilotage services, are regulated by the nautical authorities. This law also mandates that regulation of such services is through a bye-law issued by the Nautical Director. However this bye-law provides that persons who are authorised for pilotage are allowed for this service only until they reach the age of 65 years.

The applicants were authorised to pilotage, but are now 65 years old, meaning that they do not fulfil the requirements provided by the regulations. They argued that the norm that establishes the issuance of bye-laws by the Nautical Director is unconstitutional as the bye-law sets the 65-year age limit. This, the applicants argued, breaches the constitutional guarantee of freedom to work and the right to equality before law. They sought a declaration of inapplicability of the legal provision insofar as it instructs that the authority issues a bye-law for the regulation of nautical services.

II. The Constitutional Tribunal rejected the applicants' action and declared the constitutional action as inadmissible.

The Tribunal recognised that the Constitution provides a general system of rules of employment and in general recognition of the unequal labour relationship. However, the Tribunal observed that the issue here is that this action challenges an aspect of the bye-law. The constitutional action for requesting the disapplication of legal provisions may be brought solely against primary legislation, whereas the applicants seek to challenge a provision of a bye-law, not the law itself.

Nevertheless the Tribunal offered its opinion that the 65-year age limit, as provided by the regulations, is reasonable and pursues a legitimate constitutional end. The Tribunal declared that a 65-year age limitation in this particular situation is not a breach of the Constitution, in particular the right to equality and freedom to work. In fact, pilotage services demand a health situation that at the age of the applicant may not be necessarily adequate; therefore this limitation has objective grounds. On the other hand, it must be considered that from a point of view from social security the retirement age for men it also is at the age of 65 years old.

Languages:

Spanish.



Identification: CHI-2015-3-009

a) Chile / b) Constitutional Court / c) / d) 21.12.2015 / e) 2935-2015 / f) / g) / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.

4.10.2 Institutions – Public finances – **Budget**.

4.15 Institutions – **Exercise of public functions by private bodies**.

5.2.2.5 Fundamental Rights – Equality – Criteria of distinction – **Social origin**.

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

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

Keywords of the alphabetical index:

Budget Law / Universities, public and private / Gratuity / Discrimination.

Headnotes:

Legal provisions may not establish a system to finance free access to university education, which set more onerous requirements on private universities for inclusion in the system, as compared to public universities. The differential treatment between private and public universities constitutes arbitrary discrimination.

Summary:

I. The Government, as part of the annual National Budget Law, proposed to Congress a mechanism to finance free access to universities (state and private), in which it established a number of requirements for universities in order to be part of the free education policy.

A number of members of the National Congress challenged the bill, on the basis of two arguments. First, that the mechanism for free access to education through the Budget Law exceeds the Constitution, since constitutional rules are not so extensive as to include the financing of free access to universities. Second, that the conditions established in the bill are discriminatory, because they establish more requirements for private institutions to access the education gratuity in comparison to those institutions recognised as traditional or state universities.

II. In dividing votes (5 to 5 with the casting vote of the President of the Tribunal) the Constitutional Tribunal

rejected the first argument, declaring that the free education policy for universities may be established by a Budget Law. The majority, in rejecting this argument, declared that the obligation to finance the free government education programme is incorporated into the matrix idea of the budget law that established the challenged regulation.

Secondly, with regard to the allegation that the challenged clauses affect the democratic deliberation of the National Congress, the Tribunal stated that considering the clauses an integral part of the Budget Law of the Public Sector, i.e. a law in the formal sense, certainly has special characteristics, such as annuity, they have not been free of procedure or formation law and, consequently, of deliberation in both chambers. So much so, that the requesting parliamentarians themselves have participated in the various stages of the processing of that law, having had the opportunity to meet and study the full content of it and to approve or reject it reasonably at the appropriate time.

While it is true that the processing of this bill also has special characteristics that distinguish it from other laws, such as limited for discussion time and manner in which the bodies involved, as well as limitations on parliamentarians respect the powers relating to the increase or decrease in the projected expenditures; the fact remains that the constituent has ensured that this processing is done under conditions of transparency, public participation and right of parliamentary majorities and minorities to express their views and, where appropriate, to introduce indications, allowing in certain matters express legitimate dissent and divergent agreements or consensus between political forces.

The second issue was confirmed by the Tribunal, which declared that the bill was discriminatory (6 to 4). The arguments to confirm were mainly that the requirements are discriminatory. The majority vote declared that equality before the law and non-arbitrary discrimination are some of the most important constitutional principles on which the democratic system is based, giving consistency and coherence, and the same can be said about the right to education, since the effective guarantee of both allows any privilege or obstacle incompatible with the assumption that all people have equal rights and should be treated in the same way to be overcome.

It is appropriate to note, at the outset, that the judgment did not question the budgetary allocation to free education and, therefore, cannot affect the resources allocated for this purpose; and, secondly, it does not alter the actual personal and academic requirements that the clause requires vulnerable

students to access the benefit. Nevertheless, the Tribunal acknowledged that a laudable public policy is pursued, but the rules that contain it should follow the principle of constitutional supremacy, the responsibility lying with the Constitutional Tribunal to ensure that principle. The Tribunal objected that these vulnerable students were being imposed the enjoyment of free education enshrined in the Budget Law, beyond their personal or academic status conditions, such as the fact of being enrolled in certain universities, technical training centres and professional institutes, setting an eventual exclusion from those.

It is therefore the application of such requirements to higher education institutions which are part of the clause of the Law on Budgets, which generates unjustified differences between vulnerable students who are in the same situation, which is contrary to the principle of equality before the law and not arbitrary discrimination enshrined Article 19.2 of the Constitution. Especially when it is imposed on them and precludes their willingness to choose the institution of higher education at the sought date. Thus, a student who is enrolled in an institution of higher education on 30 September 2015, has fewer years of accreditation than is required by the contested clause, was not in a position to access the benefit, select the institution that qualifies entitlement to the gratuity, because the date that imposes it makes it a physically impossible situation, which is more proof of discrimination *a priori* between students. However, they are in the same socio-economic status. The criteria of differentiation, instead of ensuring equality before the law and equal opportunities for all those students, impose instead conditions that make it impossible to exercise it, leaving students in a situation of obvious exclusion, not only by their social status, but in addition they now belong to a particular institution on which weighs the decision and ability to meet those criteria.

Consequently, membership of an institution that could not fulfil the criteria established by the law will be another stigma for the most vulnerable young people and would render the benefit of the gratuity effectively useless. Therefore, lack of respect and reasonableness of the contested differentiation criteria, are responsible for arbitrary exclusion and discrimination.

Languages:

Spanish.



Identification: CHI-2015-3-010

a) Chile / **b)** Constitutional Court / **c)** / **d)** 24.12.2015 / **e)** 2552-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights**.

Keywords of the alphabetical index:

Proceeding, switch / Summary trial / Land, indigenous.

Headnotes:

Civil and indigenous proceedings have a similar structure. Therefore due process is not breached by switching from civil proceedings to indigenous proceedings.

Summary:

I. In accordance with general civil rules, if a person claims eviction for illegal occupation of land, a summary trial shall be held. However when a trial involves members of an indigenous community, then the special rules of Law no. 19.253 on the protection of indigenous people, are to be applied. The procedure was originally set for a civil trial, but since the defendants claimed that they belong to an indigenous community, the procedure changed to that provided by indigenous law. The applicant challenged the constitutionality of these norms, alleging that they breach the rights to equality, fair trial and property.

The applicant's action sought eviction of the defendants from illegally occupied land. The defendants claimed during trial that as they are indigenous, special rules must be applied. The applicant argued that these rules infringe the right to equality, because the procedure provided by indigenous law favours those who belong to an indigenous ethnicity. He also claimed a breach of the right to due process, because he had no possible defence to determine if the land in dispute should be considered as indigenous land. In fact, he alleged, the National Commission of Indigenous Development is mandated by law to report whether land belongs to

indigenous property. This report alone, alleged the applicant, was sufficient to turn the regular civil procedure to the one provided under indigenous law.

II. The Constitutional Tribunal rejected these arguments and declared the challenged legal provision as constitutional in its application to this case.

The Tribunal firstly recalled that the State recognises affirmative action through public policies, especially in the case of indigenous people. Society in general has the duty to protect indigenous land. In this general duty the Commission sought to protect indigenous land, thus its intervention is justified. Last, the Tribunal recalled that the Chilean State is a party to Convention 169 of the International Labour Organisation (ILO), which mandates that the State shall have a policy to provide effective protection to indigenous rights.

In consideration of the above questions, the Tribunal declared that in this case there is no breach of the equality principle. Both proceedings, civil and indigenous law, have a similar structure and the Tribunal saw no diminution in constitutional protection in switching proceedings.

The Tribunal also declared that there is no breach of the right to due process, as regards a just defence. The report of the Commission is not binding and may be rejected at trial.

Finally, the Tribunal held that there was no contravention of the property rights of the plaintiff. The question in the pending trial is actually to determine who owns the land and this is a question that must be resolved by the judge of the trial and not a constitutional issue.

Languages:

Spanish.



Identification: CHI-2015-3-011

a) Chile / **b)** Constitutional Court / **c)** / **d)** 24.12.2015 / **e)** 2796-2015 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Army Forces / Parental leave / Ban for dismissal.

Headnotes:

The ban on dismissal for women, which remains in effect for one year after a woman gives birth, is applicable in all cases, including in the armed forces.

Summary:

I. The statute on Army Forces provides for the retirement of professional troops when, among other cases, the full period of service is accomplished with a maximum of five years. On the other hand, employment law provides a parental leave for working women and a ban on the dismissal of women on parental leave up to one year after giving birth.

The applicants are women are in service as professional troops, who were dismissed from military service during their parental leave. They challenged the norm of the statute of Army Forces alleging that it breaches the equality principle granted by the Constitution.

II. The Constitutional Tribunal declared that the challenged provision of the statute on Army Forces is unconstitutional as it contravenes the right to equality before law.

The Tribunal declared that the norms on maternity protection provided by employment law are applicable to the entire legal system, including specific statutes, such as those concerning the Army. A pro-public servant interpretation demands that a dismissal from service in the Army, even when such dismissal is provided by the statute, demands that it should not be applicable when public servants enjoy parental leave.

Languages:

Spanish.



Croatia

Constitutional Court

Important decisions

Identification: CRO-2015-3-008

a) Croatia / b) Constitutional Court / c) / d) 24.09.2015 / e) U-I-1397/2015 / f) / g) *Narodne novine* (Official Gazette), 104/15 / h) CODICES (Croatian).

Keywords of the systematic thesaurus:

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

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

3.16 General Principles – **Proportionality.**

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

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

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

Keywords of the alphabetical index:

Election, candidacy, restriction / Election, party, candidates, list, gender, balance / Election, candidate list, minimum signatures / Election, candidate list, minimum support / Election, parliamentary.

Headnotes:

First, the prohibition on those convicted of all criminal offences, including the offences of abuse of office and official authority, to stand as candidates in elections for a six-month period is constitutional. However, the application of this rule to certain categories of offenders (e.g. those who received a conditional sentence) is unconstitutional. Second, the legislator is not authorised to set conditions for candidatures of political parties for elections by requiring additional voter “support” (in the form of signatures) because this disrupts the very purpose of establishing political parties and denies their role in a democratic society. Third, the increase in the number of voters’ signatures necessary for putting forward independent lists from 500 to 1,500 may only be acceptable if

there are sufficient and relevant reasons for this, which the legislator i.e. proponent of the law, must provide. Fourth, the automatic disqualification of lists from the election competition due to non-compliance with the “gender quota” represents a disproportionate intrusion into the freedom of proposing candidates at parliamentary elections.

Summary:

I. On the basis of a proposal of the Democratic Party of Women, the Constitutional Court instituted proceedings to review the conformity with the Constitution of Articles or parts of Articles 8, 12, 13 and 14 of the Act on Amendments to the Election of Members of the Croatian Parliament Act (hereinafter, the “AA EMCPA”) and rendered a decision repealing them i.e. repealed were Articles or parts of Articles 9.4.2.3, 20.4, 20.7, 21.2, 21a.2 of the consolidated text of the Election of Members of Croatian Parliament Act (hereinafter, “EMCPA”).

At the same time, the Court by the ruling did not accept a proposal to institute proceedings for a review of conformity with the Constitution of those parts of Articles 8, 12, 13 and 14 of the AA EMCPA that were not repealed by the decision, Article 22 of the AA EMCPA and AA EMCPA as a whole because it assessed the applicant’s objections as ill-founded.

The applicant disputed, *inter alia*, the constitutionality of the AA EMCPA as a whole and all above-mentioned Articles of the AA EMCPA, except Article 13 of the AA EMCPA, alleging that those provisions or just parts of them were not in conformity with Articles 1, 3, 5, 14, 22 and 45 of the Constitution.

Pursuant to Article 38.2 of the Constitutional Act on the Constitutional Court, the Constitutional Court *proprio motu* instituted proceedings for a review of conformity with the Constitution of part of Article 13 of the AA EMCPA and repealed it.

II. Article 1 of the Constitution (power in the state derives from the people and they exercise it through the election of representatives), Article 3 of the Constitution (gender equality, the rule of law and a democratic multi-party system), Article 16 of the Constitution (principle of proportionality) and Article 45.1 of the Constitution (right to universal and equal suffrage in elections) were relevant for the assessment of whether the submitted proposal was well or ill-founded.

The Court first examined the legal rule prohibiting perpetrators of the criminal offence of abuse of office and official authority from standing as candidates (Article 8 of the AA EMCPA, Article 9.4 of the

EMCPA). This rule imposes a prohibition on perpetrators of all criminal offences, including the offences of abuse of office and official authority, to stand as candidates from the day an unconditional prison sentence for a duration exceeding six months is rendered, to the day of execution of the sentence.

The Court held that this legal rule was in compliance with the Constitution. This means that no person covered by this general legal rule may stand as a candidate for elections to the Croatian Parliament, including those who abused their office and official authority. Three conditions of this general prohibition (the fact that it must be a final judgment, that an unconditional prison sentence for a duration exceeding six months was rendered, and that the prohibition to stand as a candidate lasts until the day of execution of the sentence) were established by the Croatian Parliament i.e. by Article 9.4.1 of the EMCPA.

The Constitutional Court repealed, for reasons of lack of proportionality, only the part, i.e. Article 9.4.2.3 of the EMCPA, concerning the derogations from this general legal rule:

First, it repealed the derogation according to which the prohibition on standing as a candidate also referred to those perpetrators of the criminal offence of abuse of office and official authority who received a conditional sentence, or were sentenced to a prison sentence for the duration of six months (and not exceeding six months, unconditionally, as prescribed by the general legal rule).

Second, it repealed the derogation where the prohibition on standing as a candidate for all perpetrators of the criminal offence of abuse of office and official authority also extended to the period of rehabilitation after the sentence had been served (and not to the day of execution of the prison sentence, as prescribed by the general legal rule). However, the Constitutional Court explicitly established that the extension of the prohibition of standing as a candidate to the rehabilitation period would be acceptable in terms of constitutional law only if it concerned serious forms of the criminal offence of abuse of office and official authority.

Since this also covered the least serious forms of the criminal offence of abuse of office and official authority, the repealed legal solution was clearly disproportionate, considering that these forms were equated with genocide, terrorism, torture, slavery or aggravated murder. On the other hand, the derogations did not cover, for instance, rape, or the sexual abuse of children, nor their exploitation for pornography, etc.

The second provision examined by the Court was the obligation of political parties to collect voters' signatures for their lists (Article 12 of the AA EMCPA, Article 20.4 and relevant part of Article 20.7 of the EMCPA).

The Court held that, due to their constitutional task in developing a democratic multi-party system, political parties are legally authorised entities for procedures of election to all representative bodies in the country and in the European Union. Therefore, the legislator is not authorised to set conditions for candidatures for elections by requiring additional voter "support" (in the form of signatures) because this disrupts the very purpose of establishing political parties and denies their role in a democratic society.

The imposition of such an obligation on political parties had the effect of eliminating small parties, in particular, from electoral competition, which is not in conformity with the Constitution. The electoral legislation is not and must not be an instrument for resolving problems caused by inadequate or inefficient legislation regulating the conditions for the establishment and activities of political parties in the Republic of Croatia.

The third provision examined by the Court concerned the increase in the number of voters' signatures for independent lists from 500 to 1,500 (Article 13 of the AA EMCPA, Article 21.2 of the EMCPA).

In the Court's view, the obligation on voters to collect signatures if they wish to put forward their independent list does not represent an act of "support" of one group of voters to the list of candidates proposed by other voters, but is rather an act of putting forward their own list of candidates by all the voters who signed. Voters' signatures are an element of legal identity of the independent list of candidates. In the course of 16 years and four parliamentary cycles, voters were obliged to collect 500 signatures. Therefore, the increase in the number of voters' signatures necessary for putting forward independent lists from 500 to 1,500 may only be acceptable if there are sufficient and relevant reasons for this, which the proponent of the law must provide.

The proposal of the Act of 2015 did not contain a single word concerning the reasons for increasing the number of voters' signatures for independent lists from 500 to 1,500. This led to the Court's assessment that this was an arbitrary political decision whose only aim was to reduce, as far as possible, the number of independent lists in the election competition. Since no reasons have been stated, according to the Constitutional Court, such an aim is illegitimate, and the legal measure is disproportionate, provided that the election legislation acknowledges and recognises the mechanism of independent lists.

The Court finally examined the mandatory “gender quota” on candidates’ lists (Article 14 of the AA EMCPA, Article 21a.2 of the EMCPA). The Constitutional Court declared in its decision that the legal rule, according to which there should be a minimum of 40% of members of each gender on the lists of candidates, must remain in force.

However, the part prescribing that a list did not meet this legal requirement was automatically not valid i.e. the last sentence of Article 21a.2 of the EMCPA was struck down. One of the reasons for this was that the Croatian Parliament also failed to repeal the misdemeanour penalty of HRK 50,000 referred to in Article 35 of the Gender Equality Act (concerning lists for the Croatian Parliament), which is imposed on any proponent who, when proposing a list of candidates, fails to comply with the gender equality principle laid down in Article 15 of the that Act.

Therefore, the Constitutional Court held that the legal obligation establishing that a minimum of 40% of members of each gender must feature on the lists of candidates was still in effect at the 2015 parliamentary elections, and a non-compliance penalty has also been envisaged.

In such circumstances, based on the fact that multi-party democracy referred to in Article 3 of the Constitution is the highest value of the constitutional order of the Republic of Croatia, and that it is in the general interest to allow parties to propose the best candidates, the automatic disqualification of lists from the election competition due to non-compliance with the “gender quota” represented a disproportionate intrusion into the freedom of proposing candidates at parliamentary elections.

Languages:

Croatian.



Identification: CRO-2015-3-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 24.11.2015 / **e)** U-III-4259/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 133/15 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Detention, order, extension / Detention, duration / Detention, risk of abscondence.

Headnotes:

The invocation by a competent criminal court of other (parallel) criminal proceedings conducted against the same prisoner in order to justify the further deprivation of his or her liberty, and denying the relevance of these other proceedings when dealing with the calculation of the total duration of the deprivation of his or her liberty is not just legally inconsistent, but directly contrary to the fundamental rule related to Article 22 of the Constitution (right to personal liberty) and Article 5 ECHR: the presumption is in favour of his or her release.

Summary:

I. A constitutional complaint was lodged against a Supreme Court ruling of 30 September 2015, extending the applicant’s detention after the first-instance judgment had been quashed (hereinafter, “impugned ruling”).

On 30 September 2015, in the case of FIMI-MEDIA, the Supreme Court quashed the non-final first-instance judgment and remanded the case to the County Court. On the same day, the Supreme Court also rendered a ruling extending the applicant’s detention by invoking the risk that the applicant might abscond in order to avoid criminal liability.

The applicant argued that the impugned ruling violated his constitutional rights guaranteed by Articles 14.2 and 16.2 in conjunction with Articles 22 and 29.1 of the Constitution. He also considered that his rights guaranteed by Articles 5 and 6.1 ECHR had also been violated.

The time line of events related to the applicant’s deprivation of liberty 2010-2015 are as follows:

Several parallel criminal proceedings are pending against the applicant. The applicant was deprived of liberty in the cases of FIMI-MEDIA, as well as of Hypo and INA-MOL, and from December 2010 he was *de facto* deprived of liberty for nearly four years.

In the case of FIMI-MEDIA (the current proceedings), the applicant was arrested in the territory of the Republic of Austria on 10 December 2010 and detention was ordered pending extradition, where he stayed until 18 July 2011 when he was extradited to the Republic of Croatia.

The applicant was in detention from 18 July 2011 to 16 December 2011, when, following the setting and posting of bail, he was released from detention.

From 16 December 2011 to 20 November 2012, the applicant was at liberty.

On 20 November 2012 he was again deprived of liberty, but this time in relation to the cases of Hypo and INA-MOL (parallel proceedings).

In this case, his detention ran from 20 November 2012 to 3 April 2014, when the judgment by which he was sentenced to prison for the duration of eight (8) years and six (6) months became final. Therefore, the applicant, from 3 April 2014, acquired the status of convicted person serving a prison sentence, and his detention was terminated.

The final judgment in these parallel proceedings was quashed by a decision of the Constitutional Court of 24 July 2015, which suspended the further serving of the prison sentence.

Therefore, from 4 August 2015, the applicant was again in mandatory detention in relation to the case of FIMI-MEDIA, which was ordered during the appellate proceedings concerning the severity of the non-final single prison sentence, which was rendered for the duration of nine years.

The Supreme Court quashed the first-instance judgment in the case of FIMI-MEDIA on 30 September 2015. Due to the quashing of this judgment, the legal grounds for ordering mandatory detention ceased to exist. Consequently, the Supreme Court assessed whether, after the quashing of the first-instance judgment, there were "other legal reasons" for the application of detention against the applicant.

In the impugned ruling of 30 September 2015, it established that the risk of the applicant absconding was still present. This ruling was the subject-matter of review before the Constitutional Court.

The Constitutional Court first established the indisputable fact that in this case there was a reasonable suspicion that the applicant had committed the criminal offences with which he was charged in the case of FIMI-MEDIA.

Therefore, it remained for the Constitutional Court to review whether the competent court had stated sufficient and relevant reasons to find that there were "particular circumstances" that indicated that the risk of the applicant absconding would still exist if the Court allowed him to be released on bail.

The competent court justified its assessment that in this particular case the risk of the applicant absconding still existed, and, consequently, in the case of FIMI-MEDIA that his detention should be extended again at the stage of the proceedings prior to the rendering of the first-instance judgment with the following reasons:

- the applicant had fled the country in December 2010;
- there were several criminal proceedings pending against the applicant for similar criminal offences with prescribed severe prison sentences; and
- the applicant's close family members lived abroad.

II. In its decision, the Constitutional Court found that the reasons stated by the Court in the impugned ruling were not sufficient and relevant to justify the risk of the applicant absconding to such a degree that it was necessary to deprive him of his liberty again in September 2015, and that this violated the applicant's fundamental right to freedom (in the procedural aspect) which is guaranteed by Article 22 of the Constitution and Article 5 ECHR. The Constitutional Court held that the impugned ruling shall cease to be valid at the latest on 30 November 2015 at 24:00 hours if, by this time, the competent court failed to render a new ruling on extending the applicant's detention based on sufficient and relevant reasons which could justify the deprivation of his liberty, or a new ruling ordering precautionary measures to ensure the presence of the applicant before the Court, without at the same time depriving the applicant of his liberty.

First, in all rulings on the deprivation of the applicant's liberty of 2010, the reasons for ordering or extending detention were exhausted with the description of the conduct of the applicant on two critical days, 8 and 9 December 2010, when he, in the opinion of the Court, fled the country to Austria with the intention of fleeing to the USA via Germany, and thus avoid criminal prosecution.

Nearly five years following this event, the competent court in the impugned ruling again justified the extension of detention by invoking the same event. In so doing, it failed to mention Constitutional Court Decision no. U-III-5141/2011 of 2011, where the applicant's constitutional complaint was upheld with

the finding that invoking solely the event of December 2010 was no longer sufficient, and that due to the time dynamics of events, the risk of the applicant absconding had become manifestly negligible.

Second, the competent court in the impugned ruling stated only one new element: it established that the lapse of time from that event in December 2010 had not affected the fact that due to this event it was still justified to extend the applicant's detention, since the applicant "for most of this time, that is, for nearly three years, was deprived of liberty in parallel proceedings", which ensured his presence in the current proceedings in the case of FIMI-MEDIA "regardless of his will". Consequently, the circumstances indicating the risk of the applicant absconding had never ceased to exist, because the "presence of the defendant was ensured by the deprivation of his liberty in the other proceedings".

The Constitutional Court held that such arguments presented by the competent court were unacceptable from the aspect of the constitutional rights of the applicant to personal liberty in procedural terms. These arguments are basically selective, because they do not take into account the relevant circumstances, or the entire legal situation in which the applicant of the constitutional complaint finds himself, or comparative case-law.

The Constitutional Court persisted in its assessment that the time that had lapsed from the event of December 2010 was relevant in order to establish the existence of the risk of the applicant absconding in 2015, which the competent court was obliged to examine in the light of the current circumstances and the applicant's current personal situation. The competent court failed to do so.

Third, the new element highlighted in the impugned ruling (and that is the court's argument that the lapse of time from the event of December 2010 did not affect the fact that this event still justified the extension of the applicant's detention) also revealed certain legal inconsistency in the existing case-law if the reasons with which the competent court explains other relevant facts in the same case are taken into consideration.

This concerns the case-law of criminal courts related to the calculation of the total length of duration of detention. Since this issue is not legally regulated, criminal courts make a strict distinction in their case-law between detention according to individual parallel (simultaneously conducted) criminal proceedings, even though they concern the same detainee, because they do not calculate as part of the current detention (for which the total length of duration is

assessed) the time spent in detention as part of the criminal proceedings conducted in parallel with these current proceedings. On these grounds, the competent court held in the impugned ruling "that in these proceedings the defendant has been held in detention for less than 7 months", although the applicant had been both *de facto* and *de iure* in detention for over 25 months if the duration of detention in the parallel (simultaneously conducted) cases FIMI-MEDIA, Hypo and INA-MOL are taken into account.

Fourth, the Constitutional Court considered the reasons by which the competent court justified the extension of the applicant's detention in the case of FIMI-MEDIA in the light of the described case-law, which makes a strict distinction between parallel criminal proceedings when it comes to detention. There are two reasons for this: the first is that several other criminal proceedings for similar criminal offences are pending against the defendant, and the second is that in December 2010 the applicant had fled the country.

The outline summary of the Constitutional Court's finding result in the following conclusion: the invocation by a competent criminal court of other (parallel) criminal proceedings conducted against the same prisoner in order to justify the further deprivation of his liberty, and denying the relevance of these other proceedings when dealing with the calculation of the total duration of the deprivation of his liberty, is not just legally inconsistent, but directly contrary to the fundamental rule related to Article 22 of the Constitution and Article 5 ECHR: the presumption is in favour of his release.

Fifth, the Constitutional Court established in its decision that for now it does not intend to review the case-law in general, which makes a strict distinction between, and "slices", (parallel and simultaneously conducted) proceedings, with the consequence that deprivation of liberty for the purpose of ordering detention for a person against whom these proceedings are conducted could overstep all the legal maximums and *de facto* last for an indeterminate period of time. The Constitutional Court considered the fact that this is a process of development of procedural law which takes time, and which must also be accompanied by elaborated legal solutions in order to ensure the necessary balance between an effective criminal-law mechanism and the longest permitted duration of a person's deprivation of liberty prior to the rendering of a first-instance judgment, or prior to the rendering of a final criminal judgment.

Cross-references:

Constitutional Court:

- no. U-III-5141/2011, 26.12.2011;
- no. U-III-4149/2015, 24.07.2015, *Bulletin* 2015/2 [CRO-2015-2-007].

Languages:

Croatian.

*Identification:* CRO-2015-3-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 15.12.2015 / **e)** U-III-1048/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 140/15 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
 5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.

Keywords of the alphabetical index:

Arbitrariness, prohibition / Counsel, quality / Detainee, right to be heard / Detention after conviction / Detention, psychiatric hospital / Lawyer, client, representation / Person of unsound mind, detention / Procedure, requirement, disregard, human rights, violation / Psychiatric hospital, detention, judicial review.

Headnotes:

An individual who has been involuntarily confined to a mental institution due to his or her mental state must, except if there are special circumstances, receive efficient legal representation which the competent courts are obliged to monitor with particular diligence. The mere appointment of a lawyer, without the individual receiving adequate legal assistance in the proceedings, cannot satisfy the requirements of necessary “legal assistance” for persons confined under the head of “unsound mind” under Article 5.1.e ECHR.

In this case, the competent courts failed to undertake the necessary measures to “correct” the actions or the failure to act of both of the applicant’s counsels, and thus deprived the applicant of efficient legal assistance in the proceedings relating to the continuation of his involuntary confinement in a mental institution.

Summary:

I. A constitutional complaint was lodged against the rulings of the competent court of second and first instance (hereinafter: impugned rulings) which ordered the continuation of the involuntary confinement of the applicant in the mental institution by one year pursuant to Article 44 of the Act on the Protection of Persons with Mental Disorders.

The applicant was ordered to be confined in a mental institution for a period of six months by a judgment of the Municipal Court, where it was found that the applicant in a state of mental incompetence had concurrently committed a criminal offence against personal freedom (by threatening and displaying intrusive conduct), a criminal offence against property (by stealing), and a criminal offence against personal freedom (by intrusive behaviour). This first-instance criminal judgment was upheld by the County Court.

The applicant considered that the impugned rulings violated his constitutional rights guaranteed by Articles 14.2, 22 and 29.1 of the Constitution, and Articles 5 and 6 ECHR. He stated several procedural objections (for example, that the court had not informed him about a hearing deciding on the continuation of his involuntary confinement in the mental institution), and substantive objections in relation to the application of Article 5.1.e ECHR.

II. The Constitutional Court assessed the constitutional complaint from the aspect of the right to liberty guaranteed by the Constitution and the European Convention on Human Rights.

In order to consider the (un)foundedness of the objections on procedural grounds, the Constitutional Court had to answer the following question related to the procedural guarantees laid down in Article 5.1.e ECHR, concerning the review of judicial decisions ordering/extending the confinement of an applicant in a mental institution:

- has the failure to invite the applicant to the hearing where a decision was made about continuing his confinement, in spite of the presence of his counsel, led to a violation of Article 5.1.e ECHR?

The Constitutional Court based the answer to this question on the facts and circumstances of the particular case, considering at the same time the proceedings as an integral whole, and applying the legal point of view of the European Court of Human Rights taken in the judgment of *M.S. v. Croatia* (no. 2) concerning the procedural guarantees against arbitrary confinement of an individual in a mental institution.

It is undisputed that the applicant, in the course of the proceedings that are the subject of consideration before the Constitutional Court, was represented by two lawyers who were appointed *ex officio* by the County Court. The first lawyer represented the applicant from 7 August 2014, the day when proceedings were instituted, while the other lawyer took on the role of the applicant's representative on 29 December 2014. The task of both counsels was to represent the applicant's interests in the proceedings, as prescribed by Article 30.1 of the Act on the Protection of Persons with Mental Disorders.

The Constitutional Court reiterated that, in the context of the guarantee of assessing conformity with the procedural and substantive requirements which, within the meaning of the European Convention on Human Rights, are essential for the "legality" of an individual's deprivation of liberty, there must be access to a court, as well as the opportunity for the individual to be heard in person or, when necessary, through some form of representation. This means, *inter alia*, that an individual who has been involuntarily confined in a mental institution due to his or her mental condition must, except if there are special circumstances, receive efficient legal representation which the competent courts are obliged to monitor with particular diligence. The mere appointment of a lawyer, without the individual receiving adequate legal assistance in the proceedings, cannot satisfy the requirements of necessary "legal assistance" for persons confined under the head of "unsound mind" under Article 5.1.e ECHR.

Based on the facts and circumstances of the case at hand, it is clear that there was no contact between the first lawyer and the applicant, since the applicant undertook all the actions in the proceedings related to his involuntary confinement in his own name. Moreover, the applicant's lawyer failed even to lodge an appeal against the ruling ordering the involuntary confinement of the applicant.

The Constitutional Court held that passivity in representing the applicant was also displayed by the second lawyer, who was appointed by the County Court on 29 December 2014, when the continuation

of the applicant's involuntary confinement was proposed. The Constitutional Court observed that the content of the appeal, which was lodged by the second counsel against the ruling on the continuation of involuntary confinement, did not give the impression that he had acted in the applicant's best interest.

Considering the above, it can be concluded that the applicant's lawyers failed to satisfy the requirements of necessary "legal assistance" in protecting the applicant's interests in the course of proceedings as these requirements have been interpreted by the European Court of Human Rights in its case-law.

Therefore the Constitutional Court held that the competent courts did not undertake the necessary measures to "correct" the actions or the failure to act of both of the applicant's counsels, and thus deprived the applicant of efficient legal assistance during the proceedings related to the continuation of his involuntary confinement in a mental institution.

Further, the Constitutional Court noted that, even though the judge presiding over the proceedings had visited the applicant in the mental institution, there is no proof that she had informed the applicant of his rights, or considered any possibility of his participation in the hearing.

As there is no convincing explanation of the courts regarding the applicant's legal (in)capacity, the Constitutional Court could not accept that there were valid reasons to justify the exclusion of the applicant from the hearing.

In the light of the findings above, the Constitutional Court concluded that the competent courts failed to meet the necessary procedural requirements in the case in hand as they did not ensure that the proceedings were devoid of arbitrariness, as required under Article 5.1.e ECHR. Therefore, the Constitutional Court declared that, in the case at hand, there had been a violation of the right guaranteed in Article 5.1.e ECHR in its procedural aspect.

The Constitutional Court emphasised that the found violation of the applicant's right guaranteed by Article 5.1.e ECHR must be removed by the County Court by holding a hearing to which it will invite the applicant to be heard, and, after that, led by the results of the hearing and medical and other relevant documentation, by rendering a decision on the merits concerning the need for further depriving the applicant of his liberty, in the shortest possible time, and at the latest by 31 January 2016.

The Constitutional Court rendered a decision repealing the impugned rulings, and declared that they shall cease to be valid on the day of the adoption of a new decision on the merits concerning the need for further depriving the applicant of his liberty, and at the latest on 31 January 2016, when the impugned ruling will, in any case, cease to be valid.

This procedural omission removed the need for the Constitutional Court to review whether the courts had satisfied the substantive requirements of continuing the applicant's involuntary confinement by holding that his mental state made it necessary to deprive him of his liberty, based on the expert witness's finding and opinion regarding the existence of a "high degree of probability" that he could repeat the criminal offence for which he had been sentenced to prison for a minimum of three years.

The Court held that it was sufficient to point out that the competent courts must assess with particular care if other more lenient measures under consideration are insufficient to protect the applicant or public interest whenever the extension of involuntary confinement is considered in future cases, and the existence of the necessary substantive requirements to consider the applicant "a person with mental disorders" and to deprive him of the right to liberty.

Cross-references:

European Court of Human Rights:

- *M.S. v. Croatia* (no. 2), no. 75450/12, 19.02.2015.

Languages:

Croatian.



Identification: CRO-2015-3-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 15.12.2015 / **e)** U-III/BI-7367/2014 / **f)** / **g)** *Narodne novine* (Official Gazette), 4/16 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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.**

Keywords of the alphabetical index:

Investigation, criminal / Investigation, effective / Right to life, investigation, effective.

Headnotes:

The case law of the European Court of Human Rights is accepted and Article 2 ECHR (right to life) should be interpreted and applied so as to make its safeguards practical and effective, that some form of effective investigation should take place when individuals have been killed as a result of the use of force, that such an investigation must be thorough, independent, accessible to the victim's family, carried out with promptness and reasonable expedition and should be effective, that Article 2 ECHR imposes a duty on the State to secure the right to life by putting in place effective criminal-law provisions, and that the meeting of procedural obligations arising from Article 2 ECHR requires the domestic legal system to demonstrate its capacity to enforce the criminal law against those who have unlawfully taken the life of another.

Summary:

I. The applicant lodged a constitutional complaint due to a failure of the competent authorities to undertake appropriate actions following her report of her brother's disappearance in 1992, and due to the ineffective investigation following her criminal report of 23 October 2013.

She considered that this presented a violation of the constitutional rights guaranteed by Articles 21, 23, 24, 26, 29.1, 32 and 46 of the Constitution. She also considered that the rights referred to in Articles 2, 3, 5.1, 13 and 14 ECHR were also violated.

II. The Constitutional Court first highlighted that the European Court of Human Rights has continuously reiterated in its case law that Article 13 ECHR orders Contracting States to introduce a domestic legal remedy allowing the competent national authority to decide on the substance of a relevant Convention complaint. In doing so, Contracting States are afforded some discretion as to the manner in which they conform to their obligations

under this provision (*Chahal v. the United Kingdom*, 15 November 1996, *Reports* 1996-V, pp. 1869-1870, paragraph 145).

Furthermore, concerning Article 2 ECHR in conjunction with Article 13 ECHR, in the case of *Jelić v. Croatia* (no. 57856/11, paragraphs 107 and 108, 12 June 2014,) the European Court of Human Rights, stated, *inter alia*, that Article 13 ECHR requires, in respect of the procedural aspect of Article 2 ECHR, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure, and also that there should have been effective and practical remedies capable of leading to the identification and punishment of those responsible and to the award of compensation, for the purpose of Article 13 ECHR.

First, the Constitutional Court considered the constitutional complaint in the part concerning the investigation related to the criminal report against unknown perpetrators for the death of the applicant's brother from the procedural aspect of the right to life guaranteed by Article 21.1 of the Constitution and Article 2.1 ECHR.

According to the case law of the European Court of Human Rights, the duties of the State in protecting the right to life may be divided into three groups: the negative duty of the State to refrain from the unlawful taking of lives; the positive duty of the State to adopt effective regulatory and implementing measures to prevent the loss of life when this can be avoided; and the procedural duty of the State to investigate suspicious cases of death.

The Constitutional Court took into account many decisions of the European Court of Human Rights concerning this matter, especially those against the Republic of Croatia. The European Court of Human Rights, for instance, in the case of *Jelić v. Croatia* (paragraphs 72-77) stated that:

- Article 2 ECHR ranks as one of the most fundamental provisions in the European Convention on Human Rights;
- Article 2 ECHR should be interpreted and applied so as to make its safeguards practical and effective;
- some form of effective investigation should exist when individuals have been killed as a result of the use of force;
- such an investigation must be thorough, independent, accessible to the victim's family, carried out with promptness and reasonable expedition and should be effective;

- Article 2 ECHR imposes a duty on the State to secure the right to life by putting in place effective criminal-law provisions; and
- that the meeting of procedural obligations arising from Article 2 ECHR requires the domestic legal system to demonstrate its capacity to enforce the criminal law against those who have unlawfully taken the life of another.

The Constitutional Court accepted the above positions in its decision.

On 2 December 2013, the applicant filed a criminal report with the County State Attorney's Office in Pula (hereinafter, "CSAOP") against unknown perpetrators for the commission of the criminal offence of war crime against the civilian population whose victim was her brother Goran Đukić.

Following the receipt of the applicant's criminal report on 2 December 2013, CSAOP undertook a range of inquiries, which were reported to the applicant, all in conformity with the relevant provisions of the Criminal Procedure Act. According to the response of CSAOP as part of the State Attorney's Office, these inquiries were still pending.

Considering all the circumstances of the case, the Constitutional Court assessed that until the day this decision is rendered, an ineffective investigation of the death of the applicant's brother cannot be discussed in the meaning of Article 21.1 of the Constitution and Article 2.1 ECHR (procedural aspect). It also cannot be discussed whether the applicant lacked access to effective remedies against the ineffective investigation of her brother's death in the meaning of Article 13 ECHR, which was also evident in her constitutional complaint, which is the subject-matter of these Constitutional Court proceedings.

Consequently, the Constitutional Court rendered a decision rejecting her constitutional complaint in the part concerning the objection against an ineffective investigation following the applicant's criminal report of 23 October 2013.

Secondly, concerning the investigation related to the report on the disappearance of the applicant's brother, the applicant claimed, in her constitutional complaint, that she had reported the disappearance of her brother to the Red Cross in Buje in 1992. She also reported his disappearance on 1 September to the Police Administration of Istria, the police station in Umag, and official records were made thereof.

However, the presented evidence indisputably led to the conclusion that knowledge of the whereabouts of the applicant's brother ended in the territory of Bosnia and Herzegovina, and not in the Republic of Croatia.

Moreover, by a ruling of the Basic Court in Derвента of 16 November 2001, the applicant's brother was pronounced dead. The established date of death given was 17 August 1992, and the settlement of Grude in Bosnia and Herzegovina was established as the place of death.

The Constitutional Court reiterated that considering such a state of affairs, the alleged involuntary disappearance of the applicant's brother in the territory of the Republic of Croatia may not be considered, and for a lack of territorial jurisdiction, it rendered a ruling dismissing the constitutional complaint in this part.

Cross-references:

European Court of Human Rights:

- *Chahal v. United Kingdom*, no. 22414/93, 15.11.1996, *Reports* 1996-V;
- *Jelić v. Croatia*, no. 57856/11, 12.06.2014.

Languages:

Croatian.



Identification: CRO-2015-3-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.12.2015 / **e)** U-I-2036/2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 138/15 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

4.6.9.1 Institutions – Executive bodies – The civil service – **Conditions of access.**
 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, examination, professional, compulsory / Civil servant, recruitment / Discrimination, prohibition / Treatment, privileged / Public service, entrance competition / Public service, equality, principle.

Headnotes:

The employment of civil servants implies equality and the selection of candidates who show that their professional and expert knowledge is such that they are the best able to perform a particular state administration task, after undergoing a procedure with clear, transparent rules that are accessible to all under the same conditions. Such a procedure (e.g. a public vacancy competition) must ensure the selection of the best candidate to fulfil the needs of a specific state administration body. General and specific employment conditions must be provided for, and exceptions from these rules are only permitted if explicitly prescribed by the law, and if they can be objectively and rationally justified.

Employees admitted to the civil service in terms of the impugned provisions of the Civil Servants Act (even if only on a fixed-term contract) without a previously conducted public vacancy competition and where there has been a failure to meet other legal conditions without a justified reason have undoubtedly been placed in a privileged situation when compared to the admission of any other persons in the civil service. Derogations from the principle on which the admission of civil servants into the civil service is based, such as an equal relationship between civil servants and the state as the employer and the equal treatment and equal conditions of admission in the civil service, lead to the violation of fundamental rules on which the civil service in the Republic of Croatia depends.

Summary:

I. On the basis of the proposal of the Trade Union of Civil Servants and Local Employees in the Republic of Croatia, the Constitutional Court instituted proceedings to review the conformity with the Constitution of Article 2 of the Act on Amendments to the Civil Servants Act (hereinafter, "AA CSA") and rendered a decision repealing it in the part in which the Civil Servants Act (hereinafter, "CSA") has been supplemented with Article 74c, whose effect ceases on 1 January 2016.

The impugned Article 74c CSA prescribes that: posts in a minister's cabinet may be filled by admitting into the civil service persons for a fixed-term period,

without previously carrying out a public vacancy competition or without publishing an internal vacancy announcement for admission to the civil service (paragraph 1); such civil servants may not be assigned to jobs outside the minister's cabinet (paragraph 2); the provisions of the CSA on probationary work, the civil service examination, transfer, and advancement (paragraph 3) do not apply to them; employment in public service may not be terminated before the expiration of the term of office of the minister based on the minister's decision (paragraph 4), and that the provisions of this Article apply in an appropriate manner to posts in the Office of the Speaker of Parliament, the Office of the Prime Minister, the Office of the Deputy Speaker of Parliament, the Office of the Deputy Prime Minister who is not head of a ministry, and the cabinet of the head of a government office (paragraph 5).

The applicant considered that Article 74c CSA was not in conformity with Article 14 of the Constitution (prohibition of discrimination and equality of all before the law) and Article 44 of the Constitution (the right, under equal conditions, to participate in the conduct of public affairs, and to have access to public services). The applicant claimed that such employment (admission) in the public service of persons (for example, without probationary work or the obligation to take the civil service examination) who are employed in the public service for the first time and are assigned to the mentioned posts has discriminatory effects for all other persons who, in conformity with the general obligation prescribed by the CSA, were obliged to take a test of their expert knowledge and skills as part of launched public vacancy competitions for admission to posts in the public service.

II. When considering whether the applicant's proposal was founded, the Constitutional Court established as relevant Articles 14 and 44 of the Constitution. The special status of civil servants and their rights, obligations and responsibilities, as well as their advancement in the civil service, is regulated by the CSA and other legislation, in conformity with Article 114.3 of the Constitution.

Conformity with the Constitution of the relevant articles of the CSA for admission to the civil service has already been the subject matter of consideration by the Constitutional Court. In ruling number: U-I-795/2006 *et al.* of 29 May 2012, the Constitutional Court stated, *inter alia*:

"8.2. Vacant posts in state bodies are filled through a public vacancy competition, an internal vacancy announcement or the transfer or assignment of the civil servant pursuant to the CSA (Article 45 CSA).

A public vacancy competition is mandatory when employing persons without work experience (trainees) in posts in the civil service, as well as when employing in the highest management posts in the civil service when the appointment of these civil servants is under the competence of the Government of the Republic of Croatia (in conformity with the CSA or other special law).

Before launching a public vacancy competition or an internal vacancy announcement, all government bodies must check with the central state administration body in charge of civil servant relations whether the Government has available civil servants who fulfil the conditions to be assigned to the post which must be filled. If the Government has available civil servants who fulfil the conditions to be assigned to the vacant post, the government body must invite them for a test and an interview in order to check their competences (knowledge, skills and capacities) by appropriately applying the legislation regulating the procedure of public vacancy competitions in the civil service.

(...)

The selection of candidates entering the competition is conducted on the basis of their professional abilities and skills acquired through both formal education and work experience in the profession. The candidates' abilities and skills are established on the basis of the test results, the results achieved in previous work in the profession, and through the assessment and the references/opinions (if enclosed) of employers with whom the candidates have already worked.

(...)

9 ... Vacancies in government bodies are filled through a public vacancy competition; however, before publishing a public vacancy competition, it is possible to fill the vacancy through transfers, promotion, or through an internal vacancy announcement published in the government body."

The Constitutional Court stressed that no constitutionally and legally relevant reasons have been stated and explained to justify the derogation from the general rules of admission to the civil service of persons who are employed in a minister's cabinet and in the organisational units of other particular government bodies. The fact that they are employed only in the minister's cabinet and in these other organisational units referred to in Article 74c.5 CSA,

and that they may not work outside these posts, is not sufficient to explain and justify the legitimacy of the derogation from the general rules of admission to the civil service.

In a democratic state (Article 1 of the Constitution), the performance of government tasks (in this specific case, state administration tasks) requires a good and efficient organisation of the state apparatus, which consists of professionally qualified employees (civil servants).

Civil servants have legal responsibilities, as well as certain traditional ones.

Thus, each civil servant is obliged to perform his or her tasks in a diligent and honest manner, regardless of who is the head of the body in which the civil servant is employed. Civil servants must place at the disposal of their head all their talent, all their intellectual capacities and all their knowledge.

Civil servants are legally, and not politically, liable for their acts.

Finally, civil servants generally enter the civil service on the basis of a public vacancy competition, and their advancement in the civil service is of a career nature, which is not affected, or should not be affected, by political facts.

Therefore, the employment of civil servants implies equality and the selection of candidates who show that their professional and expert knowledge is such that they are the best able to perform a particular state administration task, after undergoing a procedure with clear, transparent rules that are accessible to all under the same conditions. Such a procedure (e.g. a public vacancy competition) must ensure the selection of the best candidate to fulfil the needs of a specific state administration body. General and specific employment conditions must be provided for, and exceptions from these rules are only permitted if explicitly prescribed by the law, and if they can be objectively and rationally justified.

Following from the above, the Constitutional Court established that in the impugned Article 74c CSA the prescribed possibility of admission to the civil service may not be justified by a derogation related to the specific nature of the task (that they are employed in a minister's cabinet and in organisational units of particular other government bodies) and by the temporal limitation of such employment (only until the end of the term of office of the minister or head of the organisational unit of another particular government body).

Employees admitted to the civil service in the meaning of Article 74c.1 CSA (even if only for a fixed period of time) without a previously conducted public vacancy competition and where there has been a failure to meet other legal conditions have undoubtedly been placed in a privileged position when compared to the admission to the civil service of any other persons. This privileged treatment would only be constitutionally and legally acceptable if there were justified reasons for it.

However, in the statement of reasons of the Final Proposal of the CSA there is no mention of this, and the Constitutional Court in its proceedings could not establish any objective and relevant reason to justify such a decision of the legislator.

The Constitutional Court found that Article 74c.1 CSA derogates from the principle on which the admission of civil servants to the civil service is based, such as an equal relationship between civil servants and the state as the employer and equal treatment and equal admission conditions in the public service (Article 1 CSA), which undoubtedly leads to a violation of the fundamental rights on which the civil service in the Republic of Croatia depends.

Therefore, it found that Article 2 AA CSA in the part where Article 74c was added to the CSA is not in conformity with Article 14 in conjunction with Article 44 of the Constitution.

Cross-references:

Constitutional Court:

- no. U-I-795/2006 *et al.*, 29.05.2012.

Languages:

Croatian.



Cyprus

Supreme Court

Important decisions

Identification: CYP-2015-3-002

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 24.09.2015 / **e)** 1/15 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.4.7.4 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Impeachment**.
4.7.4.3.5 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **End of office**.

Keywords of the alphabetical index:

Conduct, dishonourable / Impeachment proceedings / Official, dismissal, grounds / Public interest / Public office, holder.

Headnotes:

As regards the dismissal of a Deputy Attorney General for misconduct, the conduct concerned need not be criminal conduct and need not occur in the course of the performance of the duties of the office. Whether the misconduct directly affects the person's capacity to carry out his or her public duties, or affects the perception of the officer's public performance of his or her duties, the danger is that the office itself will be brought into disrepute as a result of the conduct of its holder. The purpose of the impeachment process is not to punish the Deputy Attorney General for his serious misconduct, but to protect the public and to maintain confidence in the integrity, reputation and independence of senior officials of the State.

Summary:

I. In application no. 1 of 2015, the Attorney General (hereinafter, the "Applicant"), requested the Supreme Court, acting as Council in accordance with the Constitution, for the dismissal of the Deputy Attorney General (hereinafter, the "Respondent") for misconduct.

According to the application, the respondent, during the period between February 2014 and November 2014, showed and committed misconduct, constituting a ground for dismissal under Articles 112.4 and 153.7.4 of the Constitution. Article 112.4 of the Constitution provides that a Deputy Attorney General may not be dismissed except under the same conditions and the manner the Justices of the Supreme Court are dismissed, pursuant to Article 153.7.4 of the Constitution, i.e. for misconduct.

The Council, constituted by the Constitution, is responsible for trying cases of misconduct against the President and Members of the Supreme Court and other High officials of the Republic. It therefore has power to decide whether the Deputy Attorney General is liable for misconduct.

It is not stipulated by the Constitution or any other Law, what constitutes misconduct for the purposes of dismissal of Judges, the Attorney General, the Deputy Attorney General and other High Officials of the state.

II. It was pointed out by the members of the Council that in order to constitute misconduct by the holder of an office, the conduct concerned need not be criminal conduct and need not occur in the course of the performance of the duties of the office.

The content of the term "improper behaviour, misbehaviour" under Article 153.7.4 of the Constitution is to be construed by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold an office has two aspects. The conduct of the person concerned might be such that it directly affects the person's ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or contrary to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed. In either case, the danger is that the office itself will be brought into disrepute as a result of the conduct of its holder.

Based on the relevant legal authorities, the Council considered that the abovementioned conduct of the respondent, which was manifested in public and consisted of unfounded and serious allegations against the Applicant that he committed serious criminal and other offences, constituted serious misconduct falling within the ambit of Article 153.7.4 of the Constitution and justifying the dismissal of the Deputy Attorney General from his post.

The Council stated that senior officials of the State, like the Justices of the Supreme Court, the Attorney General and the Deputy Attorney General, must demonstrate impeccable behaviour both in the performance of the duties of their office and in general.

The behaviour of the Deputy Attorney General was well below the level of conduct expected by the holder of such office and it cannot be “cured” merely by his, *a posteriori*, apology or regret. His conduct, objectively judged, renders him incapable to carry out high duties and in the eyes of reasonable citizens and others, he is unfit to continue to perform such high duties efficiently and in the interest of the public.

The Council unanimously found the Deputy Attorney General guilty of misconduct and ordered his dismissal. It was stressed, in conclusion, that the whole impeachment process did not seek to punish the Deputy Attorney General for his serious misconduct, but to protect the public and to maintain confidence in the integrity, reputation and independence of senior officials of the State.

Languages:

Greek.



Czech Republic Constitutional Court

Statistical data

1 September 2015 – 31 December 2015

- Judgments of the Plenary Court: 4
- Judgments of panels: 57
- Other decisions of the Plenary Court: 4
- Other decisions of panels: 1 121
- Other procedural decisions: 39
- Total: 1 225

Important decisions

Identification: CZE-2015-3-009

a) Czech Republic / **b)** Constitutional Court / **c)** Third Panel / **d)** 22.09.2015 / **e)** III. ÚS 1213/13 / **f)** Discrimination on grounds of ethnicity in hotel services / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.4.3.2 Constitutional Justice – Procedure – Time-limits for instituting proceedings – **Special time-limits.**

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

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

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

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:

Burden of proof, reversal / Compensation, damages, non-economic loss / Defendant, burden of proof / Evidence, obligation to give, exemption / Discrimination, racial, protection, principle / Evidence, sufficient.

Headnotes:

First, a constitutional complaint filed against a decision by an appeals court is not impermissible if it includes objections that can be subordinated under the grounds for an appeal on a point of law under the Civil Procedure Code. Second, in a case concerning alleged discriminatory treatment, where the burden of proof rested on the defendants to prove that such discrimination had not occurred, the decision of the general courts holding that the burden had been met, through inadequate assessment of the evidence presented, violated the right to a fair trial under Article 36.1 of the Charter of Fundamental Rights and Freedoms of the Czech Republic and Article 6.1 ECHR.

Summary:

I. A hotel refused to accommodate the applicants, who had a prior telephone reservation, with the explanation that all the rooms were already occupied. In their complaint, the complainants sought a written apology and financial compensation from the company operating the hotel on the grounds of discrimination based on racial or ethnic origin.

However, according to the general courts, the company met its burden of proof, because it proved that it treated guests in a non-discriminatory manner. In their constitutional complaint, the applicants alleged violation of the right to a fair trial.

II. The Constitutional Court first considered the question of permissibility of a constitutional complaint, and concluded that a constitutional complaint filed against the decision of an appeals court that was issued before 1 January 2013, but only delivered to the complainant after that date, is not permissible under Article 75.1 of the Act on the Constitutional Court, as amended by Act no. 404/2012 Coll., if it included objections that can be subordinated under the grounds for an appeal on a point of law under Article 241a.3 of the Civil Procedure Code, in the version in effect through 31 December 2012.

The Constitutional Court further stated that in the present matter the general courts, when determining the facts of the case, applied Article 133a.b of the Civil Procedure Code, under which, if the plaintiff presents to the court facts from which it can be concluded that there was on the part of the defendant direct or indirect discrimination based on racial or ethnic origin in the sale of goods in a shop or the provision of services, the defendant must prove that there was no violation of the principle of equal treatment. The appeals (high) court then recognised,

based on a claim by a secondary party, that there was no discrimination, but that this was the consequence of prior reservations of the entire capacity of the hotel.

However, the Constitutional Court stated that, apart from proving reservations that made it impossible to accommodate the complainants on the basis of a number of pieces of documentary evidence and witness testimony, it is also necessary to consider whether this was not merely formal behaviour, the aim of which was to mask discrimination on the part of hotel employees. Only by determining this could the courts rule out discrimination. However, in the Constitutional Court's opinion, there was not a single piece of evidence submitted by the secondary party that would clearly determine the purpose of a reservation or more closely specify the circumstances connected to it. Moreover, the very existence of a connection between the hotel owner and the company making reservations raises many doubts. Last but not least, the Constitutional Court also stated that it could not agree with the opinion of the appeals court, which claimed that because there was nothing said on the part of the employees that could be considered a motive for discriminatory behaviour, discrimination could not have taken place.

It is quite evident from the foregoing that the secondary party did not meet its burden of proof, and thus the appeals court should have ruled in favour of the complainants, because in the given circumstances there was discrimination. Based on that, the Constitutional Court concluded that by this error in the course of presentation of evidence, the appeals court violated the complainants' fundamental right to a fair trial under Article 36.1 of the Charter and Article 6.1 ECHR, and therefore it annulled the contested decision of the high court.

III. The judge rapporteur in the case was Pavel Rychetský. No judge filed a dissenting opinion.

Languages:

Czech, English.



Identification: CZE-2015-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 27.10.2015 / **e)** I. ÚS 860/15 / **f)** Expulsion of a foreigner and degrading treatment / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

5.3.3 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.**

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

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

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

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

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:

Foreigner / Foreigner, detention / Foreigner, expulsion / Foreigner, forcible removal / Ill-treatment / Investigation, effective, requirement.

Headnotes:

In respect to the administrative expulsion of an alien, three principles apply. First, the person affected must be informed of the details of the performance of the expulsion without unnecessary delay, at least 24 hours in advance. Second, the use of tear gas is not appropriate against a person who is not aggressive and who merely refuses to comply with an order. Means of compulsion may not be used as retaliation for a detained person's disobedience. Third, a person deprived of his liberty does not have an opportunity to secure evidence for his claims of ill-treatment; therefore, a defensible claim can be based solely on the person's testimony, and it is the duty of

bodies acting in criminal proceedings to open an investigation on their own initiative without delay, before possible consequences of ill-treatment (in particular, on the person's state of health) can fade.

Summary:

I. The applicant complained about actions by the Police of the Czech Republic when performing his administrative expulsion on 6 June 2014, as well as about a subsequent resolution by the General Inspectorate of Security Forces (hereinafter, the "GISF") of 20 November 2014, a resolution of the Regional Prosecutor's Office in Prague of 17 December 2014, and about a notification from the Supreme State Prosecutor's Office in Prague of 25 March 2015.

The applicant argued that the police actions and the contested decisions violated the prohibition on degrading treatment and ill-treatment under Article 3 ECHR and Article 7.2 of the Charter of Fundamental Rights and Freedoms of the Czech Republic (hereinafter, the "Charter"). The applicant claimed that he was not informed sufficiently in advance about the specific circumstances of the performance of his administrative expulsion, which he was awaiting in detention. When he then resisted the administrative expulsion itself, the police used tear gas to pacify him, subsequently allegedly bound him unnecessarily tightly, and transported him on a luggage cart at the airport. At the applicant's instigation the GISF opened an investigation, but did not find any error. The Regional and Supreme State Prosecutor's Offices confirmed this conclusion in their decisions.

II. The Constitutional Court stated that the police erred when it did not inform the applicant in advance when and how his expulsion would take place. The argument by the police, that if the applicant was in detention awaiting expulsion, the performance of that expulsion was no surprise to him, and he could properly prepare himself for it, did not stand. The Constitutional Court found that the person needed to be informed at least 24 hours in advance.

Many of the applicant's claims could not be proved, and therefore the Constitutional Court addressed them only at a general level. In this context, it found that in a case where the detained person merely resists the performance of an order, is not aggressive and does not attack anyone, the use of tear gas is not an appropriate means of compulsion. According to the Constitutional Court, the police have other, milder techniques and equipment, through which the desired outcome can be achieved.

The Constitutional Court then found, in particular, that the bodies acting in criminal proceedings erred in investigating the claimed incident, when, in conflict with the requirements of international obligations, they did not open the investigation until a month after receiving the criminal complaint, by which time any traces of possible errors that had an effect on the complainant's state of health would have faded. The requirements for a defensible claim are lower with a detained person than with a person who is at liberty and can himself obtain evidence to support his claims. Therefore, such defensible claims cannot be taken lightly, and bodies acting in criminal proceedings are required to immediately open an effective and speedy investigation, so that the facts in the case can be reliably determined. Therefore, the requirement of effective investigation under Article 3 ECHR was not fulfilled.

Thus, the Constitutional Court concluded that the combination of the abovementioned factors violated the prohibition on degrading treatment and ill-treatment under Article 7.2 of the Charter and Article 3 ECHR. This conclusion gives rise to the duty of the police to systematically respond to the judgment and implement it in their internal regulations.

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

Languages:

Czech, English.



Identification: CZE-2015-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** Plenum / **d)** 19.11.2015 / **e)** Pl. ÚS 10/15 / **f)** Constitutionality of the prohibition on adoption of a child by the parent's unmarried partner / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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:

Adoption / Child, adopted, legal status / Child, best interest / Couple, unmarried, legal regime / Family / Marriage / Parentage, interests of the child / Parental rights.

Headnotes:

A legislative framework that rules out adoption of a child by a partner with whom the parent is living without being married is not inconsistent with Article 10.2 of the Charter of Fundamental Rights and Freedoms of the Czech Republic and Article 3.1 of the Convention on the Rights of the Child (hereinafter, the "CRC"). Amendment of this framework and possibly enabling the adoption of the child by the parent's partner are fully within the competence of the legislature.

Summary:

I. In a connected proceeding on a constitutional complaint under Article 87.1.d of the Constitution, the Constitutional Court reviewed the constitutional complaint of the applicant L.P., claiming violation of his fundamental rights in a proceeding in which the courts denied his petition for reversible adoption of his partner's son, with the reasoning that the Act on the Family does not permit such adoption. Panel I of the Constitutional Court concluded that the general court decisions contested by the constitutional complaint appear to violate the complainant's right to protection of family life and also appear to be inconsistent with the best interest of the child. Because the general courts applied a provision from the Act on the Family that has ceased to be in effect, Constitutional Court Panel I, on the grounds of violation of Article 10.2 of the Charter and Article 3.1 of the CRC, presented a petition to the plenum seeking a finding that the provision is unconstitutional.

II. The Constitutional Court first considered the possibility of a constitutional interpretation of the contested provision that would permit possible adoption by the second parent, including in the case of an unmarried couple. However, it found that the text of Article 72 of the Act on the Family is unambiguous. Therefore, the mutual rights and obligations between the adopted child and the original family (or one of the parents) do not expire

exclusively in the case where the adopter is the spouse of one of the adoptee's parents. In the Constitutional Court's opinion, an opposite interpretation would be completely inconsistent with the express wording of the Act.

The reasoning of Panel I of the Constitutional Court was based primarily on the fact that the contested provision of the Act on the Family does not enable individual evaluation of the best interest of the child, and in that case does not enable the replacement of a non-functioning parent with a functioning parent. However, the Constitutional Court, with reference to the case law of the European Court of Human Rights (*X and Others v. Austria*, *Gas and Dubois v. France*, and *Emonet and Others v. Switzerland*), stated that adoption of a legislative framework for adoption, such as the framework under challenge here, is fully in the competence of individual states, and does not constitute interference in family life. The requirement of a stable partner relationship, which should also provide a stronger guarantee of a stable environment for the child, can be considered grounds for having the possibility for adoption by the second parent exclusively for married couples. According to the Constitutional Court, such a requirement certainly seeks the best interest of the child. At the same time, however, it posed the question of whether marriage still provides a certain guarantee of a stable relationship and thus whether this requirement can justify the contested legislative framework for adoption.

In this review, the Constitutional Court referred to relevant statistics and to the background report to the new Civil Code. However, the main criterion was to better provide for the child's situation if its parents cease living together, because it is only in the case of the breakup of a marriage that a court must rule on the child's situation after the parents are divorced, i.e. who will continue to take care of the child and how its support will be ensured. The court must take the best interest of the child as the basis for its decision. Therefore, the Constitutional Court concluded that the contested framework does establish limitations for unmarried couples, but this limitation is sufficiently justified by the abovementioned facts, and thus seeks the best interest of the child. Therefore, it is consistent with Article 3.1 of the CRC.

In connection with the presenting panel's arguments concerning interference in family life, the Constitutional Court pointed out that the right to adopt or to be adopted is not a fundamental right protected by the constitutional order or by international treaties. It also stated that the law provided, and still provides, for a minor child and its *de facto* family, instruments that enable the family to live together and enable the

child's wishes to be met (e.g., limiting parental responsibility, or changing the child's surname even without the consent of the other biological parent). Thus, the Constitutional Court also did not find the contested legislative framework to be inconsistent with Article 10.2 of the Charter.

III. The judge rapporteur in the case was Tomáš Lichovník, who replaced the original judge rapporteur, Kateřina Šimáčková. She, along with judges Vladimír Sládeček and Radovan Suchánek, filed a dissenting opinion to the verdict and the reasoning of the judgment.

Judge Vladimír Sládeček disagreed with the verdict on procedural grounds, because in his opinion a panel of the Constitutional Court cannot submit a petition to the plenum of the Constitutional Court if it believes that a statute is inconsistent with the constitutional order, or is unconstitutional, as this has no basis in the Constitution or the Act on the Constitutional Court. Therefore, the Constitutional Court should have rejected the petition, due to lack of jurisdiction. Judge Radovan Suchánek reached the same conclusion. Beyond the dissenting opinion of Judge Sládeček he pointed out that the affected provision of the Act on the Family was not, and could not have been, directly applied in the proceeding before the general courts, because it regulates the consequences of adoption; however, in this case adoption did not take place. He also pointed out that merely deleting the provision in question would create a problem with interpretation of the following provision.

Judge Kateřina Šimáčková did not consider it correct to sacrifice the interests of specific children because of abstract protection of some legal institution, even an important one, such as marriage. The petition should have been granted, because the contested legislative framework is inconsistent both with the obligation of state bodies to seek the best interest of a child and with the right to family life. Breaking a statutory rule, under which the partner of one of a child's parents cannot adopt the child as a second parent was in the obvious interest of the child, was the child's wish, and in fact changed nothing about the child's relationship with the original second parent, whom the child had previously lost. The primary viewpoint in any activity concerning children must be the best interest of the child, and the legislative framework does not enable the general courts to take the best interest of the child into account in the case of unmarried couples. The general courts cannot review the stability of the relationship between the parent and the person applying for adoption, even though unmarried cohabitation relationships can be much more stable

than some marriages. Of course, the best interest of the child should be taken into account in each individual case.

It is not at all clear from the majority's decision, what specific interests can be given priority over the interest of a specific child in a specific proceeding. Although the dissenting judge respects the institution of marriage, she cannot overlook the fact that the number of people in society who live in harmonious and stable couples outside marriage is increasing. Moreover, no one who does not want to enter into marriage should be forced to do so. In addition, the decision of the plenum again confirmed the division of children into children of married and unmarried parents, so the child is *de facto* penalised for the parents' decision not to get married. According to the dissenting judge, the judgment also does not reflect the case law of the European Court of Human Rights, which takes a sceptical view of rigid rules in the area of family life when the interests of children are involved. If family life exists between the "social" parent and the child, it is the duty of public authorities to act so that this relationship can develop, which the present legislative framework makes impossible; on the contrary, it interferes in family relationships and prevents their full development and integration.

The dissenting judge also pointed to the specific difficulties in everyday life caused by the lack of parental responsibility for the parent's partner. The reviewed legislative framework is not proportional to the aim that it pursues, i.e. adoption of a child by a stable couple. It is questionable whether it meets even the step of suitability, i.e. requiring that marriage be a condition for adoption by the second parent; in any case, it did not meet the condition of necessity, which could be better achieved if the general courts could, in cases of unmarried couples, review the stability of the parent and his or her partner. The majority of the plenum sacrificed the best interests of the child in favour of the purported need to protect the legal institution of marriage, which, however, was not threatened in any real way; on the contrary, it was in the best interest of the child to have two "functioning" parents. If "social" parenthood was already established, it is in the best interest of the child to have the factual situation brought into line with the legal situation.

Cross-references:

European Court of Human Rights:

- *X and Others v. Austria [GC]*, no. 19010/07, 19.02.2013, *Reports of Judgments and Decisions* 2013;

- *Gas and Dubois v. France*, no. 25951/07, 15.03.2012, *Reports of Judgments and Decisions* 2012;
- *Emonet and Others v. Switzerland*, no. 39051/03, 13.03.2008.

Languages:

Czech, English.



France

Constitutional Council

Important decisions

Identification: FRA-2015-3-009

a) France / **b)** Constitutional Council / **c)** / **d)** 22.09.2015 / **e)** 2015-484 QPC / **f)** UBER France SAS and another (II) [Criminalisation of putting passengers in touch with non-professional drivers] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.09.2015, 17083 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Car sharing, non-professional chauffeur.

Headnotes:

The provisions of Article L.3124-13 of the Transport Code, which prohibit the organisation of a system for putting clients in touch with people who provide passenger road transport services for a fee but who are not taxi drivers or professional chauffeurs, are compatible with the Constitution.

Summary:

I. On 23 June 2015 the Court of Cassation submitted a request to the Constitutional Council for a priority preliminary ruling on constitutionality regarding the conformity of the provisions of the first paragraph of Article L. 3124-13 of the Transport Code with the rights and freedoms enshrined in the Constitution.

The text provides for a penalty of two years' imprisonment and a fine of €300,000 for organising a system for putting clients in touch with people who provide road transport services for passengers for a fee when they are not legally authorised to do so under the Transport Code because they are not taxi drivers or professional chauffeurs, for example.

The applicant companies argued, *inter alia*, that the provisions at issue infringed the principle that only the law can define a crime and prescribe a penalty. The applicants argued that the law had criminalised the organisation of any reservation system offering to transport passengers, even where the drivers merely requested a token sum to cover the cost of petrol and use of the vehicle.

II. The Constitutional Council dismissed all the claims of the applicant companies and held that the provisions in issue were in keeping with the Constitution.

In particular it held that neither the aim nor the effect of the provisions concerned was to ban systems for putting people interested in car sharing, as defined in the Transport Code, in touch with each other. The Constitutional Council accordingly dismissed the complaint regarding the alleged violation of the principle that only the law can define a crime and prescribe a penalty.

Languages:

French.



Identification: FRA-2015-3-010

a) France / **b)** Constitutional Council / **c)** / **d)** 25.09.2015 / **e)** 2015-485 QPC / **f)** M. Johnny M. [Employment contracts for detainees engaging in occupational activities in prisons] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.09.2015, 17328 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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

5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Prison, work.

Headnotes:

In subjecting the participation of a detainee in work activities organised in prison to an employment contract signed by the prison governor and the detainee, and in relying on that contract to list the occupational rights and duties of the detainee, provisions of the Law on Prisons do not deprive the principles set forth in paragraphs 5 to 8 of the Preamble to the Constitution of 1946 of legal guarantees.

Summary:

I. On 6 July 2015 the *Conseil d'État* submitted a request to the Constitutional Council for a priority preliminary ruling on constitutionality regarding the conformity of the provisions of Section 33 of the Law of 24 November 2009 on Prisons with the rights and freedoms guaranteed by the Constitution.

The provisions require the prison authorities to draw up an employment contract before a prisoner is allowed to take part in occupational activities organised in the prison. The contract, signed by the prison governor and the detainee, lays down the occupational rights and duties of the detainee and his or her working conditions and salary.

The applicant alleged, *inter alia*, that by not organising the legal framework of for work in prisons the law deprived the detainees concerned of any guarantee of the effective enjoyment of the rights and freedoms enshrined in paragraphs 5 to 8 of the Preamble to the Constitution of 1946 concerning the right to employment.

II. The Constitutional Council dismissed the complaints and found the challenged provisions to be in conformity with the Constitution.

The Constitutional Council noted that the provisions of Section 22 of the Law of 24 November 2009, those of Article 717-3 of the Code of Criminal Procedure and the challenged provisions laid down different rules and guarantees governing the working conditions of detainees. While it also noted that Parliament was at liberty to modify the provisions governing working arrangements for detainees in order to better to protect their rights, it held that in subjecting the participation of detainees in work activities organised in prison to an employment contract signed by the prison governor and the detainee, and in relying on that contract to list the occupational rights and duties of the detainee, in conditions that respect the provisions of Section 22 of the Law of 24 November 2009 and under

the supervision of the administrative courts, the provisions in issue did not deprive the principles set forth in paragraphs 5 to 8 of the Preamble to the Constitution of 1946 of legal guarantees.

Languages:

French.

*Identification:* FRA-2015-3-011

a) France / **b)** Constitutional Council / **c)** / **d)** 14.10.2015 / **e)** 2015-490 QPC / **f)** M. Omar K. [Administrative ban on leaving the country] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.10.2015, 19327 / **h)** CODICES (French).

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.**

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

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

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

Keywords of the alphabetical index:

Terrorism / Territory, travel, ban.

Headnotes:

A law, in introducing a means of barring any French national from leaving the country where serious reasons exist to believe that they are planning to travel abroad in order to take part in terrorist activities or to go to a zone where terrorist groups are operating, in conditions likely to result in their being a threat to public safety when they return to France, strikes what is not a manifestly uneven balance between freedom of movement and the prevention of

breaches of public order, without violating the right to an effective judicial remedy or the principle that only the law can define a crime and prescribe a penalty.

Summary:

I. On 15 July 2015 the *Conseil d'État* submitted a request to the Constitutional Council for a priority preliminary ruling on constitutionality concerning the conformity of the provisions of Article L. 224-1 of the Internal Security Code with the rights and freedoms guaranteed by the Constitution.

The provisions concerned introduce a means of barring any French national from leaving the country where serious reasons exist to believe that they are planning to travel abroad in order to take part in terrorist activities or to go to a zone where terrorist groups are operating, in conditions likely to result in them being a threat to public safety when they return to France.

The applicant argued that the provisions were in violation of freedom of movement and the right to an effective judicial remedy, on the one hand, and also the principle that only the law can define a crime and prescribe a penalty.

II. The Constitutional Council dismissed the complaints.

First, it considered that the aim of the legal provisions in issue was to prevent breaches of public order. It noted all the guarantees the law provided and in particular that a person could be banned from leaving the country only for reasons linked to the prevention of terrorism, that the person had to be allowed to submit observations within eight days of the decision being announced, that the duration of the measure could not exceed six months and that an appeal against it could be lodged with the administrative court. So the law struck what was not a manifestly uneven balance between freedom of movement and the prevention of breaches of public order, without violating the right to an effective judicial remedy.

The Constitutional Council then pointed out that Article L. 224-14 of the Internal Security Code provides for a penalty of three years' imprisonment and a fine of 45,000 euros for leaving or attempting to leave France in violation of an administrative ban, and that paragraph 11 of the same Article provides for a penalty of two years' imprisonment and a fine of 4,500 euros for any person against whom a ban on leaving the country has been issued and who fails to hand over his or her passport and national identity card to the authorities as required by law. These offences, which can only be established when an order not to leave the country has been issued, are

defined in clear and precise terms. The Constitutional Council accordingly dismissed the complaint as to the alleged violation of the principle that only the law can define a crime and prescribe a penalty.

The Constitutional Council found the provisions of Article L. 224-1 of the Internal Security Code to be in conformity with the Constitution.

Languages:

French.



Identification: FRA-2015-3-012

a) France / **b)** Constitutional Council / **c)** / **d)** 16.10.2015 / **e)** 2015-492 QPC / **f)** Rwandan Community of France Association [Associations having standing to exercise the rights of the civil party in cases concerning the public defence of war crimes and crimes against humanity] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.10.2015, 19445 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.
 5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice**.

Keywords of the alphabetical index:

War crime, public defence / Crimes against humanity, public defence / Association, civil party.

Headnotes:

The provisions of a law violate the principle of equality before the law where they limit standing to exercise civil party rights to those associations whose aim is to defend the non-pecuniary interests and the honour of victims of war crimes or crimes against humanity committed during the Second World War.

Summary:

I. On 17 July 2015, on behalf of the *Association Communauté rwandaise de France*, the Court of Cassation submitted a request to the Constitutional Council for a priority preliminary ruling on constitutionality concerning the conformity of the provisions of paragraph 5 of Section 48-2 of the Law of 29 July 1881 with the rights and freedoms guaranteed by the Constitution.

These provisions restrict the possibility of triggering a public prosecution for the offence of publicly defending crimes against humanity only to those associations which propose, in their bylaws, to defend the non-pecuniary interests and the honour of the Resistance or of people who were deported.

The applicant association claimed that, in so doing, the provisions concerned violated the principle of equality.

II. The Constitutional Council allowed the claim.

It noted first of all that the Criminal Code did not restrict the offence of the public defence of war crimes and crimes against humanity only to those crimes committed during the Second World War.

The Constitutional Council then noted that the law made no provision for different penalties for the public defence of war crimes and crimes against humanity depending on whether or not they were committed during the Second World War. Furthermore, neither the provisions in issue or any other provision of law, nor the preparatory work on the law which introduced the provisions in issue, indicated the existence of any justification for restricting standing to exercise civil party rights in cases concerning the public defence of war crimes and crimes against humanity solely to those associations which defended the non-pecuniary interests and the honour of the Resistance or of deportees.

The Constitutional Council accordingly found that the provisions in issue, by denying standing to exercise civil party rights to associations defending the non-pecuniary interests and the honour of victims of war crimes and crimes against humanity other than those committed during the Second World War, violated the principle of equality before the law.

The Constitutional Council consequently declared unconstitutional the wording: “war crimes, crimes against humanity or” in Article 48-2 of the Law of 29 July 1881 on freedom of the press.

However, immediate repeal of the law would effectively have deprived any association whose aim was to defend the non-pecuniary interests and the honour of the Resistance or of deportees of standing to exercise the rights of the civil party in cases concerning the public defence of war crimes and crimes against humanity. The Constitutional Council therefore decided to defer the date of repeal of the law until 1 October 2016, in order to give Parliament time to determine what action to take following its finding of unconstitutionality. It also suspended the limitation periods applicable to the triggering of prosecution by the civil party in cases of public defence of war crimes and crimes against humanity until the entry into force of a new law and, at the latest, 1 October 2016.

Languages:

French.

*Identification:* FRA-2015-3-013

a) France / **b)** Constitutional Council / **c)** / **d)** 22.12.2015 / **e)** 2015-527 QPC / **f)** M. Cédric D. [house arrest in the event of a state of emergency] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.12.2015, 24084 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

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

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

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

Keywords of the alphabetical index:

State of emergency, house arrest.

Headnotes:

The Constitution does not rule out the possibility for the law to provide for a state of emergency. The legal provisions regulating the conditions of house arrest, do not place a disproportionate restriction on freedom of movement.

Summary:

I. On 11 December 2015 the *Conseil d'État* submitted a request to the Constitutional Council for a priority preliminary ruling on constitutionality concerning the conformity of the provisions of Section 6 of the State of emergency Law of 3 April 1955, as amended by Law no. 2015-1501 of 20 November 2015, with the rights and freedoms guaranteed by the Constitution.

The provisions concerned regulate the house arrest measures the Minister of the Interior can take when a state of emergency has been declared under the Law of 3 April 1955.

II. The applicant's complaint concerned only the first nine paragraphs of Section 6 of the Law of 3 April 1955, which led the Constitutional Council to confine the scope of its preliminary ruling to those provisions. The applicant claimed in particular that the provisions in issue violated the rights guaranteed by Article 66 of the Constitution and the right to freedom of movement.

The Constitutional Council began by examining the conditions governing the ordering of house arrest and noted that the measure fell under the sole responsibility of the administrative authorities and could therefore have no purpose other than to protect public order and prevent crime.

It held that, by both their purpose and their scope, the provisions in issue involved no deprivation of individual liberty within the meaning of Article 66 of the Constitution.

However, regarding the amount of time during which a person under house arrest should be confined to his place of residence, the Constitutional Council considered that the maximum period, fixed at twelve hours per day, could not be extended without the house arrest becoming a deprivation of liberty and therefore falling within the scope of Article 66 of the Constitution.

As regards freedom of movement, after noting that the Constitution did not rule out the possibility for the law to provide for a state of emergency, the Constitutional Council held that the provisions in issue did not disproportionately affect freedom of movement, for three sets of reasons.

First, house arrest can be ordered only once a state of emergency has been declared. Under Section 1 of the Law of 3 April 1955 a state of emergency can be declared only in the event of "imminent danger resulting from serious breaches of public order" or "where events, by their nature and gravity, take on the appearance of a public disaster". In addition, house arrest can be ordered only against people residing in the zone covered by the state of emergency and in respect of whom there are "serious reasons to believe that their behaviour constitutes a threat to public security and order".

Second, the actual house arrest measure and its duration, its conditions of application and any additional obligations that may be associated with it must be justified and in proportion with the reasons behind the measure in the particular circumstances that led to the declaration of the state of emergency. The administrative authorities are responsible for ensuring that the measure is suitable, necessary and proportionate to the aim pursued.

Third, under Section 14 of the Law of 3 April 1955 a house arrest measure implemented in application of that law ends when the state of emergency ends. Any extension beyond twelve days of the state of emergency declared by Cabinet decree requires a law fixing its duration. On this point the Constitutional Council pointed out that this duration was not excessive, regard being had to the imminent danger or the public disaster that led to the state of emergency being declared. Furthermore, if the state of emergency is extended by a new law, any house arrest previously ordered cannot be extended without a new order being issued.

Languages:

French.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2015-3-021

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 14.09.2015 / **e)** 1 BvR 1321/13 / **f)** / **g)** / **h)** *Zeitschrift für das gesamte Familienrecht* 2016, 26-29; *Zeitschrift für die Anwaltspraxis* EN-no. 825/2015; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Fact, establishment / Investigation, effective, *ex officio*, requirement.

Headnotes:

The right to effective judicial protection (Article 2. 1 in conjunction with Article 20.3 of the Basic Law) can be violated if courts interpret procedural options available to them to investigate and establish the facts of a case in such a restrictive way that it renders a review of the merits of the case impossible (cf. Federal Constitutional Court, 2 BvR 1533/94, 7 December 1999; 2 BvR 779/04, 19 October 2004; 2 BvR 429/11, 9 December 2014; 2 BvR 2063/11, 18 December 2014).

While not every violation of the courts' obligation to investigate and to establish the facts of the case *ex officio* (an obligation laid down by statutory law for certain cases) also violates the Constitution, a violation of fundamental rights is possible under specific circumstances.

According to these standards, the right to effective judicial protection is violated if a decision is based on a serious error in applying the law, e.g. if a legal provision that is obviously applicable is not taken into account (cf. Federal Constitutional Court, 1 BvR 1243/88, 3 November 1992 with further references).

The same holds true if courts fail to use the possibilities to investigate at their disposition which have good prospects of success, especially if they do not take into account specific institutionalised facilities and measures of assistance.

Summary:

I. The applicant in the initial proceedings, a Romanian national, had sued the applicant in the case at hand, a widow of Romanian nationality, for a share of the inheritance of her deceased husband based on the assertion that they had adopted him. The applicant, however, contested that that person had been adopted by herself and her husband. Therefore, the applicant applied for recognition of the adoption which had supposedly taken place. The applicant again contested that it had taken place. In the proceedings, the Local Court did not request the Romanian adoption files for consultation by way of judicial cooperation.

The applicant challenged the decision the Local Court had taken, claiming that the Court had violated Articles 3.1 and 103.1 of the Basic Law, by not requesting the adoption files for consultation.

II. The Federal Constitutional Court reversed the decision and remanded it to the Local Court for a fresh decision, as the right to effective judicial protection had been violated by the Local Court, on the basis of the following considerations:

a court, if this is provided by law, is obliged to establish all facts relevant to the case, but it does not have to follow every potential lead. It may close a case if further investigations would add no pertinent, decisive facts. It does not have to grant every application to take evidence made by the parties to the proceedings. This includes cases in which evidence would be inadmissible, impossible to obtain or completely useless.

In this particular case, however, the Local Court, pursuant to the relevant German laws, was under an obligation to investigate the relevant circumstances *ex officio*.

Within the European Union, in general, judicial cooperation in the field of taking evidence is governed by Council Regulation (EC) no. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (hereinafter, "Council Regulation"). The court did not avail itself of the possibilities provided under that Regulation, although by making the request it might have been able to determine whether there was an obstacle to recognising the adoption that allegedly had taken place.

The general conditions for requesting the taking of evidence were present. However, the Local Court was of the opinion that the applicability of the Council Regulation depended on the proceedings abroad still pending.

The Council Regulation might enable a court to request case files from other member states. However, the Local Court had dismissed the possibility of such a request without due consideration; it did not consider the following points: while opinions as to whether the Council Regulation permits a German court to request original case files from other Member States still differ for various reasons (in contrast to Article 1.1 of the Hague Convention on the Taking of Evidence of 18 March 1970 – hereinafter, “Hague Convention”, there is no explicit mention of “other judicial acts” in the Council Regulation, which is interpreted in different ways – resulting either in such acts being within or falling outside of the scope of the Council Regulation; there is no unanimity with regard to the question whether a request of case files constitutes “another judicial act”), it cannot be ruled out from the outset that it is possible. Even if such a request were impossible under the Council Regulation, Article 21.1 of the Council Regulation would have allowed for application of the Hague Convention and might have provided another possibility.

The Local court was inconsistent in its approach: as it considered the question of whether the couple had applied for the applicant’s adoption to be decisive, as it did not take into consideration any other means of establishing that fact and as there was no case-law of the Court of Justice of the European Union about the disputed question whether the Council Regulation allowed for a request of the case-law in another Member State, it would have been under a duty to refer the question to the Court of Justice of the European Union pursuant to Article 267.3 of the Treaty of the Functioning of the European Union.

In addition, even if it had been impossible to request the case files under the Council Regulation, the Local Court should have tried to use other means available under the Council Regulation.

Moreover, the court could have asked for assistance by way of general mutual judicial assistance, assistance not regulated and depending on the good will of the other state involved, but, from the facts of the case, an option that might have been possible.

The court also failed to use the mechanisms established through the European Judicial Network in Civil and Commercial Matters (cf. 2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial

matters) to facilitate judicial cooperation, which would have enabled it to learn about the various options available.

Supplementary information:

Legal norms referred to:

- Article 2. 1 in conjunction with Article 20.3 of the Basic Law;
- Article 21.1 of Council Regulation (EC) no. 1206/2001, 28.05.2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters;
- 2001/470/EC – Council Decision, 28.05.2001, establishing a European Judicial Network in civil and commercial matters;
- Article 1.1 of the Hague Convention on the Taking of Evidence, 18.03.1970.

Cross-references:

Federal Constitutional Court:

- 2 BvR 1533/94, 07.12.1999, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest – *BVerfGE*) 101, 275;
- 2 BvR 779/04, 19.10.2004, Chamber Decisions of the Federal Constitutional Court (*BVerfGK*) 4, 119;
- 2 BvR 2063/11, 18.12.2014;
- 1 BvR 1243/88, 03.11.1992, (*BVerfGE* – Official Digest) 87, 273;
- 2 BvR 429/11, 09.12.2014.

Languages:

German.



Identification: GER-2015-3-022

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 22.09.2015 / **e)** 2 BvE 1/11 / **f)** / **g)** to be published in the Federal Constitutional Court’s Official Digest / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2015, 1751-1755; *Die Öffentliche Verwaltung* 2015, 974; *Verwaltungsrundschau* 2015, 432; CODICES (German).

Keywords of the systematic thesaurus:

4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees.**

Keywords of the alphabetical index:

Parliament and committees, mirror-image composition / Mediation Committee, working groups.

Headnotes:

The principle of mirror-image compositions of Parliament and committees does not apply to working groups of the Mediation Committee, irrespective of whether such groups are established through formal decision of the Committee or through an informal decision.

Summary:

I. *Organstreit* proceedings were instituted by two former members of the German *Bundestag* who, at the same time, were members of the Mediation Committee and the parliamentary group of “THE LEFT PARTY” of the *Bundestag*. The applicants challenged their exclusion from participation in a working group (application no. 1) and from an informal discussion group (application no. 2) that were established in the context of the mediation proceedings concerning the Act on Determining Standard Benefits and Amending the Second and the Twelfth Book of the Code of Social Law (hereinafter, the “Act”).

II. The Federal Constitutional Court decided that the applications were only admissible in part and unfounded in that respect, basing its decision on the following considerations:

The Mediation Committee was the only suitable respondent, and only with regard to application no. 1 concerning the composition of the working group.

Creation of the working group on the Act, and its composition excluding members of the *Bundestag* belonging to the parliamentary group of “THE LEFT PARTY”, was attributable to the Mediation Committee, but neither to the *Bundestag*, nor the *Bundesrat*. The decisive factor was that the circumstances as a whole (decision taken at a meeting of the members of the Committee, the objective of the meeting) were such as to allow attributing both the meeting and the decision to the Mediation Committee.

Application no. 2 was inadmissible. The refusal to appoint the applicant Dagmar Enkelmann as a member of the informal discussion group and to permit her to participate therein was not attributable to any of the respondents. The mere fact that members of the Mediation Committee participated in the discussions and that premises of the *Bundesrat* were supposedly used for the first meeting did not make the discussions sufficiently similar to procedures of the respondents in terms of form and organisation to justify attributing the discussions to one of them.

The admissible part of application no. 1 was unfounded. The Mediation Committee’s refusal to appoint member of Parliament Katja Kipping as a member of the Mediation Committee’s working group and to permit her participation therein did not violate the applicants’ rights under the second sentence of Article 38.1 and Article 77.2 of the Basic Law.

Pursuant to the second sentence of Article 38.1 of the Basic Law, members of the *Bundestag* are representatives of the entire people. This presupposes equal rights of participation for all members of Parliament and includes the right to equal participation in the process of parliamentary policy formulation. This right of participation does not only concern the act of decision-making itself but also prior discussions.

In principle, the right of participation of all members of Parliament extends to committees of the *Bundestag*. As committees perform an essential part of parliamentary work, they must generally be a miniature version of the Plenary and, in their composition, must mirror the composition of the Plenary. Under the principle of mirror-image compositions, a parliamentary group’s strength in the Plenary has to be mirrored as exactly as possible. This principle also applies to sub-committees, but not to bodies and functions that are merely of an organisational nature.

The principle of mirror-image compositions also applies to electing members of the *Bundestag* to serve as members of the Mediation Committee. While, as a joint committee of two constitutional organs, the Mediation Committee cannot be compared to a *Bundestag* committee as such, its relevance in the context of the legislative process equals that of the *Bundestag* committees.

However, the principle of mirror-image compositions in Parliament and committees does not apply to working groups of the Mediation Committee, regardless of whether they were established by formal Committee decision or informally.

Regulation of the details of organisation and the course of business of such working groups is generally included in the power to adopt rules of procedure for the Mediation Committee which under the second sentence of Article 77.2 of the Basic Law pertains jointly to the *Bundestag* and the *Bundesrat*. The Mediation Committee's Rules of Procedure merely provide that the Committee may establish sub-committees. Since the power to adopt rules of procedure entails broad leeway, the standard of constitutional review is limited to determining whether the provision complies with mandatory constitutional requirements concerning the composition of and the rights of participation within these bodies.

Such mandatory requirements cannot be derived from the second sentence of Article 38.1 and Article 77.2 of the Basic Law. The right of members of the *Bundestag* to participate equally in parliamentary policy formulation does not extend to working groups of the Mediation Committee, and such groups are not involved in Parliament's representation of the people in a way that would require their composition to mirror the parliamentary groups' strength in the Plenary as exactly as possible.

In fact, the working groups of the Mediation Committee are not of a purely organisational nature, but have the task of contributing, through intensive substantive work, towards finding a compromise for bills – a compromise that is capable of securing a majority. Without doubt, such compromise proposals to a certain degree result in anticipating decision-making in the Mediation Committee in terms of content. However, this is one feature of the specific *modus operandi* in the Mediation Committee that can be compared neither to the deliberative procedure in the *Bundestag* nor to the decision-making process in the *Bundesrat*.

It is the purpose and objective of mediation proceedings to achieve political compromise between the two legislative bodies. They do not serve the function of public parliamentary negotiations and decision-making. Rather, to achieve an efficient legislative process, the Basic Law allows delegating deliberation of legislative bills to a Committee that is, by composition and procedure, particularly suitable to work out a compromise. To fulfil this task, the Mediation Committee possesses – within the limits of its rules of procedure – broad leeway for autonomously designing its procedure. This entails the power to prepare decision-making by establishing formal and informal bodies that are composed according to other criteria than a mirror-image composition.

The search for consensus also determines the course of business in practice. In the practice of the Mediation Committee, establishing working groups when working on difficult and complex issues serves mainly to introduce external expertise, by involving experts from parliamentary groups or ministries or other experts. The flexible composition and the informal character of such working groups open up the deliberation process and allow new aspects to be introduced, making it more likely that agreement will be reached. The Mediation Committee is free to adopt the results of the working groups, to reject them completely, or to modify them. During this process, all members, including those who were not part of the working groups, may submit their own proposals. The fact that members of smaller parliamentary groups will usually not succeed in securing a majority for their amendments is not a particularity of the mediation procedure but a feature also inherent in parliamentary deliberations and decision-making in the *Bundestag* and its committees.

Supplementary information:

Legal norms referred to:

- Articles 38.1 and 77.2 of the Basic Law.

Languages:

German, English version to be published on the Court's website; English press release available on the Court's website.



Identification: GER-2015-3-023

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 23.09.2015 / **e)** 2 BvE 6/11 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2015, 593-608; *Bundeswehrverwaltung* 2015, 250-256; *Neue Zeitschrift für Verwaltungsrecht* 2015, 1593-1602; *Juristenzeitung* 2016, 37-46; CODICES (German).

Keywords of the systematic thesaurus:

- 3.4 General Principles – **Separation of powers.**
- 4.5.2 Institutions – Legislative bodies – **Powers.**

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

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

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

Keywords of the alphabetical index:

Armed forces, deployment, abroad, parliament, approval, requirement / Armed forces, use, abroad / Foreign affairs, competences / Foreign relations, constitutional review.

Headnotes:

1. The requirement of a parliamentary decision under the provisions of the Basic Law pertaining to defence is not limited to deployments of armed military forces within systems of collective security but applies generally to all deployments of German armed military forces abroad. It does not depend on them having the character of actual wars or being war-like.
2. In cases of imminent danger, the Federal Government may, by way of exception, preliminarily order on its own that armed military forces be deployed. In such a case, it must immediately bring the continuing deployment to the attention of the *Bundestag*, and, upon request by the *Bundestag*, withdraw the armed forces deployed.
3. Whether the conditions triggering the emergency power were present is a question subject to full review by the Federal Constitutional Court.
4. If a deployment of armed forces ordered by the Federal Government under its emergency powers for cases of imminent danger is already over at the earliest possible moment in which a parliamentary decision could have been sought and if, therefore, Parliament cannot influence the specific use of armed forces in a legally relevant manner, the requirement of a parliamentary decision under the provisions of the Basic Law that concern defence, the Federal Government is not under a duty to seek a decision by the German *Bundestag* on the deployment. However, the Federal Government must inform the *Bundestag* promptly and in a qualified manner about completed deployments of armed forces.

Summary:

I. *Organstreit* proceedings initiated by the parliamentary group of ALLIANCE 90 / THE GREENS (BÜNDNIS 90 / DIE GRÜNEN) concerned the issue of whether the Federal Government violated the rights of the *Bundestag* by not seeking its

retrospective decision for deploying *Bundeswehr* (German armed forces) soldiers to evacuate German citizens from Libya on 26 February 2011.

II. The Federal Constitutional Court decided that the application was unfounded. The evacuation of German citizens from the Libyan town of Nafurah conducted by *Bundeswehr* soldiers on 26 February 2011 constituted a deployment of armed military forces within the meaning of the constitutional requirement of a parliamentary decision. However, the respondent was not obliged to retrospectively seek the *Bundestag's* legally non-binding political approval of the completed operation. In addition, the *Organstreit* proceedings did not concern a possible violation of the parliamentary right to promptly receive qualified information on the completed deployment of armed military forces.

The requirement of a parliamentary decision for deployments of armed military forces, which applies directly by virtue of the Constitution, gives the *Bundestag* the right to participate in decision-making concerning such deployments. In principle, a parliamentary decision must be obtained before the deployment commences. The requirement of parliamentary involvement is not limited to deployments of armed military forces within systems of collective security but applies to all deployments of armed German forces abroad.

Considering its function and importance, the requirement of a parliamentary decision enshrined in the Constitution's provisions on armed forces must be interpreted in favour of Parliament. In particular, the issue of whether a parliamentary decision is necessary cannot depend on the political or military evaluations and prognoses of the Federal Government – this holds true even in cases of imminent danger.

According to the jurisprudence of the Federal Constitutional Court, Parliament must be involved in cases concerning “deployments of armed military forces”. Deployments fall within this definition if German soldiers are involved in armed activities. For making this determination, it is irrelevant whether there already is armed combat. What is decisive is whether there is a specific expectation that German soldiers will become involved in armed hostilities immediately.

In principle, every deployment of armed German forces requires constitutive parliamentary participation. It is not limited to actual wars or war-like deployments abroad. Even deployments that are clearly of little importance and scope or minor political importance may require a parliamentary decision under the Constitution.

As a rule, the Constitution prohibits deployments of armed military forces without prior parliamentary decision. Thus, the Federal Government and the *Bundestag* must ensure that, in general, a parliamentary decision is obtained before the governmental decision to use armed force is taken and that no such decision is taken before parliamentary decision proceedings have been completed.

In cases of imminent danger, the Federal Government may, by way of exception, order armed military forces to be deployed without a prior parliamentary decision. In order for a deployment to be continued, however, the *Bundestag* must approve it as soon as possible. This requirement for the immediate involvement of Parliament after a deployment has begun does not have the legal effects of a retrospective approval, namely that if such retrospective approval were denied, the deployment would have been illegal from the beginning onwards. The Federal Government's emergency decision rather has the same legal effects as a decision taken in the usual order of things, with a prior decision of the *Bundestag*. Therefore, in cases of deployments initiated by emergency decision of the Federal Government, parliamentary approval is constitutive only for the future. Denial of parliamentary approval obliges the Federal Government to terminate the deployment and to withdraw the forces deployed.

The issues of whether German soldiers were involved in armed activities and whether there was imminent danger are subject to full review by the Federal Constitutional Court. In particular, constitutional review of the criterion of imminent danger does not exceed the judiciary's functions. Limitations of this kind are acknowledged when it comes to political discretion in the field of foreign policy as well as in defence matters. However, the Federal Government's factual and legal evaluation in assuming imminent danger is not a political decision but a determination of whether a factual situation fulfils the legal requirements of an emergency power – this determination can be reviewed using objective criteria.

There is no room for a constitutive parliamentary decision if Parliament cannot influence a deployment of armed military forces ordered by the Federal Government under its emergency powers for cases of imminent danger, because it was over before a parliamentary decision could be sought.

However, the *Bundestag* as well as its committees are tasked with exercising parliamentary oversight over deployments of armed military forces that were initiated by emergency decision of the Federal Government, because of imminent danger and that were over before Parliament could be involved. It follows from the constitutional requirement of a parliamentary decision that the Federal Government must inform the *Bundestag* promptly and in a qualified manner about completed deployments of armed forces. This obligation of formal information concerns the relevant factual and legal considerations the Federal Government's decision to deploy armed military forces is based on, as well as the details and the outcome of this deployment. Moreover, the Federal Government must inform Parliament in an effective way. In principle, the information must be provided to the *Bundestag* as a whole in order to enable all of its members to access the information and in writing.

Languages:

German, English version to be published on the Court's website; English press release available on the Court's website.



Identification: GER-2015-3-024

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 06.10.2015 / **e)** 1 BvR 1571/15; 1 BvR 1582/15; 1 BvR 1588/15 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Neue Zeitschrift für Arbeitsrecht – Sonderheft* 2015, 1271-1274; *Neue Juristische Wochenschrift* 2015, 3294-3296; *Europäische Grundrechte-Zeitschrift* 2015, 633-636; *Zeitschrift für Tarifrecht* 2015, 636-638; CODICES (German).

Keywords of the systematic thesaurus:

1.5.4.7 Constitutional Justice – Decisions – Types – **Interim measures.**

Keywords of the alphabetical index:

Injunction, constitutional complaint.

Headnotes:

§ 32.1 of the Federal Constitutional Court Act allows the Federal Constitutional Court to decide a matter provisionally by way of a preliminary injunction if this is urgently required to avert severe disadvantage, prevent imminent violence, or for other important reasons in the interest of the common good. This decision is taken independently of the principal proceedings' prospects of success. The Federal Constitutional Court merely weighs the consequences, by comparing the situation with and without a preliminary injunction, for the time until the principal proceedings are decided. A strict standard applies, which is even stricter if the execution of an Act of Parliament is to be suspended. The Federal Constitutional Court must exercise the utmost restraint in using its power to issue preliminary injunctions, as a preliminary injunction against an Act of Parliament constitutes significant interference with the original competence of the legislator.

In this regard, it is decisive whether the disadvantages that are likely to occur if the Act of Parliament remained in force until a decision is rendered in the principal proceedings are irreversible or very difficult to reverse. For example, a preliminary injunction would be conceivable if it were foreseeable that, with the challenged provisions remaining in force until a decision is rendered in the principal proceedings, the applicants would be unable to negotiate collective agreements in the longer term, an activity constituting an essential objective of trade unions. A preliminary injunction may also be called for if the challenged provisions remaining in force had such an impact on a number of members of a trade union that its collective bargaining capacity would be called into question. This does not currently seem to be the case.

Summary:

I. In their constitutional complaints and the applications for preliminary injunctions that were submitted at the same time, the three applicants challenged the Act on Uniform Application of Collective Agreements of 3 July 2015. They are trade unions that organise specific professions. Their collective bargaining competences overlap with those of other trade unions, which organise employment sectors and thus usually unite bigger groups of employees.

The Act on Uniform Application of Collective Agreements inserted a new rule of conflict into the law on collective agreements. This rule applies if the scope of collective agreements negotiated by different trade unions overlap in one firm either as a company or a unit in a larger company. Pursuant to

the second sentence of § 4a.2 of the Collective Agreements Act (*Tarifvertragsgesetz – TVG*), a court has the power to decide that the only collective agreement that will apply is one that has been negotiated by the trade union with most members in that firm. A trade union that sees its collective agreement superseded may join the collective agreement negotiated by the majority trade union through subsequent signature.

Prior to the adoption of the Act on Uniform Application of Collective Agreements, this type of situation was not regulated by law. Until 2010, in case of conflict between collective agreements in one firm, the courts, based on a principle of speciality, enforced the collective agreement that was most closely related to the firm in terms of location, organisation, operation, and personnel, and therefore was best suited to meet the requirements and the characteristics of the firm. Since 2010, after the Federal Labour Court changed its jurisprudence, conflicts between collective agreements were tolerated; in cases concerning individual employees, labour courts solved conflicts between collective agreements primarily based on the principle of speciality, but without deciding that one collective agreement had priority in the entire firm. Now, according to the Act on Uniform Application of Collective Agreements, the principle of majority applies to the entire firm in cases of conflict between different collective agreements.

II. The applications for preliminary injunctions were found to be admissible, but unfounded for the reasons set out below.

At the time of the decision, there was nothing to indicate that the applicants or third parties would suffer grave or irreversible disadvantages, or disadvantages that would be difficult to reverse, pending the rendering of a decision in the principal proceedings. The applicants considered their bargaining power to be weakened by the Act on Uniform Application of Collective Agreements, and this did constitute a disadvantage. However, the challenged Act of Parliament did not prohibit activities in the field of collective bargaining as such.

The individual cases in which employers, relying on the Act on Uniform Application of Collective Agreements, refused to negotiate or stopped a process of collective bargaining constituted grave disadvantages indeed. However, they were to be tolerated for the limited period of time. In addition, the Act on Uniform Application of Collective Agreements did not directly regulate the lawfulness of measures of industrial action in labour disputes, which, as such, are protected by Article 9.3 of the Basic Law.

At the time of the decision, it was not clear whether, pending the rendering of a decision in the principal proceedings, the rule of conflict under § 4a TVG would be applied so often that a preliminary injunction would become indispensable, as the parties to collective agreements have several possibilities in collective bargaining politics to avoid a situation of conflict. In addition, it could not be ruled out that collective agreements that had been superseded would apply to past situations if the challenged rule of conflict was declared void in the principal proceedings in this case.

Furthermore, at least until a decision in the principal proceedings had been made, there was no sufficiently specific prognosis that the number of members of a trade union would change irreversibly or in a way that threatened the unions' existence, nor did it necessarily follow from the application of the Act in question. In any case, there was, at the time of the decision, no indication that the applicants' collective bargaining capacity and thereby their existence as collective bargaining partners would be seriously threatened.

The Federal Constitutional Court held that the applicants were free to reapply for a preliminary injunction, should the factual circumstances change significantly and that the protective function of the preliminary injunction may justify the issue by the Panel of a preliminary injunction *ex officio* without such an application by the applicants.

Supplementary information:

Legal norms referred to:

- Article 9.3 of the Basic Law;
- Act on Uniform Application of Collective Agreements;
- Second sentence of § 4a.2 of the Collective Agreements Act;
- § 32.1 of the Federal Constitutional Court Act.

Languages:

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



Identification: GER-2015-3-025

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 03.11.2015 / **e)** 2 BvR 2019/09 / **f)** / **g)** / **h)** *Wertpapier-Mitteilungen Teil IV* 2016, 51-55; CODICES (German).

Keywords of the systematic thesaurus:

1.4.9 Constitutional Justice – Procedure – **Parties**.
3.9 General Principles – **Rule of law**.

Keywords of the alphabetical index:

Service of process, misuse / Service of process, international / Hague Service Convention / General right of personality.

Headnotes:

In general, it is compatible with the general right of personality pursuant to Article 2.1 of the Basic Law to serve an action according to the rules of the Hague Service Convention that has been brought abroad, cf. Decision 1 BvR 1279/94, 7 December 1994.

Incompatibility with the Basic Law may arise if the service of process is obviously being misused.

Summary:

I. The applicant is a corporation operating internationally as automotive supplier and arms manufacturer and also maintains two sites in the United States of America (hereinafter, the "U.S."). In November 2002, together with other multinational concerns, it was sued for damages by a group of South African plaintiffs in a class action before a court in the U.S. for aiding and abetting in human rights violations committed by the apartheid regime in South Africa. The plaintiffs invoked the Alien Tort Claims Act, pursuant to which U.S. federal courts have original jurisdiction in civil actions brought by foreigners on tort acts committed in violation of international law or international treaties to which the U.S. is a member.

In April 2009, the U.S. District Court seized of the matter admitted the action to a limited extent, but explicitly reserved its decision on personal jurisdiction and on the question of proper service for later. A U.S. Court of Appeals suspended the proceedings until decision of proceedings *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* at that time already pending before the U.S. Supreme Court. In

its judgment of 17 April 2013, the Supreme Court dismissed the *Kiobel* action for lack of jurisdiction of U.S. District Courts (*Supreme Court of the United States of America, Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, no. 10-1491). It held that there was a presumption against extraterritorial application of laws (presumption against extraterritoriality), unless the legislator had specifically provided for such application. It further stated that even if claims touched and concerned the territory of the U.S., their link to the U.S. had to be strong enough to displace the presumption against the extraterritorial application of the Alien Tort Claims Act. As a consequence, in December 2013, the District Court dismissed the action against the applicant in the present case. That decision has become final since then.

In Germany, the Düsseldorf Local Court, upon decree by the president of the Düsseldorf Higher Regional Court, served the action in July 2003. The Düsseldorf Higher Regional Court rejected the appeal against the service in its order of 22 July 2009 as unfounded. This order is challenged via the constitutional complaint.

II. The Federal Constitutional Court decided that the constitutional complaint was inadmissible for the following reasons.

The applicant's initial application had become moot. After the final dismissal of the action in the U.S., the applicant lacked the interest as well as the possibility to claim invalidity of the service of process.

Since the initial application had become moot, the applicant lacked the recognised legal interest in lodging a constitutional complaint that is necessary to further pursue the constitutional complaint. Only by way of exception and in particular cases can a legal interest in lodging a constitutional complaint still be recognised under such circumstances. These requirements were not met in the present case.

With regard to a risk of repetition, under constitutional law, the applicant did not have a legally recognised interest in having the challenged order reviewed for its compatibility with the Constitution. There was no indication that, as the applicant assumed, it would again have to face court proceedings in the U.S. in the future. Comments on the *Kiobel* Judgment rendered by the U.S. Supreme Court concurred in that comparable actions before U.S. federal courts were no longer to be expected.

Nor was there a profound and particularly severe interference with fundamental rights. Service of process that jeopardised mere financial interests of the applicant was not comparable to typical interferences of that kind.

Finally, one could not derive a continuing recognised legal interest in lodging a constitutional complaint from the assumption that an issue of general constitutional significance required clarification. To the extent relevant for the decision in the case, there were no constitutional concerns against the Hague Service Convention, which has been integrated into the German legal order by Act of 22 December 1977. For the present case, there was no need to clarify whether the service of process in Germany of an action pending in a foreign country would be compatible with Article 2.1 of the Basic Law in conjunction with the rule of law if the objective pursued by the action obviously violated indispensable principles of a free state under the rule of law. The legal institutions used and rules applied in the U.S. court proceedings against the applicant neither individually nor taken together constituted such an obvious violation.

In its jurisprudence, the Federal Constitutional Court had already adjudicated on some of these legal institutions and had declared that they did not violate indispensable rule of law principles: this concerned punitive or exemplary damages (1 BvR 1279/94, 7 December 1994), class actions (2 BvR 1198/03, 25 July 2003) and pre-trial discovery (2 BvR 1133/04, 24 January 2007).

The obligation to respect these legal institutions might find its limits where proceedings in foreign courts are obviously being misused. There was, however, no evidence to indicate that the claim before the court was – at least in its amount – obviously without substance, that the defendant did obviously not have anything to do with the challenged conduct, or that considerable pressure, also by the media, was applied forcing the applicant to accept an unjustified settlement. Nor could it be ruled out from the outset that the applicant, as a legal person under private law, could be held responsible under international law. According to one view held in international law doctrine, a core of basic human rights obligations exists that also apply to individual natural persons or legal persons under private law and which, where they are violated, might entail sanctions under international law. One could not completely rule out that such violations might cause liability under private law. Therefore, the mere attempt to enforce such liability before the courts was not in itself sufficient to indicate obvious abuse of legal rights.

Supplementary information:

Legal norms referred to:

- Article 2.1 of the Basic Law;
- The Hague Service Convention;
- The U.S. Alien Tort Claims Act.

Cross-references:

Constitutional Court:

- 1 BvR 1279/94, 07.12.1994, *Bulletin* 1994/3 [GER-1994-3-033], *Entscheidungen des Bundesverfassungsgericht* (Official Digest – *BVerfGE*) 91, 335 (339);
- 2 BvR 1198/03, 25.07.2003, *Entscheidungen des Bundesverfassungsgericht* (Official Digest – *BVerfGE*) 108, 238 <248>;
- 2 BvR 1133/04, 24.01.2007, Chamber Decisions of the Federal Constitutional Court (*BVerfGK*) 10, 203 <207>.

Supreme Court of the United States of America:

- *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, no. 10-149, 17.04.2013.

Languages:

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

*Identification:* GER-2015-3-026

a) Germany / **b)** Federal Constitutional Court / **c)** Complaints Chamber / **d)** 16.12.2015 / **e)** Vz 1/15 – 1 BvR 99/11 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1 Constitutional Justice – **Constitutional jurisdiction.**

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

Keywords of the alphabetical index:

Length of proceedings, reasonableness.

Headnotes:

A party to proceedings before the Federal Constitutional Court who suffers a disadvantage due to the unreasonable duration of the proceedings before the Federal Constitutional Court shall receive adequate compensation (first sentence of § 97a.1 of the Federal Constitutional Court Act).

Reasonable duration of proceedings shall be established on a case-by-case basis, taking into account the Federal Constitutional Court's tasks and position (second sentence of § 97a.1 of the Federal Constitutional Court Act).

When identifying and assessing the relevant circumstances for establishing a reasonable duration, one has to draw on the standards that the Federal Constitutional Court and the European Court of Human Rights (cf. European Court of Human Rights, *Klein v. Germany*, no. 33379/96, 27 July 2000; *Rumpf v. Germany*, no. 46344/06, 2 September 2010; *Grumann v. Germany*, no. 43155/08, 21 October 2010) have developed in assessing the unreasonable duration of judicial proceedings.

However, when assessing the duration of proceedings before a constitutional court, it is also particularly important to take into account other circumstances than merely the order of registration, such as the nature of the case and its political and social relevance. Proceedings that are of particular importance for the common good are to be accorded priority. Taking into account a constitutional court's tasks and position, the duration of proceedings taking longer than usual is not as such unreasonable, at least not without further indications. As a rule, exceptional and particular circumstances are needed to establish unreasonable duration.

Summary:

I. In the initial proceedings, the applicant sought the deletion of his personal data from the public prosecutor's register of proceedings. He also challenged the fact that a criminal file on him had been handed over to the Archives of the Land North Rhine-Westphalia. He filed an application for judicial decision with the Higher Regional Court against the rejection of his requests by the public prosecutor; the application was dismissed as unfounded in the last instance. On 4 October 2010, he lodged a constitutional complaint (AR 7295/10, later 1 BvR

99/11) challenging this decision. By letter dated 1 February 2015, he filed a formal objection to judicial delay combined with a request for a prompt decision on the merits. On 13 May 2015, by a decision stating reasons, the constitutional complaint was not admitted for decision, whereupon the applicant filed his formal complaint against judicial delay on 7 September 2015.

II. The Federal Constitutional Court decided not to grant the relief sought for the reasons set out below.

The constitutional complaint was received by the Federal Constitutional Court in October 2010, and the order not admitting it for decision was dispatched in June 2015, so it took about four years and eight months to conclude the contested proceedings. Thus, the proceedings took unusually long. However, taking into account the tasks and the position of the Federal Constitutional Court, the duration was justified by factual reasons and therefore not unreasonable.

In the relevant period of time, an exceptionally high amount of proceedings of large dimensions and of high political importance were pending in the reporting Justice's Cabinet, which is, *inter alia*, competent for the law on data protection. There were also important proceedings pending in the Chamber of the First Panel competent to deal with the proceedings instituted by the applicant, and these proceedings were given priority. These proceedings, which had particularly large dimensions and were particularly difficult, could not have been allocated to other Justices of the Panel, as they too were burdened with a heavy workload.

There was no indication that the reporting Justice's decision to defer the proceedings might have been based on extraneous considerations. The applicant's proceedings were not of a political and social relevance exceeding that of the pending Panel proceedings, which would have been an obstacle to deferring the proceedings. In addition, the fact that this decision to defer the case was taken, in January 2011 for the first time, was not as such contested by the applicant. The same reasons to defer applied with regard to the proceedings decided by the competent Chamber of the First Panel and mentioned in the reporting Justice's statement; moreover, these proceedings, with the exception of the ones decided in March 2014, had been received by the Federal Constitutional Court earlier than the applicant's proceedings.

The applicant was of the view that the Chamber competent to decide his case would not have had to deal with the merits of the case. However, he failed to realise that the mere fact that a constitutional complaint had not been admitted for decision does not provide a sound basis for such a conclusion. Moreover, the order of non-admission contained reasons, which is not required by law; in 2014, the last year for which figures are available, this was the case, with regard to the two Panels taken together, in 3.58% of the constitutional complaint proceedings concluded by an order of non-admission issued by a Chamber. From a purely statistical perspective, this made the applicant's proceedings stand out from the multitude of proceedings, irrespective of their outcome. Furthermore, the fact that the order of non-admission contained reasons demonstrated that contrary to the applicant's statement, the Chamber competent to decide the case did discuss the case and the legal issues it raised in depth.

Moreover, there was no indication that the constitutional complaint had a particular subjective significance, which would have been an obstacle to its being deferred. According to the reporting Justice's statement, which has not been contested in this respect, the applicant is effectively seeking above all the deletion of data stored in the public prosecutor's register of proceedings, and that are specifically protected against misuse. The purpose of storage of these data is highly specific, and there is no indication that specifically those data are to be accessed. The same applies to the data transmitted to the Land Archives, whose use is, in addition, subject to specific conditions.

According to the reporting Justice's statement, the reason for deferring the applicant's constitutional complaint proceedings ceased to exist after the written opinion in the proceedings concerning the Federal Criminal Police Office Act had been completed on 17 March 2015. The subsequent period of time until the conclusion of the applicant's constitutional complaint proceedings on 13 May 2015 is not unreasonable, also when taking into account the Court's obligation to at least partially compensate time accrued with increasing length of proceedings by advancing the course of proceedings in a particularly timely manner. This period of processing time has not been challenged by the applicant.

Supplementary information:

Legal norms referred to:

- § 97.1 of the Federal Constitutional Court Act.

Cross-references:

European Court of Human Rights:

- *Klein v. Germany*, no. 33379/96, 27.07.2000;
- *Rumpf v. Germany*, no. 46344/06, 02.09.2010;
- *Grumann v. Germany*, no. 43155/08, 21.10.2010.

Languages:

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



Hungary

Constitutional Court

Important decisions

Identification: HUN-2015-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24.09.2015 / **e)** 28/2015 / **f)** On the referendum initiative on early retirement of men / **g)** *Magyar Közlöny* (Official Gazette), 2015/137 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.6 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of referendums and other instruments of direct democracy.**

1.5.6.3 Constitutional Justice – Decisions – Delivery and publication – **Publication.**

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

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

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

Keywords of the alphabetical index:

Retirement, age, gender, equality / Referendum, pension / Referendum, limitation.

Headnotes:

Women have the right to preferential treatment, especially in the field of the right to a pension, and this right follows from the Fundamental Law.

Summary:

I. A union leader proposed a referendum on the subject of allowing men who have worked for forty years to retire with full benefits. The question is whether men and women should be entitled to the same rights to early retirement, i.e. after forty years of employment. The National Election Committee had refused the authentication of the question in the signature-collecting sheets concerning the referendum on early retirement rights. Later Hungary's Supreme Court (the Curia) overrode the decision of the National Election Committee. Following the Curia's ruling, trade unions began

collecting the 200,000 signatures required by law for calling a referendum, but several women and lobby groups representing women submitted complaints to the Constitutional Court.

II. The Constitutional Court declared that the Curia's ruling was unconstitutional and annulled it. The Court made an early announcement due to the on-going collection of signatures and published the reasoning of the decision at a later point. The Court's decision meant that a referendum could not be held on the issue.

The Constitutional Court first examined whether the question to be put to a referendum was to be held fell into the category that was not allowed to be included in a referendum by the Fundamental Law. According to Article 8.3.b of the Fundamental Law, no referenda may be held on the central budget, the implementation of the central budget, central taxes, duties, contributions, customs duties, or the content of Acts determining the central conditions for local taxes. The Court argued that any such changes to the pension system have an effect of the state budget, since lowering the age for obtaining an old-age pension of men would increase the amount the state budget should cover.

The Court also examined whether the question was to be held against the principle of equality. Article XV.2 of the Fundamental Law stipulates that "Hungary shall guarantee the fundamental rights to everyone without any discrimination, in particular on grounds of sex". Women entitled to special protection in accordance with Articles XV.5 and XIX.4 of the Fundamental Law. Under provision Article XV.5 of the Fundamental Law, Hungary shall take special measures to protect, among others, women. Article XIX.4 of the Fundamental Law reads that "Hungary shall contribute to ensuring a livelihood for the elderly by maintaining a unified state pension system based on social solidarity and by allowing for the operation of voluntarily established social institutions. The conditions of entitlement to state pension may be specified by an Act also in view of the requirement for increased protection for women". As a result, women have the right to preferential treatment, especially in the field of the right to a pension, and this right follows from the Fundamental Law. This constitutional right would have been violated in the case of a successful referendum.

Languages:

Hungarian.



Identification: HUN-2015-3-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 19.11.2015 / **e)** 32/2015 / **f)** On compensation for victims of a collapsed brokerage house / **g)** *Magyar Közlöny* (Official Gazette), 2015/177 / **h)**.

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
5.2 Fundamental Rights – **Equality.**
5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Compensation, eligibility, failed brokerage, victim / State regulation, increase threshold, unfair.

Headnotes:

The legislator is not entitled to put an undue, unpredictable burden on the investment companies financing the compensation of the Investor Protection Fund.

Summary:

I. On 14 April 2015 Parliament approved a bill in an expedited procedure to establish a top-up fund to compensate investors of the failed brokerage Quaestor up to €100,000 apiece. Under the existing laws, Quaestor investors were already eligible for compensation from the Investor Protection Fund of up to €20,000. However, lawmakers approved the new legislation that effectively raised the threshold to about €100,000.

The Investor Protection Fund is an autonomous organisation that provides limited property coverage funded primarily from the contributions paid by its members, if any of its members is not capable of performing its commitment to disburse clients' assets. Because the Investor Protection Fund had already been largely depleted over the course of compensating the victims of earlier scandals (BudaCash, Széchenyi Bank), the adopted law required financial brokerage firms and banks trading in securities to advance sufficient funds to cover most of the projected outlays.

The banks responded by filing a petition to the Constitutional Court. In addition to arguing that it was wrong to require them to compensate the victims of a former competitor that acted irresponsibly or even criminally, they also pointed out that it was unfair to compensate Quaestor victims up to five times more than BudaCash victims.

II. The Constitutional Court annulled the part of law providing for the compensation of victims holding between €20,000-€100,000. The Constitutional Court stated that the law was unconstitutional as it led to discrimination against some investors eligible for the compensation, placed disproportionate ownership restrictions on investment service providers involved in the compensation, and provided insufficient time for preparation. According to the decision of the Constitutional Court the legislation was not entitled to put an undue, unpredictable burden on the investment companies financing the compensation.

Supplementary information:

After the verdict of the Constitutional Court, the Government submitted a new bill to Parliament that provided for the compensation of the Quaestor victims. Parliament adopted the new rules in December 2015.

Languages:

Hungarian.



Italy Constitutional Court

Important decisions

Identification: ITA-2015-3-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 07.10.2015 / **e)** 230/2015 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 46, 18.11.2015 / **h)**.

Keywords of the systematic thesaurus:

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

3.20 General Principles – **Reasonableness.**

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

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

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

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

Keywords of the alphabetical index:

Disability pension / Communication allowance / Deaf / Foreign national.

Headnotes:

A provision making the granting to non-EU nationals of a disability pension for deaf people and a communication allowance (*indennità di comunicazione*) conditional on their being holders of a residence permit, and therefore having legally resided in Italy for at least five years, amounts to discrimination contrary to Article 3 of the Constitution and must therefore be declared unconstitutional.

Summary:

I. The Milan District Court raised the question of the constitutional legitimacy of the part of Section 80.19 of law no. 388 of 23 December 2000 “which makes the granting of a disability pension for deaf people and a communication allowance (*indennità di comunicazione*) to foreign nationals legally resident in Italy conditional on them being holders of a residence permit”.

The District Court considered the provision contrary to the constitutional rules which protect the right to health and the principle of non-discrimination against foreign nationals legally residing in Italy.

II. The Constitutional Court found the provision in issue contrary to the Constitution. On numerous occasions, with reference to many welfare measures, it has had to examine the limits placed by the legal provisions in issue on the entitlement of non-EU nationals legally resident in Italy. The law limits welfare benefits, which are personal rights for the purposes of the legislation on personal services in the welfare field, to foreign nationals who have a residence permit (now a permanent residence permit). Permanent residence permits are issued to individuals who have had a valid residence permit for at least five years.

In its Judgments no. 306 of 2008 (on welfare support for persons unfit to work) and no. 11 of 2009 (on pensions for people unable to work) the Court found the provision concerned unconstitutional for being unreasonable, insofar as it denied the aforementioned benefits to non-EU nationals who did not earn enough money to qualify for the residence permit on which the benefits were conditional.

Following Judgment no. 187 of 2010 the provision at the origin of the question examined today has been criticised several times for discrimination against non-EU nationals in respect of the different types of welfare measures concerned in each case. In that same judgment the provision was declared unconstitutional insofar as it made eligibility for the disability allowance (*assegno mensile di invalidità*) conditional on possession of a residence permit, and therefore on the requirements for obtaining such a permit.

Then came Judgment no. 329 of 2011, still concerning the same provision, which was once again declared contrary to the Constitution, this time with reference to the allowance paid to minors with disabilities to attend vocational training classes (*indennità di frequenza*), from which non-EU nationals were excluded. The Court emphasised the interests at issue here, all of which are protected by the Constitution: protecting children and health, protecting people with disabilities and the welfare of their families, the need to ensure the prompt integration of minors into the workforce and their full participation in social life. There had therefore been a violation of Article 14 ECHR and, as a consequence, a violation of Article 117.1 of the Constitution, a violation of the principle of equality and the right to education, health and work, which were all the more serious in that they affected minors with disabilities.

In Judgment no. 40 of 2013, in respect of welfare support and the pension for unfit for work, the same provision was declared contrary to the principle of solidarity enshrined in Article 2 of the Constitution, in so far as it excluded from these benefits non-EU nationals who were unfit to work, even if they were legally resident in Italy.

Lastly, in Judgment no. 22 of 2015 the Court declared that making the disability pension for the blind or partially blind (*ciechi parziali*) conditional on their possession of a residence permit, and therefore on their having been in Italy for at least five years, was to disregard the real needs of these people, in violation of Articles 2, 3 and 117.1 of the Constitution, together with Article 14 ECHR.

In the case before it concerning the disability pension for deaf people and the communication allowance (*indennità di comunicazione*), the Court considered that the same solution is called for: these benefits must also be afforded to non-EU nationals lawfully resident in Italy, even if they do not yet have an EU long-stay permit. These are special benefits designed to protect the right to health (Article 32 of the Constitution) and the right to social protection (Article 38 of the Constitution) of people suffering from serious disabilities which considerably limit their ability to work.

Supplementary information:

The judgment applies the principles which the Constitutional Court has repeatedly defended in respect of other support measures in favour of people with serious disabilities, for which non-EU nationals were not eligible.

Cross-references:

Constitutional Court:

- no. 306/2008 of 29.07.2008, *Bulletin* 2008/2 [ITA-2008-2-002];
- no. 187/2010 of 26.05.2010, *Bulletin* 2010/2 [ITA-2010-2-001];
- no. 329/2011 of 16.12.2011, *Bulletin* 2011/3 [ITA-2011-3-001];
- no. 40/2013 of 11.03.2013, *Bulletin* 2013/1 [ITA-2013-1-001].

Languages:

Italian.



Kosovo

Constitutional Court

Important decisions

Identification: KOS-2015-3-009

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 21.12.2015 / **e)** KO 130/15 / **f)** The Referral of the President of the Republic of Kosovo, Her Excellency, Atifete Jahjaga, concerning the assessment of compatibility of the principles contained in the document entitled “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements” (hereinafter, the “Association”) with the spirit of the Constitution, Article 3.1 (Equality Before the Law), Chapter II (Fundamental Rights and Freedoms) and Chapter III (Rights of Communities and their Members) of the Constitution of the Republic of Kosovo / **g)** Official Gazette, 23.12.2015 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

2.1.1.4.14 Sources – Categories – Written rules – International instruments – **European Charter of Local Self-Government of 1985**.

3.21 General Principles – **Equality**.

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

Keywords of the alphabetical index:

Legal entity, new / Local Self-Government / Municipalities, association / Community, diversity.

Headnotes:

“The Association” must be established as provided by the First Agreement on the Principles that Regulate the Normalisation of the Relations between the Republic of Kosovo and the Republic of Serbia signed on 19 April 2013 (hereinafter, the “First Agreement”). However, the Principles as elaborated under the document titled “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements” are not entirely in compliance with the spirit of the Constitution, equality of the law and Chapter II and III of the Constitution. The forthcoming legal act of the Government and the

Statute implementing the Principles and thus establishing the Association must meet the constitutional standards as reasoned by the Court.

Summary:

I. The First Agreement was ratified by the Assembly and the law on ratification of such agreement was enacted by the President on 12 September 2013. The First Agreement established the creation of an Association/Community of Serb majority municipalities in Kosovo. On 25 August 2015, the Prime Minister agreed on a document entitled “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements”. This document was to serve as a basis for establishing the legal framework for the implementation of the Association.

The President filed a referral requesting the Court to decide whether these Principles are compatible with the spirit of the Constitution, its multi-ethnic nature, basic rights and freedoms and rights of communities and their members, as guaranteed by Article 3.1, Chapter II and III of the Constitution.

The applicant claimed it was necessary that the Court rule on the merits of this Referral considering that the implementation of the obligations arising from those principles will have a legal effect on the constitutional system, by creating a new legal entity, namely the Association. She further argued that these principles represent an intermediary legal act, which stems from the First Agreement and that they add additional elements in the process of creating the Association. Therefore, the applicant argued that there is a need for a constitutional assessment of these principles before proceeding further with its establishment.

II. The Court decided that the referral is admissible based on the authorisation of the President in the Constitution to raise constitutional questions before the Court. In addressing the merits of the referral, the Court decided to review the Principles chapter by chapter to ensure each chapter complies with the Constitution and specific provisions of each chapter are related to constitutional provisions. Furthermore, the Court reiterated that its reasoning and conclusions shall serve as a basis for the elaboration of the legal act and the Statute.

With respect to the Legal Framework, the Court considered that the principles laid down in this chapter do not entirely meet the constitutional standards. To meet such standards, the legal act, and the Statute that will establish this Association, must be in compliance with Articles 12, 21.4, 44 and 124.4 of the Constitution.

The Court expressed concern with the ambiguous language used in prescribing the Objectives of the Association. It observed that the meaning of certain terms was different in the English, Albanian and Serbian versions. As a result, the Court concluded that any ambiguities in the definition of the objectives of the Association must be clarified, once these principles are elaborated into a legal act and Statute. Consequently, the Court concluded that the objectives foreseen under this chapter did not entirely meet the constitutional standards. The objectives shall secure the responsibility of the participating municipalities to respect the Constitution and the laws, and shall not circumvent or avoid the administrative review by central authorities.

With respect to the Organisational Structure of the Association, the Court observed that the proposed structure raises concerns regarding respect for the diversity of communities' resident within the participating municipalities, and the reflection of this diversity in the staffing and structures of the Association. Therefore, the Court concluded that the organisational structure does not entirely meet the constitutional standards. In order to meet the latter, it must be in line with Articles 3, 7, 57.1, 61 and 62 of the Constitution.

With respect to Relations with Central Authorities, the Court found that the Association cannot be vested with full and exclusive authority to promote the interests of the Kosovo Serb community in its relations with the central authorities. In addition, the Court found that the Association cannot be entitled to propose amendments to legislation and other regulations considering that the Constitution recognises such right exclusively to the President of the Republic, the Government, and the deputies of the Assembly or to at least ten thousand citizens. Similarly, the Court found that in order for the Association to file a referral with the Court, it must comply with the provisions of Article 113 of the Constitution.

With regards to Legal Capacity, Budget and Support and General and Final Provisions, the Court found that the legal act and Statute shall ensure financing and expenditure of the Association in compliance with Article 124.5 of the Constitution. The procedural principles enumerated under general and final provisions must also be harmonised in order to meet the constitutional standards.

In its final conclusions, the Court found that the referral is admissible. The First Agreement foresees the establishment of the Association and the requirement that it be established has become part of the internal legal system. The First Agreement defines the

structures of the Association to follow the same basis as the existing statute of the Association of the Kosovo municipalities. The Principles elaborated in the document entitled "Association/Community of Serb majority municipalities in Kosovo – general principles/main elements" are not entirely in compliance with the spirit of the Constitution, Article 3.1, Chapter II and III of the Constitution. The Court specifically referred to Articles 3, 7, 12, 21, 44, 79, 81, 93, 101, 113, 123, 124 and 137 of the Constitution. The elaboration of the Principles into the legal act and the Statute, which will be reviewed by the Court, shall follow the reasoning of Court in its judgment.

Languages:

Albanian, Serbian, English (translation by the Court).



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2015-3-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 20.10.2015 / **e)** KT27-N16/2015 / **f)** On different number of voters in single-member constituencies / **g)** TAR (Register of Legal Acts), 15777, 20.10.2015, www.tar.lt / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Election, constituency, boundaries, voters, number / Election, voters, equality / Election, votes, inequality / Election, votes, weighing, value.

Headnotes:

Having opted for an electoral system under the Constitution where a portion of members of parliament are elected in single-member constituencies, the legislature must ensure that the number of voters in such constituencies does not differ so significantly from the national average that it has the capacity to distort the equal value of voters' votes in establishing the results of voting. There is no constitutional justification for such differences in the number of voters and for denying the essence of equal suffrage as such.

Summary:

I. The case was initiated by a group of members of Parliament. The applicant argued that the provision of Article 9.1 of the Law on Elections to the *Seimas* (national parliament), under which deviation by 20%

of the number of voters in each single-member constituency from the average number of voters in all single-member constituencies is allowed, creates preconditions for distorting the equal value of voters' votes in establishing the results of voting and for denying the essence of equal suffrage as such.

II. The Constitutional Court recalled the fact that the principle of equal suffrage is one of the generally recognised principles of democratic elections to political representative institutions consolidated in the Constitution. This principle means that in the course of organising and conducting elections, all voters must be treated equally and that the vote of each voter has an equal value with regard to votes of any other voters and is of equal significance in establishing the results of voting. Under the Constitution, when regulating electoral processes by law, one must ensure an equal active electoral right of all the voters, as well as an equal passive electoral right of all the candidates.

It is noted in the ruling that the bigger the difference in the number of voters among separate constituencies, the bigger possible distortion of the equal value of voters' votes in establishing the results of voting. However, it does not mean that, under the Constitution, any differences in the number of voters among separate constituencies are impossible. The number of voters in the constituencies is subject to change due to various objective reasons (for example, migration of voters, other demographic factors), therefore, while forming the constituencies, it is impossible to assess exactly what the number of voters will be in each constituency on the day of election. The Constitution does not require unreasonable things, and legal acts may not demand impossible things, either. Thus, under the Constitution, there is no requirement for all constituencies to contain precisely the same number of voters.

The Constitutional Court also noted that ensuring such generally recognised democratic principles of elections as fair competition between subjects implementing passive electoral rights and the transparency of the electoral process implies certain requirements for the formation of constituencies: constituencies must satisfy the principle of connectivity, they must be compact, and their boundaries must be clear and easy to understand.

Thus, having chosen an electoral system where members (or part thereof) of the *Seimas* are elected in single-member constituencies, a duty arises from the Constitution for the legislator, after it has taken into account all the significant circumstances, to establish such a legal regulation regarding the

formation of constituencies, whereby an even distribution (as much as possible) of the number of voters among them would be ensured.

The Constitutional Court also held that, due to such a deviation from the size between the largest and smallest constituency, according to the number of voters, an obvious disproportion of the number of voters is created – as regards the number of voters, the largest constituency is 1.5 times larger than the smallest constituency. It was recognised that the legal regulation, whereby the deviation of the number of voters of up to 20% is allowed, does not ensure an even distribution (as much as possible) of the number of voters among single-member constituencies. Thus, this legal regulation was in conflict with Article 55.1 of the Constitution.

Supplementary information:

In this ruling, attention was paid to the standards of international good practice in electoral matters consolidated in the documents of the European Commission for Democracy through Law (the Venice Commission) – Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 51st and 52nd Plenary sessions (Venice, 5-6 July and 18-19 October 2002), CDL-AD(2002)023-e. It showed that substantially smaller differences in the number of voters in constituencies are typical of democratic states – usually the deviation of the number of voters allowed does not exceed 10%. The Constitutional Court held that there are no constitutional arguments that these standards of international good practice in electoral matters could not be deemed constitutionally grounded, thus, when establishing the legal regulation on the formation of constituencies and heeding the Constitution, the legislature should take such standards into consideration.

As a consequence of this ruling, the provision of the Law on Elections to the *Seimas* was amended. The deviation of the number of voters which is allowed in each single-member constituency was reduced from 20% to 10% from the average number of voters in all single-member constituencies.

Cross-references:

- Constitutional Court of Hungary, no. 22/2005 (VI.17.), 14.06.2005;
- Constitutional Council of France, no. 2008-573 DC, 08.01.2009;
- Constitutional Court of Croatia, no. U-X-6472/2010, 08.12.2010, *Bulletin* 2010/3 [CRO-2010-3-018].

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2015-3-010

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.11.2015 / **e)** KT29-N18/2015 / **f)** On a limitation on the right of servicemen of professional military service to work in another job / **g)** TAR (Register of Legal Acts), 17587, 04.11.2015, www.tar.lt / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

- 4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**
- 5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**
- 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**
- 5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**
- 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

Keywords of the alphabetical index:

Employment / Military personnel, special status / Military service, terms / National security.

Headnotes:

The legislator, while imposing a prohibition on professional military servicemen from engaging in certain types of employment, properly implemented the right to establish, at its discretion, other limitations on such activity which are implied by the constitutional mission of military service, the exceptional character of the status of servicemen, the special character of this service, as well as other important circumstances related to national defence and national security, as well as ensuring the fulfilment of the international obligations undertaken by the State.

Summary:

I. The case was initiated by a group of members of Parliament. The applicants argued that the provision of the Law on the Organisation of the National Defence System and Military Service, which consolidates the prohibition precluding professional military servicemen from working under an employment contract or from being self-employed, except in cases provided for in this Law, may be in conflict with the Constitution. The applicants argued that such a limitation may violate the human right to freely choose a job or business or the right of citizens to enter on equal terms the state service.

II. The Constitutional Court held that since, the Constitution consolidates a differentiated notion of civil state institutions and military and paramilitary state institutions, this creates legal preconditions for establishing, by legal acts, a differentiated regulation of relations connected with the activities of civil state institutions and military and paramilitary state institutions. It also enables the establishment of a legal status for persons working in civil and military and paramilitary state institutions that can be distinguished by certain special features.

The Constitutional Court held that, in implementing its discretion to regulate the organisation of the national defence system, the legislator must, by means of laws, establish such a regulation of the organisation of this system, *inter alia*, the organisation of military service, that would ensure the protection of the constitutional values of utmost importance. These include the independence of the state and its territorial integrity and constitutional order, as well as the adequate defence of the state against a foreign armed attack. The Constitution gives rise to the duty of the legislator to establish such a legal regulation under which the Republic of Lithuania would have a regular and well-organised army, capable of performing the constitutional functions of national defence. In regulating relations in connection with the national defence system, *inter alia*, military service, the legislator must take account of the geopolitical situation and other factors that have influence on national security. The legislator must also assess potential threats to national security, as well as long-term political processes, the participation of the state in the organisations of mutual assistance between states, and the international obligations of the state in ensuring security, peacekeeping missions, etc.

The constitutional mission of military service, the special features associated with the status of servicemen, the special character of this service, and other important circumstances related to ensuring

national defence and national security, as well as to the fulfilment of international obligations undertaken by the state, also imply the discretion of the legislator to establish other limitations on the activity of professional military servicemen. The legislator, in imposing this prohibition, paid regard to the limitations on the activity of professional military servicemen; in addition, the legislator properly implemented the right to establish, at its discretion, other limitations on the said activity. Thus, as assessed by the Constitutional Court, the prohibition in question is constitutionally well-founded and justifiable; it does not violate the human right, consolidated in Article 48.1 of the Constitution, to freely choose a job or business, or the right of citizens, consolidated in Article 33.1 of the Constitution, to enter on equal terms the state service of the Republic of Lithuania.

At the same time, the Constitutional Court emphasised that the legislator, in implementing its discretion to establish other limitations on the activity of professional military servicemen, including the prohibition on work under an employment contract or on self-employment, must establish such a legal regulation governing the work remuneration of professional military servicemen that would ensure the possibility for these servicemen to perform their constitutional obligation fully and with dignity.

The Constitutional Court also drew attention to the fact that work under an employment contract and self-employment constitute activity forms that are similar in terms of their continuity and the aim of persons engaged in these activities to receive income, but differ in their character: employment relations are characterised by the subordination of an employee with regard to the employer; whereas self-employment is characterised by independence. Therefore, in implementing its discretion to establish other limitations on the activity of professional military servicemen, the legislator may take into account, among other things, the peculiarities of these types of activity.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2015-3-011

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 16.12.2015 / **e)** KT33-N21/2015 / **f)** On the research and use of the subsurface by applying hydraulic fracturing / **g)** TAR (Register of Legal Acts), 19859, 16.12.2015, www.tar.lt / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Action, economic, freedom / Competition, freedom / Environment, hazard / Environment, impact, assessment / Environment, protection / Mining and metallurgy / Public health, protection / Waste.

Headnotes:

The provisions of the Subsurface Law, which provide that, while conducting subsurface research and/or using subsurface resources by means of hydraulic fracturing, the waste of the mining industry may be left in artificial subsurface cavities, are not in conflict with the Constitution. Under the Constitution, the legal regulation of economic activity permits the employment of technologies to research the subsurface and mine its resources, even where such technologies might pose a threat to the environment or people's health. However, it is also necessary to establish effective measures for proper protection of the environment or people's health.

Summary:

I. The case was initiated by a group of members of the Parliament. The applicants' doubts regarding the compliance of the impugned provisions with the Constitution were related to the application of hydraulic fracturing in the research and extraction of unconventional hydrocarbons (shale gas or shale oil). The applicant argued that such technology might pose a threat to the environment or people's health.

II. The Constitutional Court held that the subsurface is among the objects of the natural environment directly mentioned in Article 54 of the Constitution; thus, the state is under a constitutional obligation to ensure the protection and rational use of the subsurface. The fact that the subsurface was assigned to the exclusive ownership of the state is a constitutional ground for establishing a special, distinctive legal regime for its protection and use in comparison with other objects of the natural environment. Thus, the constitutional obligation of the state to ensure the proper protection and rational use of the subsurface implies a special legal regulation for its protection and use, and special conditions of, as well as limitations and prohibitions on, the economic and other activity related to the use of the subsurface.

It was noted in the ruling that the state duty to regulate economic activity so that it serves the general welfare of the nation means that the legislator must coordinate various constitutional values: the freedom of individual economic activity and economic initiative, the freedom of fair competition, the protection of consumer interests, and the protection of human health and the environment.

In regulating economic activity related to the use of the subsurface, account should be taken, *inter alia*, of the economic interests of the state, among which is the necessity to ensure the security and reliability of the energy system as a constitutionally important objective and a public interest. Under the Constitution, in an attempt to ensure, among other things, this public interest, *inter alia*, an opportunity to receive energy resources from various sources should be established whereby the conditions could be created for appropriate research of the subsurface and for rational use of the resources thereof. In addition, while regulating such activity, the state must ensure the protection of the subsurface, other objects of the natural environment (land, water, air, wildlife, and plants), and people's health against harmful effects.

The Constitutional Court held that, under the Constitution, the legislator may also establish such legal regulation of the economic activity that would permit the application of certain technologies to research and/or mine subsurface resources where such technologies might pose a threat to the environment or people's health. However, the legislator must also establish effective measures that could create preconditions for the proper protection of the environment or people's health, and which would not allow carrying out any such economic activity by which inevitable harm could be inflicted on the environment or people's health.

According to the provisions of the Subsurface Law that were challenged in this case, the application of hydraulic rock fracturing is allowed for researching and using the subsurface. A characteristic feature of hydraulic rock fracturing is that it generates a certain part of waste of the mining industry: substances used for such fracturing and certain substances formed in the subsurface as a result of such fracturing are left in artificial subsurface cavities.

The Constitutional Court held that the Subsurface Law and other laws have established measures designed for protecting people's health and the environment in conducting research into the subsurface and/or exploiting subsurface resources, including unconventional hydrocarbons, *inter alia*: research into and/or exploitation of unconventional hydrocarbons is prohibited in protected territories and in certain other territories; the Law imposes an obligation to carry out an environmental impact assessment; the Law imposes an obligation to inform the competent institutions about the substances to be used during such activity; and it must be ensured that the substances used in researching and/or exploiting unconventional hydrocarbons do not get into groundwater and/or surface water, etc.

The Constitutional Court drew the conclusion that, upon establishing in laws the measures creating the preconditions for avoiding inflicting harm on the environment and people's health in conducting research into the subsurface and/or exploiting subsurface resources by means of hydraulic fracturing, the impugned provisions of the Subsurface Law did not violate the requirements arising from Articles 53.3 and 54.2 of the Constitution.

In addition, it was noted that, if it transpired that the measures for protecting people's health and the environment as established in laws are not sufficiently effective, a duty would arise from the Constitution for the legislator to establish additional protection measures, and, should it prove impossible to do so, the legislator would have to prohibit the conduct of certain activity.

Languages:

Lithuanian, English (translation by the Court).



Moldova Constitutional Court

Statistical data

1 January 2015 – 31 December 2015

Lodged complaints in 2015: 59

By subject:

- Members of Parliament and parliamentary factions: 42
- The President of the Republic of Moldova: 1
- Supreme Court of Justice: 7
- Ombudsperson: 2
- Central Electoral Commission: 7

Pending complaints in 2015 (including those lodged in 2014 and transferred in 2015): 66

By object:

- Review of constitutionality: 33
- Interpretation of the Constitution: 18
- Exceptions of unconstitutionality: 6
- Confirmation of the results of elections and validation of MP mandates: 6
- Request of opinion on an initiative to revise the Constitution: 3

Judgments delivered in 2015: 32

By object:

- Review of constitutionality of acts: 18
- Interpretation of the Constitution: 5
- Settlement of exceptions of unconstitutionality: 2
- Confirmation of the results of elections and validation of MP mandates: 6
- Approval of the Report on Constitutional Jurisdiction in 2014: 1

Important decisions

Identification: MDA-2015-3-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 24.06.2015 / **e)** 21 / **f)** Interpretation of Articles 69.2, 70.1, 99 and 100 of the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 2015/340-346 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.5.3.4.2 Institutions – Legislative bodies – Composition – Term of office of members – **Duration.**

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

Keywords of the alphabetical index:

Electoral mandate, plurality, incompatibility / Office, concurrent holding / Mandate, termination / Office, incompatibility.

Headnotes:

The constitutional principle of separation of the powers provides for safeguards to ensure the rule of law and entails the regulation of incompatibilities and conflicts of interests.

Under Article 69.2 of the Constitution, the powers ascribed to any Member of Parliament (hereinafter, “MP”) cease in cases of incompatibility. Article 70 of the Constitution provides that the office of the MP is incompatible with the holding of any other remunerated position, except for didactic and scientific activities, other incompatibilities being established by organic law. Under Article 5.1 of the Law on MP status, the situation of incompatibility of the MP shall be removed within 30 days following the date of the validation of his or her mandate.

Summary:

I. The applicants MPs requested the Constitutional Court to interpret Articles 69.2, 70.1 and 100 of the Constitution in order to clarify the situation that constitutes incompatibility with an MP’s office (e.g., member of Government), the moment at which their capacity as MPs ceases and on the ways to eliminate the situation of incompatibility.

II. The Court noted that for the normal functioning of the whole political and legal system, the parliamentary mandate and the establishment of safeguards, such as incompatibilities and immunities, must be

effectively upheld. The Law addresses issues related to the incompatibility of holding two offices simultaneously, such as laws that ensure the independence of the person holding public office, avoid the concentration of excessive powers by one and the same person, as well as preserve professional integrity and moral development of this person.

The concept of incompatibility of an MP’s office is based on the principle of the separation of powers, as enshrined in Article 6 of the Constitution. The MP must not only be independent from any influences, but must also refrain from exercising offices or perform activities that, by their nature, would conflict with his or her representative mandate or that would impede him or her in its exercise.

The Court held that where a situation of incompatibility transpires, the mandate of the MP must cease, either *de jure* (by way of occurrence of the cause of incompatibility) or by virtue of the MP’s resignation, where he or she renounces the mandate.

The period of 30 days following the validation of mandates, set up by the legislator to eliminate the situation of incompatibility, constitutes a transitional period. During this time, the MP shall choose one of the offices that cannot be exercised simultaneously and shall act accordingly.

The Court found that the situation of incompatibility for newly-elected MPs arises upon the validation of their mandate by the Constitutional Court. For MPs in office, this occurs when taking on another remunerated office or on the occurrence of other situations of incompatibility, provided for by law.

Prior to the expiry of the legally provided period for cessation of the situation of incompatibility, the MP shall choose between the mandate of an MP and the office that creates the incompatibility (i.e., resigning from one of the positions).

If an MP resigns from office, his or her mandate ceases upon submission of the request for resignation. Where the MP does not act within the legally provided period, the mandate ceases *de jure* upon the expiry of the legal period applicable to the elimination of the situation of incompatibility. The resignation shall be acknowledged by Parliament, which declares the vacancy of the mandate.

All procedures on incompatibility of MPs shall be completed within the 30 days, as provided by law. Otherwise, upon the expiry of this period, the mandate of the MP shall cease *de jure*, without requiring any other formal conditions.

With regard to maintaining the situation of incompatibility of an MP's office with the position of member of an outgoing Government, following the expiry of 30 days, the Court held that under Article 103.1 of the Constitution, the Government may continue to exercise its mandate until the date of validation of the election of the new Parliament.

The abovementioned constitutional provision is based on the idea that each Parliament must designate its own Government, and the structure of the Government and its programme of activity shall comply with the political configuration resulting from the elections.

At the same time, under Article 103.2 of the Constitution, the outgoing Government shall only control the administration of public affairs until the new Government has been sworn in.

The Court underscored that, although a situation of incompatibility persists, the provisions and the spirit of the Constitution aim to ensure a continuous exercise of power by state institutions, set up in accordance with the Constitution.

The Court noted that the reshuffling cannot be carried out by an outgoing Government. Reshuffles may only occur in case of objective impossibility of persons to exercise their mandate (disease and death), so as to preserve the *status quo* of the state administration.

The Court noted that, upon formation of the new Parliament, in case of election to office of an MP of acting members of the outgoing Government, they may cumulate offices until the date of the taking of the oath by the members of the new Government.

Supplementary information:

Legal norms referred to:

- Articles 69, 70, 99 and 100 of the Constitution;
- Law no. 199 on the status of persons, 16.07.2010;
- Law no. 39 on the status of MP, 07.04.1994;
- Law no. 64 on the Government, 31.05.1990.

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2015-3-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 16.07.2015 / **e)** 22 / **f)** Review of the constitutionality of Parliament's Decision no. 140 of 3 July 2015 on the appointment of the Children's Rights Ombudsperson / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 2015/340-346 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.13 General Principles – **Legality.**
 4.12.1 Institutions – Ombudsman – **Appointment.**
 5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Children's Rights Ombudsperson / Well-known activity.

Headnotes:

The Constitution recognises the rule of law as having supreme value. The rule of law also includes the principle of legality. Concurrently, the Constitution imposes a positive obligation on the State to protect children, by creating the necessary institutions.

In accordance with the Constitution, the legislator has regulated the institution of the Children's Rights Ombudsperson, which aims to ensure the observation of rights and freedoms of the child by providing the necessary protection and assistance, as well as establishing eligibility conditions for the office of the Ombudsperson.

An appointed Ombudsperson for Children's Rights must meet the minimum requirement as set out by the legislator. Because the Parliament's recent appointment of the Children's Rights Ombudsperson did not meet the requirement that he or she be well-known for defending and promoting human rights, the appointment was deemed unconstitutional.

Summary:

I. On 16 July 2015, the Constitutional Court ruled on the constitutionality of Parliament's Decision no. 140 of 3 July 2015 on the appointment of the Children's Rights Ombudsperson (hereinafter, the "Decision").

The case originated in the application lodged with the Constitutional Court on 10 July 2015 by an MP. The applicant requested the Court to review the constitutionality of the Decision in relation to the rule of law, as enshrined in the Constitution. According to the applicant, the person appointed as the Children's Rights Ombudsperson did not fulfil one of the conditions required by law for holding this office, namely to be well-known for defending and promoting human rights.

II. The Court noted that the basis of the rule of law, as enshrined in Article 1.3 of the Constitution, is the principle of legality.

The Court added that the concept of the "rule of law" imposes the obligation to observe the law, especially by the enacting authority. Taking into account the constitutional principle of legality in a state governed by the rule of law, Parliament is constitutionally obliged to comply with the adopted laws.

Article 6 of Law no. 52 of 3 April 2014 on the Ombudsperson lays down the eligibility conditions for the office of the Ombudsperson and the Children's Rights Ombudsperson, one of them being "well-known for defending and promoting human rights."

The Court held that the reputation for defending and promoting human rights is a characteristic of a person who aspires to be an Ombudsperson. The necessity for being well-known stems from the fact that the institution of the Ombudsperson, including the Children's Rights Ombudsperson, is the guarantor of democratic development. It represents one of the authorities mediating between society and the State, in order to ensure dialogue and respect for universal values of human rights and freedoms.

The Court held that professionalism and reputation are two key elements for making this person heard by other authorities and institutions of the State.

In the context of the examined case, the Court noted that the reputation can be proved by: public pleas on the national and international level, on behalf of children; communicating with children/teenagers/parents; monitoring the application of legal and normative acts, on national and international level, in the field of children's rights; experience in providing services or in defending and guaranteeing children's rights and the proof of a vast experience on social inclusion of children with various social vulnerabilities, etc.

The Court explained that the concept of "well-known activity" does not fall within the scope of the duration of a person's activity, but expresses his or her professional evaluation and assessment. Accordingly, the Court noted that the appointment as the Ombudsperson of someone who does not fulfil the legal conditions, undermines the principles of democracy and the rule of law.

The principles of legality, equality, impartiality, and democracy, on which the Ombudsperson's activity is based, may be compromised by promoting, in this important position of ensuring the respect for human rights, a person who does not fulfil the necessary conditions of experience and reputation. The above-mentioned circumstances might lead to the inefficiency of the Ombudsperson's institution.

The main instrument of the Ombudsperson is his or her authority, which is imposed by force of argument and criticism, with responsiveness and support of all public authorities, as well as with the support of civil society. For this reason, the reputation of the Ombudsman should be *a fortiori* an expression of his or her authority.

The principle of legality implies the obligation to observe the law, including by the supreme legislative body of the State. The attempt to assign legitimacy to an authority that ensures the protection of human rights in ways that ignore the law, constitutes a violation of the law.

In conclusion, the Court could not ascertain the fulfilment of the condition for being well-known for defending and promoting human rights by the person appointed by the challenged decision and therefore declared it unconstitutional.

Supplementary information:

Legal norms referred to:

- Articles 1 and 49 of the Constitution;
- Article 6 of Law no. 52 on the Ombudsperson, 03.04.2014.

Languages:

Romanian, Russian (translation by the Court).



Montenegro

Constitutional Court

Important decisions

Identification: MNE-2015-3-003

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 14.10.2015 / **e)** U-I 15/15 / **f)** / **g)** *Službeni list Crne Gore* (Official Gazette), no. 76/15 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

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

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

4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing.**

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

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

Keywords of the alphabetical index:

Political parties, financing, local government, budget allocation.

Headnotes:

Provisions which impose an obligation on the Ministry of Finance to transfer funds to a political entity if a local administration body has not done so are in breach of the principles of legal certainty, the unity of the legal system and the separation of powers.

Summary:

I. Montenegro is a civil, democratic, ecological state, based on the rule of law; state power is regulated following the principle of the separation of powers into the legislative, executive and judicial. Legislative power is exercised by Parliament, executive power by the Government and judicial power by the courts. Parliament is empowered to adopt laws, the budget and the final statement of the budget, whilst the Government is empowered to enforce laws, other regulations and general acts and propose the budget and the final statement of the budget. These powers

are limited by the Constitution and the law. Constitutionality and legality are protected by the Constitutional Court; legislation must be in conformity with the Constitution and confirmed international agreements, and other regulations shall be in conformity with the Constitution and the law.

Under the Constitution, the legislator is empowered to regulate matters of national interest and therefore the matter of financing of political entities and election campaigns. Under Article 53.3 of the Constitution, the state supports political and other associations when it is in the public interest to do so. Political parties and the freedom of their establishment form part of the expression of a democratic multi-party system, as a core value of a democratic society. The financing of political parties is essential for their operation; the realisation of a democratic multi-party system depends on political parties.

Under these powers, Parliament adopted the Law on Financing of Political Entities and Election Campaigns, which regulates the manner of acquisition and provision of financial funds for the regular operation and the election campaigns of political entities, prohibitions and restrictions on disposal of state-owned property, funds from public authorities in the course of the campaign as well as the control, supervision and auditing of financing and financial operations of political entities, in order to achieve legality and transparency in their operation. Article 11 of this Law prescribes the procedure for allocation of budget funds for regular financing of political entities.

Under Article 1.2 of the Constitution, the principles of legal certainty and the rule of law require legal norms to be accessible and predictable for their addressees, so that they have a thorough knowledge of their rights and obligations and can behave accordingly.

The Government sought a review of the constitutionality of Article 11.8.9 of the Law on Financing of Political Entities and Election Campaigns, contending that it was out of line with the Constitution and published international agreements and that it contravened the provisions of Articles 116.4 and 117.1 of the Constitution, which stipulate the principles of budgetary autonomy and independence of local self-government; that autonomy of local self-government, among other things, is reflected in its financial independence, i.e. the authority of the municipal assembly to take independent decisions on the budget for the fiscal year and the obligation to settle expenditures planned by the decision. Interference by central government in this area derogates from and undermines the concept.

Parliament did not submit a response to these allegations.

II. The Constitutional Court found that the unity of the legal order entails the mutual harmonisation of all legal regulations in Montenegro. This would generally preclude a law regulating one area making amendments to legal solutions contained in the systemic law regulating this or any other area.

Under Article 11 of the Law on Financing of Political Entities and Election Campaigns (hereinafter, the "Law"), if a local administrative body does not transfer funds to a political entity by the fifth day of the month to cover the previous month, the political entity is entitled, within the additional period of fifteen days, to submit an application to the Ministry for the transfer of funds (paragraph 8). The Ministry must then transfer the funds demanded under the previous paragraph to the political entity within fifteen days of receipt of the request (Article 11.8.9 of the Law).

The Constitutional Court found that Article 11.8.9 of the Law violated the constitutional principles of the rule of law, division of powers and unity of the legal order, under the provisions of Articles 1.2, 11.2 and 145 of the Constitution.

Jurisprudence from the European Court of Human Rights shows that the law must be sufficiently clear to show the extent of the discretionary powers of the competent authorities and the manner in which these rights are exercised. The European Court of Human Rights has also expressed the view that the law must indicate the scope of discretion conferred on the competent authorities and formulate with sufficient clarity the manner of its exercise, in order to provide adequate protection against arbitrary decision-making.

Article 11.8.9 of the Law did not, in the Constitutional Court's opinion, meet the requirements of legal certainty and the rule of law in the Constitution or the legality standard, in terms of the above jurisprudence from the European Court of Human Rights. The provision implies that the funds which the local government body in charge of finance does not transfer to the political entity of local self-government from the municipal budget, the Capital City and the Royal Capital will be transferred to it by the government body responsible for finance from the state budget, within fifteen days of the receipt of the request for funds. Furthermore, the legislator did not specify the budget funds from which the Ministry would have to transfer to the political entity for its regular financing or the process for determining and planning the necessary funds for this purpose, as well as their extent. This has

placed the Ministry in a position where it cannot foresee the impact its actions could have on the state budget. The uncertainty brought about by Article 11.8.9 of the Law, in terms of the final effect means that the provision cannot be considered as one that is based on the principle of the rule of law, or one which satisfies the standards of the principle of legal certainty and predictability. The Constitutional Court accordingly found that Article 11.8.9 of the Law ran counter to the principle of the rule of law as the highest value of the constitutional order (Article 1.2 of the Constitution).

The Constitutional Court also noted that Parliament, by enacting Article 11.8.9 of the Law, had violated the constitutional principle of the separation of powers under Article 11 of the Constitution. Individual branches of government can only act within the limits of legal functions and powers entrusted to them by the Constitution. The constitutional division of responsibilities between national authorities means that the legislator cannot interfere with constitutionally established principles, which cannot be either broadened or restricted, i.e. Parliament should not undermine the principle of functional immutability. It cannot violate a functional division or domain of power established by the Constitution, by stipulating either to itself or another state body functional powers which they possess under the Constitution.

The enactment of Article 11.8.9 of the Law resulted in the legislator imposing on the Ministry in charge of finance an imperative obligation to dispose of the Budget of Montenegro in a manner contrary to the Law on Budget and Fiscal Responsibility. In this way, Parliament violated the principle of the separation of powers.

The Constitutional Court also found that Article 11.8.9 of the Law violated the principle of unity of the legal order under Article 145 of the Constitution, which covers the mutual conformity of all national legal regulations and generally excludes the possibility that a law regulating one area can make changes to certain legal solutions in the systemic law regulating this or any other area. Under Article 40 of the Law, spending units are obliged to use the resources within the limits set by the Law on State Budget (paragraph 1). It also covers any new commitments, which will extend into subsequent fiscal year, which a spending unit may undertake, provided that such expenditure is defined in the current budget as a multi-year expenditure, with the previous consent of the Ministry of Finance (paragraph 6). These provisions of the Law on Budget and Fiscal Responsibility do not allow for the possibility of executing the state budget contrary to their purpose, as determined by the Law on Budget for the year for

which the budget is passed, which means that these funds and their purpose must be established or planned by that law.

In contrast, Parliament, by bringing in Article 11.8.9 of the Law, has determined the purpose of budget funds, and schedule and method of execution of the state budget, as a multi-year expenditure related to the regular financing of political subjects within local government in a manner that is contrary to the Law on Budget and Fiscal Responsibility.

The Constitutional Court therefore identified an indirect violation of Articles 116.1,2 and 117.1 of the Constitution and Article 9.1 of the European Charter of Local Self-Government. These provisions stipulate that a municipality must be financed from its own resources and the assets of the state; it must have a budget and be autonomous in the performance of its duties; local authorities, within the framework of national economic policy, are entitled to adequate financial resources to be deployed in accordance with their powers.

The Constitutional Court held that Article 11.8.9 of the Law was not in conformity with the Constitution and published international agreements. Its legal force would cease as of the date of publication of this decision. This decision would be published in the Official Gazette.

Cross-references:

European Court of Human Rights:

- *Sunday Times* (no. 1) v. *United Kingdom*, no. 6538/74, 26.04.1979, Series A, no. 30; *Special Bulletin Leading Cases – ECHR* [ECH-1979-S-001];
- *Huvig v. France*, no. 11105/84, 24.04.1990, Series A, no. 176-B;
- *Malone v. United Kingdom*, no. 8691/79, 02.08.1984, Series A, no. 82; *Special Bulletin Leading Cases – ECHR* [ECH-1984-S-007].

Languages:

Montenegrin, English.



Netherlands Council of State

Important decisions

Identification: NED-2015-3-001

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 18.11.2015 / **e)** 201501544/1/A4 / **f)** X (a citizen) and Others v. the Minister of Economic Affairs / **g)** ECLI:NL:RVS:2015:3578, *Jurisprudentie Bestuursrecht* 2015/218 / **h)** CODICES (Dutch).

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.**

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

Keywords of the alphabetical index:

Danger to life / Danger, community / Decision making process, transparency / Decision, executive, minister / Decision, reason.

Headnotes:

Ministerial consent to gas extraction in Groningen was annulled on the basis that the minister had provided insufficient reasons for his decision, especially in light of the risk of seismic activity associated with more intense levels of gas extraction. In weighing the human rights arguments made by the applicants, the right to life and to private and family life under Articles 2 and 8 ECHR are applicable, but do not preclude gas extraction; rather, they necessitate an effective legislative and governmental framework for decisions concerning extraction.

Summary:

I. The Administrative Jurisdiction Division of the Council of State (hereinafter, the “Council”) dealt with 41 appeals against the Minister of Economic Affairs (hereinafter, the “minister”). The applicants challenged the ministerial consent of 30 January 2015, as amended on 29 June 2015, for the Groningen field gas extraction plan proposed by the

Nederlandse Aardolie Maatschappij BV (NAM). This decision allowed for the extraction of 33 billion cubic metres. Residents, municipalities, water authorities, interest groups and the province claimed the gas extraction in the province of Groningen ought to be stopped or at least further reduced, as the gas fields were said to have turned these parts of the Province of Groningen into earthquake areas.

The Council annulled the ministerial decision which consented (with restrictions) to the extraction plan for the fields. The Council held that the minister had given insufficient reasons for his decision, especially with regard to the estimation of risks in Groningen on the one hand and of the need to reserve gas for customers on the other hand. The Council held that the applicability of human rights set high standards for the arguments of the minister. As a result of the Council's decision, the minister will have to issue a new decision on the extraction plan. In the meantime, the Council imposed interim relief measures, limiting total extraction from the field to 27 billion cubic metres from 1 October 2015 to 30 September 2016 and suspending extraction in the clusters in the Loppersum-region.

II. The Council found that that there was a link between the annual gas extraction from the field and the seismic threat: a reduction in the extraction would lead to a lower seismic threat and therefore a reduction in the seismic risk. Even though the minister was entitled to place great importance on the security of supply, the Council held that the minister had allowed a higher production level than was required on average. Thus, the justification provided by the minister to base the maximum level of extraction in a relatively cold year was insufficient.

With regard to the new decision to be taken by the minister, the Council set out how the human rights which had been invoked by the applicants ought to be weighed. The Council confirmed its standing case-law that local bodies and their organs could not rely on human rights, as those rights, given their nature and historic origin, are not meant to protect public bodies. Moreover, the Council found that the right to life protected by Article 2 ECHR as interpreted by the European Court of Human Rights was applicable in the case of gas extraction, as this really was a dangerous industrial activity which might raise positive obligations. In addition, the Council held that Article 8 ECHR was applicable, as there was a sufficiently clear risk to the life and homes of the earthquake area residents. The Council held that positive obligations under Articles 2 and 8 ECHR and Article 1 Protocol 1 ECHR would not prohibit gas extraction, but merely required an effective legislative and governmental framework. The Council held that

the Mining Act in principle provided for such a framework and concluded that the minister had quite an amount of discretion with regard to the choice of measures to take in concrete circumstances. Whether the boundaries of this discretion are respected, can only be reviewed once a new decision has been taken. Referring to its standing case-law, the Council held that some social human rights, which the applicants brought forward, could not be relied on in court. Finally, the Council held that the applicants could not rely on equal treatment clauses. Since gas extraction concerned a case which only existed in the Province of Groningen and nowhere else in the Netherlands, there was no unequal treatment of equal cases.

Cross-references:

European Court of Human Rights:

- *Taşkın and Others v. Turkey*, no. 46117/99, 10.11.2004, *Reports of Judgments and Decisions* 2004-X;
- *Kolyadenko and Others v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28.02.2012;
- *Hardy and Maile v. United Kingdom*, no. 31965/07, 14.02.2012.

Languages:

Dutch.



Identification: NED-2015-3-002

a) Netherlands / **b)** Council of State / **c)** Aliens Chamber / **d)** 26.11.2015 / **e)** 201500577/1/V/1 / **f)** Secretary of State of Security and Justice v. X (a foreigner) / **g)** ECLI:NL:RVS: 2015:3415 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4.6 Sources – Categories – Written rules – International instruments – **European Social Charter of 1961**.

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.

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

Keywords of the alphabetical index:

Foreigner, residence permit / Foreigner, social assistance, entitlement, condition.

Headnotes:

The Secretary of State for Security and Justice is allowed to impose conditions on the provision of basic housing to persons without a valid residence permit. It does not follow from Article 8 ECHR, concerning the right to a private and family life, that the State is under a general obligation to provide for shelter for aliens who are of age, with or without a residence permit.

Summary:

I. The Administrative Jurisdiction Division of the Council of State (hereinafter, the “Council”) heard the Secretary of State’s appeal of a judgment by the District Court. The lower court had supported the claim of an alien in his application for basic housing or a living allowance, who had previously in vain objected against the Secretary of State’s decision refusing assistance on the basis that he lacked a valid residence permit.

II. The Council ruled *inter alia* that the Secretary of State for Security and Justice was allowed to impose conditions on persons without a valid residence permit obtaining basic housing. The District Court had earlier ruled differently, referring to the European Social Charter, the European Convention on Human Rights and a decision of the European Committee of Social Rights (ECSR). The Council found that the ruling of the ECSR is not legally binding. Such rulings may play a part in the interpretation or applicability of treaty provisions that can be relied on in court like Article 8 ECHR, but it is for the European Court of Human Rights to decide if they do and to what extent. The Council confirmed its standing case-law that it does not follow from Article 8 ECHR that the State is under a general obligation to provide for shelter for aliens who are of age, with or without a residence permit. It also recognised that respect for private life under Article 8 ECHR – which also includes a basic care for a person’s physical and mental integrity – may in certain circumstances entail positive obligations, for instance to realise some form of housing. In this case some form of shelter had been provided for, as the alien then stayed at a location restricting his liberty. The Council ruled that the Secretary of State was entitled to expect that the

alien cooperated in his own departure in exchange for ‘a bed, a bath and bread’. Setting such cooperation as a criterion for ‘a bed, a bath and bread’, was lawful.

Supplementary information:

The case was a highly sensitive one, due to the different way in which the coalition partners within government interpreted a statement made by the Committee of Ministers of the Council of Europe following the ECSR’s CEC-ruling. The Central Appeals Tribunal, highest court in *inter alia* social security cases, took the same view as the Council of State in judgments delivered on the same day.

Cross-references:

Central Appeals Tribunal:

- nos. ECLI:NL:CRVB:2015:3803 and ECLI:NL:CRVB:2015:3834, 26.11.2015.

European Committee of Social Rights:

- *CEC v. the Netherlands*, no. 90/2013, 01.07.2014.

European Court of Human Rights:

- *V.M. and others v. Belgium*, no. 60125/11, 07.07.2015;
- *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, no. 31045/10, 08.04.2014, *Reports of Judgments and Decisions* 2014.

Languages:

Dutch.



Norway

Supreme Court

Important decisions

Identification: NOR-2015-3-005

a) Norway / **b)** Supreme Court / **c)** Chamber / **d)** 20.11.2015 / **e)** HR 2015-2308-A / **f)** / **g)** / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Criminal proceedings / Journalist, source, disclosure / Terrorism, fight.

Headnotes:

The seizure of unpublished film material by police from a documentary maker, who was working on a film to depict why Norwegian citizens enlist as foreign fighters in Syria, could not be upheld. Although the police had seized the material as part of an on-going terror investigation, Norwegian criminal law and Article 10 ECHR guarantee protection from search and seizure of unpublished journalistic material that has not been edited in order to anonymise sources. On the basis of a weighing of interests and the broad protection the European Convention on Human Rights affords to unpublished material that can reveal unidentified sources, there was no basis to set aside the principle of protecting journalists' sources in this case.

Summary:

I. In April 2015, the Police Security Service (hereinafter, the "PST") initiated covert investigations to prevent several persons, including A and B, from infringing Section 147d of the General Civil Penal

Code by taking part in a terror organisation and/or recruiting members of such a group. The investigation showed that B was increasingly radicalised, and that he planned to travel to Syria.

Via the preventive investigation, the PST was also aware that a Norwegian film maker was working on a film on extreme Islamism and the recruitment of foreign fighters, and that in this regard film recordings were being made in which A and B participated. On 7 June 2015, A was arrested as he was about to travel to Syria and charged for attempting to join the ISIS terror organisation. B was also charged.

The day after the arrest, the PST searched the film maker's home and seized six to eight hours of unpublished film material. The material was sealed and handed over to the courts without being reviewed.

II. The Supreme Court revoked the seizure, assuming that the material could reveal unidentified sources. It was held that the journalists' right to refuse to disclose their sources in accordance with Section 125 of the Criminal Procedure Act and Article 10 ECHR also gives protection from search and seizure of unpublished journalistic material in the form of notes, sound recordings and film that have not been edited in order to anonymise sources.

The Court discussed whether the seizure nevertheless could be maintained according to Section 125.3 of the Criminal Procedure Act, which states:

When information should be disclosed due to important public interests and the information is of vital significance to the clarification of the case, based on an overall assessment the court may nonetheless require the witness to disclose the name (...).

It was clear that important public interests indicated that the prosecuting authority should have access to the material. On the other hand, however, it was shown how there was a particularly strong need for protection of sources. On the basis of a weighing of interests and the broad protection afforded by the European Convention on Human Rights (to unpublished material that can reveal unidentified sources, there was no basis to set aside the principle in this case.

Languages:

Norwegian, English.



Identification: NOR-2015-3-006

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 18.12.2015 / **e)** HR 2015-2524-P / **f)** / **g)** / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

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

2.1.1.4.5 Sources – Categories – Written rules – International instruments – **Geneva Convention on the Status of Refugees of 1951.**

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989.**

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

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

Keywords of the alphabetical index:

Asylum law, reasoning, adequacy / Asylum, application, rejection / Asylum, internal / Asylum, originating country, safe.

Headnotes:

The Immigration Appeals Board (UNE) had rejected an Afghan family's application for asylum, on the basis that they had the option of internal flight within Afghanistan (internal flight alternative, "IFA").

Summary:

I. In 2013, the Immigration Appeal Board (hereinafter, "UNE") turned down the asylum application of an Afghan family with two children (aged 2 and 6). UNE acknowledged that the family had a well-founded fear of being persecuted in their home region, cf. Section 28.1.b of the Immigration Act and Article 1.A of the Geneva Convention on the Status of Refugees of 1951, but found that internal flight within Afghanistan was an appropriate alternative in the particular case.

II. The Supreme Court, sitting in plenary session, upheld the decision.

The Supreme Court unanimously held that UNE had correctly applied Article 3.1 of the Convention on the Rights of the Child of 1969 (hereinafter, the "CRC"), cf. Section 28.3 of the Immigration Act, when considering the best interests of the children merely on the basis of the situation in the internal flight area, without comparing the children's living conditions in Norway to the expected conditions in Afghanistan. The Court noted that Article 22 of the CRC, which directly concerns the right to asylum, did not outline other criteria than what in this respect will normally follow from the Geneva Convention on the Status of Refugees of 1951. Neither did Article 3 ECHR require a comparison of the conditions in the two countries.

Moreover, a majority of the justices found that UNE had given sufficient grounds for the refusal and that the decision was justifiable. The Court referred, *inter alia*, to the discussion of internal flights in UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan of 6 August 2013.

A minority of six justices held the refusal invalid on the basis that the oldest child, age 6, had not been allowed to meet and give a statement under the hearing in accordance with Article 12 of the CRC. The majority, however, stressed that there was no conflict of interest between the child and the parents. Based on an overall assessment, the majority found that the child had been sufficiently heard through the family's counsel, who had attended the hearing together with the parents.

Languages:

Norwegian.



Poland

Constitutional Tribunal

Important decisions

Identification: POL-2015-3-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.10.2015 / **e)** SK 54/13 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2015, text 1632 / **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.**

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

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

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

Keywords of the alphabetical index:

Freedom of expression, exception / Blasphemy.

Headnotes:

The criminalisation of blasphemy does not impair the very substance of freedom of expression but limits this freedom in conformity with the principle of proportionality. The law punishing blasphemy with a fine is compatible with the Constitution.

Summary:

I. The case, initiated by a constitutional complaint, concerned Article 196 of the Criminal Code, which punishes by a fine, by restriction of personal liberty or by up to 2 years' imprisonment of any person who offends the religious feelings of others by publicly insulting the object of worship or a public place of worship.

Bound by the formal limits of a constitutional complaint, the Tribunal focused solely on the norm set forth in the aforesaid article of the Criminal Code, which served as the effective basis for the judicial

decision against the complainant. The punishment is a fine of blasphemy against an object of worship, defined as a material object, a person, a symbol and anything a religious community considers worthy of the utmost respect and glory.

The Tribunal explained that a complainant may challenge a law only in close connection with an individual act and its application to him or her. The complainant must also specify which of his or her constitutional rights were violated and how. In view of these restrictions, the Tribunal examined the case with reference to the *nullum crimen sine lege certa* principle (Article 42.1 together with Article 2 of the Constitution), to freedom of opinion and expression (Article 53.1 together with Article 54.1 of the Constitution) and to the rules of proportionality (Article 54.1 together with Article 31.3 of the Constitution).

II. The Tribunal began by explaining that Article 196 of the Criminal Code does not protect objects of worship but rather the religious feelings of specific individuals who have been hurt by the offensive conduct of the perpetrator. In order for such an offence to have been committed, several conditions must be met:

- some form of offensive conduct must have occurred: spoken or written word, gesture, drawing, picture, film, installation, etc. It must go beyond a mere negative opinion and express scorn, the desire to humiliate or ridicule a certain vision of the world;
- conduct must have taken place in public, or in such a way that an unlimited number of onlookers could have witnessed it;
- conduct must have triggered an emotional reaction in the people whose religious feelings were offended;
- offence must have been committed intentionally, the perpetrator either positively intending to hurt the feelings of others or realising and accepting that his or her conduct might have that effect.

The Tribunal found that the law was sufficiently clear and precise to enable the punishable conduct to be identified. Legal language accepts vague wording, which cannot be treated *a priori* as a violation of legislative technique. The standards set in the Tribunal's case-law require that:

- identification of what the vague wording refers to be possible in conformity with the rules of interpretation applied in the legal culture concerned;
- wording concerned should not be interpreted arbitrarily *ad casu* by State authorities;

- procedural guarantees exist to ensure transparency of the manner in which the wording is interpreted, such as oversight by a second instance or the jurisdiction of the High Court to interpret the laws concerned;
- derogation from such a provision by the Constitutional Tribunal be allowed only when it is impossible to eliminate doubt even with the help of accepted interpretation methods. In the present case the Tribunal found nothing to support the allegation that the law lacked the requisite precision.

The complainant also argued that Article 196 of the Criminal Code assigned greater importance to freedom of religion over freedom of conscience as it granted additional protection to the religious feelings of believers while denying such protection to people who believed in no religion. The Tribunal found that Article 196 of the Criminal Code, which protects religious feelings – something atheists do not have by definition – did not create a privilege. Freedom of conscience was protected by other norms, such as Article 194 of the Criminal Code prohibiting discrimination, Article 256 of the Criminal Code punishing hate speech or Article 257 of the Criminal Code criminalising public insult based on a person's atheism, for example. The Tribunal accordingly found that to this extent Articles 53.1 and 54.1 of the Constitution were not appropriate reference norms.

Lastly, the Tribunal found that the law at issue satisfied the rules of proportionality and did not impair the very substance of freedom of expression, which does not include conduct that is insulting or scornful towards others. The Tribunal emphasised that the law at issue did not prohibit criticism or the expression of a negative opinion of an object of worship; public criticism of a religious community, its functioning and its beliefs, and even challenging the very existence of the subject worshipped were perfectly acceptable as long as the criticism was not insulting. The Tribunal also pointed out that it was possible to portray or criticise an object of worship in the context of an artistic activity, provided that there was no insult involved. An artistic or scientific purpose did not justify insult. All criticism must be devoid of humiliating or degrading judgements.

The Tribunal pointed out that the case-law provides a relatively broad interpretation of freedom of expression. This freedom may be subject to restrictions, however, as it goes hand in hand with obligations and responsibility linked to the circumstances and nature of the statement. The protection of religious feelings, that is feelings linked to shared beliefs, is also linked to the protection of human dignity, which is a source of human rights and freedoms (Article 30 of the

Constitution). Furthermore, there is no single understanding of the social role of religion and it is for the national authorities to define the restrictions to be placed on freedom of expression while respecting conventional thinking on the subject. The Tribunal also referred to the case-law of the European Court of Human Rights, according to which insulting discourse does not enhance public debate, or develop the spirit of tolerance and respect for human dignity upon which all democratic, pluralist society is founded. The State may also consider it necessary to take steps to punish certain forms of expression, especially in the event of intentional attacks on tolerance, such as when an object of worship is presented in bad faith in a provocative manner.

Cross-references:

Constitutional Tribunal:

- Resolution W 2/91, 06.11.1991;
- K 17/93, 07.06.1994, *Bulletin* 1994/2 [POL-1994-2-009];
- SK 22/02, 26.11.2003, *Bulletin* 2004/1 [POL-2004-1-004];
- SK 13/05, 12.09.2005;
- SK 30/05, 16.01.2006, *Bulletin* 2006/1 [POL-2006-1-002];
- K 4/06, 23.03.2006, *Bulletin* 2006/1 [POL-2006-1-006];
- P 3/06, 11.10.2006;
- P 1/06, 20.02.2007;
- Kp 3/09, 28.10.2009, *Bulletin* 2010/1 [POL-2010-1-002];
- SK 52/08, 09.06.2010;
- U 10/07, 02.12.2009, *Bulletin* 2010/1 [POL-2010-1-003];
- K 3/09, 08.06.2011, *Bulletin* 2011/2 [POL-2011-2-003];
- P 12/09, 06.07.2011, *Bulletin* 2012/2 [POL-2012-2-004];
- K 11/10, 19.07.2011, *Bulletin* 2012/1 [POL-2012-1-001];
- P 20/10, 14.02.2012;
- SK 65/12, 25.02.2014;
- P 4/14, 11.03.2015, *Bulletin* 2015/2 [POL-2015-2-002].

Supreme Court:

- Decision III KRN 24/92, 17.02.1993;
- Order I KZP8/09, 29.07.2009;
- Resolution I KZP 12/12, 29.10.2012.

European Court of Human Rights:

- *Handyside v. United Kingdom*, no. 5493/72, 07.12.1976, Series A, no. 24;
- *Otto-Preminger-Institut v. Austria*, no. 13470/87, 20.09.1994, Series A, no. 295-A;
- *Dubowska and Skup v. Poland*, nos 33490/96, 34055/96, 18.04.1997, *Decisions and Reports (D.R.)*, no. 89-B, p. 156;
- *Murphy v. Ireland*, no. 44179/98, 10.07.2003, *Report of Judgments and Decisions 2003-IX* (extracts);
- *Müslüm Gündüz v. Turkey*, no. 35071/97, 04.12.2003;
- *Klein v. Slovakia*, no. 72208/01, 31.10.2006;
- *Kutlular v. Turkey*, no. 73715/01, 29.04.2008.

Languages:

Polish.



Identification: POL-2015-3-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.10.2015 / **e)** K 12/14 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2015, text 1633 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Conscience clause, health care professions.

Headnotes:

Certain restrictions on the conscience clause are contrary to the Constitution, namely the obligation to dispense urgent medical care where there is no risk of death, serious injury or a serious health problem, and the obligation to explain any real possibilities of receiving such medical care from another doctor or in another establishment. However, the obligations to

notify one's superior in writing and to record one's refusal in the medical documentation are compatible with the Constitution.

Summary:

I. As the national authority officially representing a professional organisation (Article 191.1.4 of the Constitution) in matters concerning its sphere of activity (Article 191.2 of the Constitution), the Medical Council submitted an application to the Tribunal against Section 39 together with Section 30 of the Law of 5 December 1996 on the medical and dental professions in so far as they concerned the conscience clause.

Four aspects of the aforesaid legal provisions were challenged, namely the doctor's obligations to:

- dispense urgent medical care, in spite of conscientious objection, where there was no risk of death, serious injury or a serious health problem;
- explain any real possibilities of receiving such medical care from another doctor or in another establishment;
- notify their superior in advance and in writing, of their refusal to dispense certain treatment on conscientious grounds;
- mention recourse to the conscience clause in the patient's medical documentation.

The Tribunal examined the case with reference to higher norms, namely the principles of legal certainty (Article 2 of the Constitution) and proportionality (Article 53.1 together with Article 31.3 of the Constitution).

II. The Tribunal emphasised that freedom of conscience was not limited to the right to profess a certain vision of the world but also included the right to act in conformity with one's own conscience and not to be forced to take action incompatible therewith. Being forced to take action contrary to one's conscience would violate the inalienable dignity inherent in all human beings. The Tribunal noted that the right of doctors to have recourse to the conscience clause emanated directly from constitutional provisions and international law and not from Section 39 of the aforesaid law on the medical professions. Freedom of conscience, including the conscience clause, must be respected irrespective of the existence – or otherwise – in the legal provisions confirming it. The law cannot arbitrarily introduce or do away with the conscience clause and must ensure that any restrictions to it meet constitutional standards (Article 31.3 of the Constitution). The law challenged in this case must be examined from the point of view of the proportionality of these restrictions.

For the purposes of this case, the Tribunal highlighted the distinction between medical treatment (fundamental duty of doctors) and a broader category of health care that includes acts whose purpose is not strictly therapeutic. The Tribunal found that it was impossible to clearly define those urgent cases, which justified restrictions to the conscience clause as opposed to other medical treatment of a non-therapeutic nature. Consequently, the Tribunal ruled out the possibility of recourse to the conscience clause in urgent cases justified by the patient's health, but not where the urgency was of a different nature. The Tribunal decided, in this context, that the wording "other urgent cases" was too general, which made it impossible to identify the constitutional values that might justify the restriction of freedom of conscience in conformity with Article 31.3 of the Constitution. The other rights of patients, unrelated to the protection of their life or health, could not take precedence over freedom of conscience, an essential constitutional value in a democratic state governed by the rule of law, based on human dignity.

The Tribunal noted that no one could be forced to cooperate in the pursuit of a goal unacceptable to their conscience. It also held that indicating the real possibilities of having a medical intervention performed was not the doctor's personal responsibility. Such a measure was ineffective and inappropriate and, above all, unnecessary to ensure that patients had access to the information concerned and to protect public order in a democratic state governed by the rule of law. The law should use other means to inform patients how to exercise their rights.

Regarding the written notification of the conscientious objection, the Tribunal found that the declaration should take a general form and, in principle, be submitted by the medical professional upon taking up the post. Failing that, it would be impossible for the authorities to ensure access for patients to guaranteed health care.

The obligation to notify did not impair the very substance of freedom of conscience. Nor did the obligation to record the conscientious objection in the medical documentation. In the opinion of the Tribunal, it was impossible to bring the conscience clause into play and at the same time conceal the fact. The record in the medical file was a technical measure to ensure compliance with the legal restrictions on conscientious objection. The Tribunal nevertheless emphasised that the grounds given for the refusal must focus on medical considerations and not define the moral principle behind the refusal, as the purpose of the medical file was not to explain the doctor's vision of the world but to record medical data (the results of medical analyses, for example) showing

that at the time of the refusal the patient's life or health was not at risk.

III. Four dissenting opinions were attached to the judgment.

Cross-references:

Constitutional Tribunal:

- U 8/90, 15.01.1991;
- U 1/92, 07.10.1992;
- K 11/94, 26.04.1995;
- K 26/96, 28.05.1997, *Bulletin* 1997/2 [POL-1997-2-012], [POL-1997-S-001];
- P 11/98, 12.01.2000, *Bulletin* 2000/3 [POL-2000-3-019];
- K 32/00, 19.03.2001;
- SK 10/00, 02.04.2001, *Bulletin* 2001/2 [POL-2001-2-013];
- K 7/01, 05.03.2003, *Bulletin* 2003/2 [POL-2003-2-017];
- K 17/05, 20.03.2006, *Bulletin* 2006/3 [POL-2006-3-011];
- K 6/06, 19.04.2006, *Bulletin* 2006/2 [POL-2006-2-007];
- K 30/06, 08.11.2006;
- K 4/07, 26.03.2008;
- K 54/07, 23.06.2009; *Bulletin* 2009/3 [POL-2009-3-003];
- P 56/11, 25.07.2013;
- SK 55/13, 04.11.2014;
- K 22/10, 26.11.2014;
- K 52/13, 10.12.2014.

Languages:

Polish.



Portugal

Constitutional Court

Statistical data

1 January 2015 – 31 December 2015

Total: 1 510 judgments, of which:

- Abstract reviews
 - Prior: 2
 - Ex post facto*: 12
 - Omission: -
- Referenda
 - National: -
 - Local: -
- Concrete reviews
 - Summary Decisions¹: 810
 - Appeals: 508
 - Challenges: 127
- President of the Republic²: -
- Mandates of Members of the Assembly of the Republic³: -
- Electoral Matters⁴: 22
- Political Parties⁵: 16
- Declarations of Assets and Income: 2
- Incompatibilities⁶: -
- Funding of Political Parties and Election Campaigns⁷: 11

¹ Summary decisions are those that can be issued by the rapporteur if he or she believes that the Court cannot hear the object of the appeal, or that the question which is to be decided is a simple one – particularly because it has already been the object of a decision by the Court, or it is manifestly without grounds. A summary decision can consist simply of a referral to earlier Constitutional Court jurisprudence. It can be challenged before a Conference of the Court (made up of three Justices from the same Chamber). The Conference's decision is then definitive if it is unanimous; otherwise it can itself be challenged before the Chamber's Plenary.

² Questions regarding the President's mandate, not his or her election.

³ Questions involving disputes over the loss of a seat.

⁴ Cases involving electoral coalitions, electoral disputes and disputes about electoral administrative matters.

⁵ Includes records of the abolition or disbanding of political parties, and challenges against decisions taken by party organs.

⁶ Only with regard to declarations of incompatibility and disqualifications of political officeholders.

⁷ Annual accounts of political parties, election campaign accounts, and appeals against decisions by the Political Accounts and Funding Entity (ECFP). The ECFP is an

Important decisions

Identification: POR-2015-3-015

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 29.09.2015 / **e)** 412/15 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

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 proceedings, right of appeal / Accused, procedural rights.

Headnotes:

The essential core of the right of appeal is the right to appeal against convictions and other judicial acts during the proceedings whose effect is to deprive or restrict the accused's freedom or other fundamental rights.

The legislator's freedom to shape the definition of the criminal appeal regime is limited by the fact that the right of appeal forms part of the essential core of the guarantees applicable to the accused person's defence. The right of appeal is the effective power to initiate a review of the jurisdictional decision to convict. It is only once that decision has been issued that the right to appeal against it can really be exercised; the accused must be able to know the grounds for the decision, and this only becomes possible once it has been handed down.

independent organ that operates under the aegis of the Constitutional Court and whose mission is to provide the latter with technical support when it considers and scrutinises political parties' annual accounts and the accounts of campaigns for elections to all the elected entities with political power (President of the Republic; Assembly of the Republic; European Parliament – Portuguese Members; Legislative Assemblies of the autonomous regions; elected local authority organs).

Summary:

I. In 2013, a Code of Criminal Procedure (hereinafter, "CPP") norm was amended in such a way that Appeal Court decisions imposing prison terms of not more than five years could not themselves be the object of appeal, even if the Court of Appeal overturned a verdict of acquittal at first instance. The question in the present case was whether, in the light of the current regime governing appeals in criminal proceedings, it was still possible to consider that the mere fact that two courts at different hierarchical levels hear the case is enough to ensure the guarantees of the defence of an accused person who, having been found not guilty at first instance, is convicted on appeal.

II. The Constitutional Court found that inasmuch as the amended norm did not make an exception of situations in which a decision to acquit at first instance was reversed by the second instance, it was unconstitutional.

The question of constitutionality in this concrete review case was whether it should be possible to appeal against an Appeal Court decision to overturn an acquittal verdict handed down by the court of first instance and to sentence the accused to a term of imprisonment of not more than five years (longer prison terms are subject to different rules). The appellants argued that the criminal procedural norm under which Appeal Court decisions imposing prison terms of up to five years in appeal cases could not themselves be the object of appeal, could only constitutionally be applied in cases of so-called 'dual conformity' (i.e. where the decisions at first and second instance are both to acquit, or both to convict, possibly with other procedural requisites as well), and not in those in which the two courts decided in opposite directions.

The Court said that this matter was already the object of substantial constitutional jurisprudence, in which a similar normative solution was not found unconstitutional. However, the norm before it in the present case further developed the legislator's intention to restrict access to the Supreme Court of Justice (hereinafter, "STJ", the jurisdictional body with the competence to hear appeals against decisions of Courts of Appeal) to cases of "greater penal import". The question now facing the Court was whether its previous case law should be maintained in the new legislative context. This issue was especially problematical, because the new norm made it impossible to appeal against a "surprise conviction" by a Court of Appeal that resulted in a sentence of not more than five years in prison (or another, lesser penalty).

In the first Ruling in which it found that it was not unconstitutional not to be able to appeal against Appeal Court decisions, the Constitutional Court said that such decisions represent the implementation of the guarantee of a double degree of jurisdiction, inasmuch as the appeal hearing gives the accused the opportunity to set out his or her defence for a second time, thereby fulfilling the grounds for the existence of the right of appeal in the first place. At that time, the Court considered that as long as this double degree of jurisdiction existed, there were grounds (the intention to reasonably restrict access to the STJ, thereby avoiding the paralysis that might result from it having to hear large numbers of cases involving minor crimes) for limiting the possibility of a third level of jurisdiction.

The 2007 revision of the CPP reduced the collegiality of the decisions of the senior courts, which are now taken solely by the president of the applicable chamber (previously, appeal hearings had involved two assistant judges in cases before Courts of Appeal and three assistant judges in cases before the STJ). The revision also made it harder for there to be an appeal hearing, with any form of oral intervention becoming the exception rather than the rule, and the submission of new evidence before Courts of Appeal becoming an exception for the first time.

In such a context, acquittal by a collective (three judges) court of first instance, following a hearing at which the accused was present and evidence was presented, can be overturned at appeal with a conviction and effective prison term decided in conference (by two judges – the rapporteur and an assistant judge, inasmuch as the chamber's president only votes in the case of a tie), without a hearing or any new submission of evidence and with no possibility of further appeal. Although cases in which Courts of Appeal reconsider evidence are exceptional, that possibility does exist and can mean that acquittals are replaced by conviction on appeal.

In these circumstances the Court took the view that it was not possible to conclude that the new judgement by the appeal instance provided sufficient opportunity for the accused to defend him or herself. When the accused submits his or her counterarguments ("counter", because he or she is not the appellant, inasmuch as he or she would not appeal against an acquittal), he or she is unaware of both the grounds (and particularly any factual elements) for his or her conviction, if that is what the Court of Appeal is about to decide, and the reasons why in that event the Court of Appeal's decision is going to differ from that of the trial court – i.e. at this point he or she still does not know what view the appeal instance is going to take of the evidence before it.

The accused finds him or herself in a situation in which acquittal at first instance is followed by conviction and the imposition of a prison term by the Court of Appeal – i.e. he or she is deprived of his or her freedom, and to an extent that he or she does not have the opportunity to question. The Constitutional Court accepted that the possibility of appeal in such cases could make the regime asymmetrically favour the defence, but said that the fact that the accused cannot have less rights than the prosecution in the way in which the degrees of appeal in criminal proceedings are configured does not mean that he or she cannot have more.

The Court also considered that this conclusion is in line with the right to a review of criminal convictions and sentences set out in Article 14.5 of the International Covenant on Civil and Political Rights with regard to cases in which the conviction is imposed by an appeal court and the verdict at first instance was acquittal.

III. The Vice-President of the Court dissented from the Ruling. She recalled that in past cases the Court had always sought to achieve a balance between an effective protection of all the fundamental rights involved – namely by issuing rulings in which an efficient protection of the rights of the defence of accused persons in criminal proceedings coexisted with safeguarding the rationality of the judicial system – and that part of this balance involved ensuring a double degree of jurisdiction, while simultaneously considering it reasonable to limit the possibility of a triple degree. She opined that the majority decision upset the balance between the defence of people's rights and the efficiency of the justice system. In her opinion the content of the right to appeal in criminal proceedings cannot be determined without taking account of the idea of a double degree of jurisdiction, but that one must also consider other constitutional values and interests, such as legal certainty, the speedy administration of justice, and the need to guarantee the quality of the protection provided by the justice system, and thus that one cannot allow too much time to pass between the occurrence of the fact which is submitted to judgement and the judgement itself.

The dissenting Justice said that the present Ruling implied that the Portuguese Constitution attaches so much weight to the value 'freedom' that that value would always occupy a preponderant place in relation to any other constitutionally recognised assets or interests, whatever the circumstances. She recalled that the Convention for the Protection of Human Rights and Fundamental Freedoms does not require the signatory states' legal systems to provide for a triple degree of jurisdiction. She acknowledged that in General Comment no. 32, the United Nations

Human Rights Committee interprets the provisions of Article 14.5 of the International Covenant on Civil and Political Rights (ICCPR) otherwise, but said that that view is not binding and cannot be considered an 'authentic interpretation' of the Covenant.

She went on to say that if the current state of Portuguese infra-constitutional law is not allowing the double degree of jurisdiction to effectively guarantee all the fundamental rights enshrined in the Constitution, the problem does not lie in the norm before the Court, but rather in the way in which the ordinary legislator has modelled the way in which the double degree is procedurally implemented.

Supplementary information:

It should be noted that at the time of writing, an appeal to the Plenary is pending against this Chamber decision.

Cross-references:

Constitutional Court:

- nos. 322/93, 14.01.1993; 265/94, 23.03.1994; 610/96, 17.04.1996; 183/98, 11.02.1998; 384/98, 19.05.1998; 30/01, 30.01.2001; 148/01, 28.03.2001; 189/01, 03.05.2001; 49/03, 29.01.2003; 255/05, 24.05.2005; 487/06, 20.09.2006; 682/06, 13.12.2006; 424/09, 14.08.2009 and 324/13, 04.06.2013.

European Court of Human Rights:

- *Krombach v. France*, no. 29731/96, 13.02.2001, para. 96, *Reports of Judgments and Decisions* 2001-II;
- *Shvydka v. Ukraine*, no. 17888/12, 30.10.2014, para. 49;
- *Dorado Baúlde v. Spain*, no. 23486/12, 01.09.2015, para. 15;
- *Ekbatani v. Sweden*, no. 10563/83, 26.05.1988, Series A, no. 134;
- *Fejde v. Sweden*, no. 12631/87, 29.10.1991, Series A, no. 212-C;
- *Botten v. Norway*, no. 16206/90, 19.02.1996, *Reports* 1996-I;
- *Constantinescu v. Romania*, no. 28871/95, 27.06.2000, *Reports of Judgments and Decisions* 2000-VIII;
- *Tierce and others v. San Marino*, nos. 24954/94, 24971/94 and 24972/94, 25.07.2000, *Reports of Judgments and Decisions* 2000-IX;
- *Bazo González v. Spain*, no. 30643/04, 16.12.2008.

Human Rights Committee, General Comment no. 32, para. 47.

Constitutional Court of Spain:

- no. 120/1999, 28.06.1999, para. 4, *Boletín Oficial del Estado* no. 181, 30.07.1999, pp. 19-24;
- no. 296/2005, 21.11.2005, para. 3, *Boletín Oficial del Estado* no. 304, 21.12.2005, pp. 18-23;
- no. 60/2008, 26.05.2008, para. 4, *Boletín Oficial del Estado* no. 154, 26.06.2008, pp. 3-15;
- no. 16/2011, 28.02.2011, para. 3, *Boletín Oficial del Estado* no. 75, 29.03.2011, pp. 80-86.

Languages:

Portuguese.



Identification: POR-2015-3-016

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 07.10.2015 / **e)** 494/15 / **f)** / **g)** *Diário da República* (Official Gazette), 207 (Series I), 22.10.2015, 9185 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 4.6.1 Institutions – Executive bodies – **Hierarchy**.
- 4.6.2 Institutions – Executive bodies – **Powers**.
- 4.6.3 Institutions – Executive bodies – **Application of laws**.
- 4.6.9.5 Institutions – Executive bodies – The civil service – **Trade union status**.
- 4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.
- 4.8.6.2 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Executive**.
- 4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae***.

Keywords of the alphabetical index:

Local autonomy, constitutional principle / Collective bargaining, right / Collective labour agreements / Local government, act, control.

Headnotes:

Local authorities are territorial legal persons whose purpose is to pursue the interests of their local populations, and the constitutional norm requires and guarantees that they exist throughout the country. They are more than a mere autonomous state administration, inasmuch as they contribute to and form part of the democratic organisation of the state. Their existence is justified by the values 'freedom' and 'participation', in a system in which one of the basic principles is that everyone is entitled to participate in the process of taking the collective decisions which affect them. Local authorities enjoy a degree of independence from external guidelines or powers that condition them, namely those issued or exercised by the state.

Local autonomy is one of the fundamental pillars underpinning the territorial organisation of the Portuguese Republic, and the way in which the Constitution designs that organisation presupposes a set of local authority powers which ensures that in the fulfilment of its responsibilities, local government is relatively free from direction by the central administration. As such, the ordinary law can only condition or compress local autonomy when a national or supra-local public interest justifies it, and even then only when the uncompressible core of that autonomy is safeguarded. The Constitution makes local authorities autonomous public-sector employers, which means they must (subject, naturally, to the general terms of the law) have the power to enter into collective agreements – a power that is derived from the principle of local autonomy.

Local government autonomy particularly includes organisational, budgetary, asset-related, financial, fiscal, staff-related and regulatory autonomy, as well as the autonomy to consult constituents.

To oblige local authorities to co-manage constitutionally enshrined dimensions of their autonomy jointly with the state administration would in fact mean emptying that autonomy of its content. The law can limit local authorities' power to collectively contract staff, but it cannot provide for case-by-case interventions by the state in the exercise of their local autonomy.

Summary:

I. The Ombudsman brought this abstract *ex post facto* review case before the Constitutional Court, challenging LTFP norms that subjected collective public-sector labour agreements entered into by local authorities to approval by the members of the

government with responsibility for Finance and the Public Administration. This created a plural legitimacy to negotiate such agreements on the public-sector employer's side, in that it required simultaneous intervention by members of the central government and the local-government employer. The Ombudsman argued that these norms contradicted the constitutional status of local authorities, namely in terms of the principle of local autonomy.

The General Law governing Labour in the Public Service (hereinafter, "LTFP") says that collective labour agreements involving public-sector employers (hereinafter, "ACEPs"), which are a form of collective labour regulation instrument (hereinafter, "IRCT"), must be signed by representatives of the applicable trade unions, the applicable members of the government, and the representatives of the public employer in question. In municipal authorities, the competences inherent in the status of public local-government employer are exercised by the mayor. The members of the national government with the legitimacy and representative status needed to enter into collective labour agreements on behalf of public-sector employers are the Minister of Finance and the Secretary of State for the Public Administration. Giving the legitimacy to enter into collective agreements on the public side to multiple entities – i.e. not just the employer, but members of the government as well – meant that an agreement could only enter into effect if the government agreed with it.

II. Pursuant to the Constitution, within the regime governing public-sector staff the ordinary legislator created an opportunity for collective bargaining between workers' representatives and employers (in this case, local authorities). To the extent that the norms in question limited the power of local authorities, acting in their role as employers, to enter into collective agreements with their staff, within the general limits imposed by law on the one hand but without interference from the government in the bargaining process on the other, the Court found that they entailed an unconstitutional compression of the principle of local autonomy.

The European Charter of Local Self-Government says that the principle of local autonomy requires: "the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs".

The "uncompressible space" within which there must be autonomy is the local area's own affairs. However, this does not imply that local authorities cannot or should not be called on to fulfil their tasks in ways that do not conflict with state policies, because the manner in which such authorities pursue their

populations' specific interests must be conjugated with the state's pursuit of the overall national interest. In the past the Constitutional Court had already noted that the relationship between the local authorities that belong to the autonomous administration on the one hand and the state on the other is purely one of different positions (higher and lower) in a hierarchical structure designed to coordinate different (national and local) interests, and not one of supremacy and subordination targeted at achieving a single interest – i.e. the national interest, which would thus supersede local interests.

While it is true that the Constitution requires that the attributes, responsibilities and organisation of local authorities and the competence of their organs be regulated by law, it is within the above context that the ordinary legislator must balance the pursuit of local versus national or supra-local interests, albeit its margin for doing so is very broad. In performing this task it must be guided by the principle of administrative decentralisation and recognise that local authorities possess a range of attributes and responsibilities of their own (and that their organs have competences of their own), which are designed to enable them to satisfy the specific interests of their local communities.

The form of local autonomy expressed in the existence of specific staff rosters, albeit established in accordance with the law and containing local public servants who are subject to the applicable state regime is an element of local government autonomy that is protected by the Constitution and linked to the ability of local authorities to organise their own departments and services. The guarantee that they will have their own body of staff who are not dependent on the state administration is instrumental to the ability of local authorities to fulfil their responsibilities and pursue the specific interests of their populations.

The question of constitutionality in the present case was posed by the fact that the norms made it impossible for local authorities and their staff (represented here by trade unions) to autonomously shape the respective labour regime, within the margin which the law grants to everyone who regulates collective labour agreements in the public sector. Under the LTFP, collective public-sector labour agreements entered into by local authorities govern the labour regime applicable to public servants on local government rosters. The competence to enter into and sign them pertains to local authorities, acting in their role as public-sector employers. The state is not these workers' public-sector employer. Under the norms, if the members of the government with responsibility for Finance and

the Public Administration disagreed with the terms or even the very existence of a collective labour agreement, they could block the ability and freedom to enter into it in a way which the Court considered to be in breach of the principle of local autonomy. The Court therefore declared the norms unconstitutional.

III. One Justice concurred with the Ruling, but said that the principle of the unity of the public service regime means that the definition of the rules applicable to local government staff and agents does not fall within the body of matters that are the object of local autonomy. He said that under the Constitution this is an area of action that pertains to the national community. However, he concurred with the majority decision because the law allows local authorities to intervene in this domain in such a way as to generate new arrangements (indeed, it now gives them a new power to negotiate and enter into collective public-sector labour agreements), and the same law cannot thus condition that intervention by subjecting it to a co-decision, veto or any control of its merit by the government, failing which it would contradict the responsibilities inherent in the power of local authorities to administer their own staff.

Cross-references:

Portuguese Constitutional Commission:

- Opinion no. 3/82, *Pareceres da Comissão Constitucional*, Volume 18.

Constitutional Court:

- nos. 432/93, 13.07.1993; 379/96, 06.03.1996; 329/99, 02.06.1999; 631/99, 17.11.1999; 296/13, 28.05.2013; 398/13, 15.07.2013 and 109/15, 11.02.2015.

Federal Constitutional Court of Germany:

- no. 15, 30.07.1958, *Entscheidungen des Bundesverfassungsgerichts*, Volume 8, p. 134.

Languages:

Portuguese.



Identification: POR-2015-3-017

a) Portugal / b) Constitutional Court / c) Plenary / d) 20.10.2015 / e) 538/15 / f) / g) *Diário da República* (Official Gazette), 224 (Series II), 16.11.2015, 33054 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.13 General Principles – **Legality**.
 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Health service, national, right / Health facility, access / Executive law, developing general bases / Healthcare / Medical information, right / Medicine, marketing and promoting / Professional ban.

Headnotes:

The Administration's normative activities are limited to secondary aspects, and must take the form of executive regulations. Where constitutional rights, freedoms and guarantees are concerned, this exclusion of any regulatory intervention by the Administration does not only refer to restrictions on rights, freedoms and guarantees themselves, but also covers their regulation in its entirety, regardless of whether the Administration is seeking to create a regime that is more restrictive, or on the contrary more permissive, than the one that already exists.

Summary:

I. This abstract *ex post facto* review was requested by the Attorney-General. A norm in the 2006 Executive Law that established the legal regime governing medicines for human use, under which the regime governing access by medical sales representatives (hereinafter, "DIMs") to establishments, departments and services that form part of the National Health Service (hereinafter, "SNS") is defined by Order of the Minister of Health. The petitioner challenged a number of norms concerning access by medical sales representatives to establishments belonging to the National Health Service, the issue of their credentials by the National Authority of Medicines and Health Products (INFARMED), and the regime governing their visits to SNS facilities, all of which are included in an Executive Law that established the legal regime governing medicines for human use, or in a Ministerial Order issued under the terms of the Executive Law.

The Attorney-General argued that the matter of access by DIMs to the SNS formed part of the “Bases of the National Health Service” – an area in which the Constitution reserves legislative competence to the Assembly of the Republic.

The petitioner’s view was that the terms of the Health Minister’s Order entailed imposing a sanction in the form of the revocation of an earlier administrative act issuing credentials and regulating a DIM’s access to SNS facilities – a sanction designed to respond to a failure by the DIM to fulfil certain behavioural duties provided for by law. The Attorney-General’s position was that under the norms, the act of issuing the credentials that allow DIMs to gain access to SNS facilities could be revoked as a penalty for committing an administrative offence, the normative framework for which was vague.

II. The Court recalled that the Constitution does not define what Basic Laws are, so such a Law is not just one that calls itself by that name, but any Law in which the legislator limits itself to setting out the key outlines of a given legal regime. It questioned whether the matter of marketing and selling medicines, which is directly linked to the work of DIMs (in that, for public health reasons, the promotion and advertising of medicinal products is dependent on actions designed to inform health professionals about them), falls within the scope of the General Bases governing the Pharmaceutical Business, as delimited in the Law governing the Bases of the Health System.

The Court said that acts which create rights enjoy (some) protection against the Administration’s power to revoke them. However, inasmuch as the act that permits access to SNS establishments does not create rights, it can be the object of valid administrative suspension. Such suspensions are subject to a duty to hear the interested parties before taking a decision to suspend, and to provide the grounds for that decision afterwards, and it must be possible to challenge them jurisdictionally. However, they cannot be opposed on the grounds of the existence of interests that would warrant a more intense protection than that. DIMs do not possess a subjective public right to gain access to and circulate within SNS spaces, and the administrative act by which that access is temporarily denied must be qualified as a suspensive act. It is legitimate to say that the suspension of access is underlain by the impossibility of reconciling continued access with the proper operation of the SNS department or service.

The degree of protection afforded to access by DIMs to SNS establishments is linked to the risk which that access poses to the values and assets – *maxime* patients’ right to life and to healthcare – whose

safeguarding is a primary responsibility of SNS establishments. These values and assets are more important than a DIM’s access, so that access must be subject to conditions which render it precarious and which are determined in the light of the superior values and assets. The Court said that regardless of whether one sees the act imposing the prohibition as a revocation or as a sanction, there is no doubt as to the validity of the empowering norm or the legality of the regulatory Order.

Even if one were to argue that the nature of the norm is essentially that of one which imposes a sanction and the norm is therefore subject to the principles governing the whole of the law on public sanctions, it fulfils the applicable requirements in terms of typification (whose intensity varies across the different aspects of the law on sanctions). While there can be no doubt that whenever a sanction exists, there must always be a minimum degree of determinability as to both the content of the illicit fact and the type of sanction that can be imposed, that degree is indeed respected in the Order before the Court.

The challenged norms enable the parties that are the object of administration (DIMs and the pharmaceutical companies they represent) to know both exactly what duties they must fulfil if they are not to risk seeing their access to SNS facilities suspended, and what the maximum duration of such a suspension can be. The norms present a content that is operable and precise enough not to conflict with the dimension of the principle that the Administration can only act in accordance with the law under which certain normative provisions can only be determined by certain entities using certain formats.

In the present case, the Court considered that the legal norms contained in the Order neither restrict, nor even seek to shape, the fundamental right to exercise an occupation or the freedom to exercise economic initiative. As such, it found no violation of the Parliament’s exclusive power to issue legislation regarding constitutional rights, freedoms and guarantees.

As such, the Court declined the Attorney-General’s request to declare the norms unconstitutional.

III. Two Justices concurred with the Ruling, and three partially dissented from it. The dissenting opinions primarily took issue with specific aspects of the majority finding that the norms were not organically unconstitutional.

Cross-references:

Directive no. 2001/83/EC of the European Parliament and of the Council, 06.11.2001.

Constitutional Court:

- nos. 326/86, 25.11.1986; 307/88, 21.12.1988; 329/99; 517/99, 22.09.1999; 602/99, 09.11.1999; 128/00, 23.02.2000; 255/02, 12.06.2002; 368/03, 14.07.2003; 41/04, 14.01.2004; 289/04, 27.04.2004; 666/06, 05.12.2006; 620/07, 20.12.2007 and 398/08, 29.07.2008.

Languages:

Portuguese.



Identification: POR-2015-3-018

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 03.11.2015 / **e)** 576/15 / **f)** / **g)** *Diário da República* (Official Gazette), 236 (Series II), 02.12.2015, 35135 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.10 General Principles – **Certainty of the law.**
- 3.11 General Principles – **Vested and/or acquired rights.**
- 3.13 General Principles – **Legality.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 3.19 General Principles – **Margin of appreciation.**
- 3.20 General Principles – **Reasonableness.**
- 3.21 General Principles – **Equality.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**
- 5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration.**

Keywords of the alphabetical index:

Public sector, salary, reduction / Company, state-owned, wholly or partially / Budgetary balance, principle / Burden of public costs, shared equally, principle / Appropriateness, principle.

Headnotes:

The general criterion under which the members of the executive governing bodies and the staff of companies that belong to the universe of business activities engaged in by public-sector entities and the majority of whose capital is state-owned are deemed equivalent to the rest of the country's public servants for the purposes of determining the regimes applicable to their pay and pay supplements and the award of other monetary benefits, is justified by the constitutionally legitimate idea that because both groups are paid out of public funds (entirely, in the case of public servants; at least partly, in the case of the directors and staff addressed in the Ruling), the former should also be subject to the remuneratory contingencies to which the latter have been successively subjected in recent years.

Summary:

I. This abstract *ex post facto* review case was brought before the Constitutional Court by the Ombudsman, who challenged part of a norm in a 2014 Law establishing the mechanisms for temporary pay cuts and the conditions for their reversal. The segment in question concerns the directors and staff of entities in the universe of business activities engaged in by public sector entities and in which the majority (but not all) of the capital is state-owned. The petitioner argued that the definition of the subjective scope of application of the mechanisms and conditions that is set out in this part of the norm violated the principle of proportionality.

The entities that process the pay of actual public servants (as opposed to the staff and directors of the companies addressed in the present Ruling) encompassed by the cuts are required to transfer these sums to the state purse, except in cases in which the entities' budgets were already calculated taking the reductions into account.

The Ombudsman argued that the segment of the norm under which the benefit of the cuts in basic monthly pay in the universe of public entities in which the state holds the majority but not all of the capital conflicts with the constitutional principle of proportionality included in the principle of a state based on the rule of law, because it does not require

the entities that process the salaries to transfer the resulting savings to the state purse. As such, the mechanism instituted by the norm is not entirely suited to the pursuit of the public interest that would serve to legitimate the norm. The partial suppression of the workers' pay without an obligation to hand the resulting funds over to the state would not *in totum* serve the 'reduce public spending' aspect of the overall budgetary consolidation goal, but would instead make it possible to generate additional dividends or other material advantages for the minority private shareholders.

II. The Court had already conducted a prior review of some of the segments of norms in the Assembly of the Republic Decree that gave rise to the Law which includes the norm before the Court in the present case, and had not found any unconstitutionality in them. An earlier norm had determined both a cut in 2014 in the salaries of staff paid out of public funds equal to that which had already been applied in 2013, and a cut to be applied in 2015, but this time with a reduction equal to 80% of the cut in the two preceding years. At the time, the Court concluded that that measure was an on-going part of the budgetary consolidation effort begun with the Economic Adjustment Programme agreed by the Portuguese government and the IMF, the European Commission and the ECB. It considered that, with that specific configuration, it continued to be possible to link the measure to the pursuit of the same public interest as that which had led to the adoption of similar measures in the State Budget Laws (LOEs) for 2010, 2011, 2012, and 2013 – i.e. the interest in cutting public spending and correcting an excessive budget imbalance under a multiyear plan with a defined time limit.

The Court recalled that in that past case it had not found the fact that the measure had affected the monthly pay of public sector workers in 2014 to be unconstitutional, because the measure was still a transitional one designed to achieve budgetary objectives that were essential to a rebalancing of the country's public finances.

It also considered that in the context of a financial emergency, it is justifiable to differentiate between the position of staff who are paid out of public funds and that of other persons. Under the Law, the staff and the members of the governing bodies of entities in the national, regional and local Public Business Sectors and of companies in which the state holds either a simple majority or a 100% stake are included in the overall universe of public sector workers.

The Court recalled that, as a general principle that public authority should be limited, the principle of

proportionality or that excess is prohibited requires the state/legislator to suit its actions to the goals it is seeking to achieve, and not to configure measures in such a way that they are inappropriate, unnecessary or excessively restrictive in relation to those goals.

The Court said that in the present case, the legislator based itself on the principle that there are mechanisms other than a direct transfer to the state purse that are also capable of allocating the benefit of the pay cuts to the budgetary consolidation effort. The issue directly raised by the review request was whether the measure in question is functionally suited to and capable of helping balance the public finances, or is instead clearly not effective enough to justify the coercive burden it places on the staff it affects.

The State Budget Laws for 2011 and the subsequent years classified the Public Administration pay cuts (in the broad sense of the term) and the steps taken to rationalise the Public Business Sector (SEE) under various different budgetary headings, but all as measures designed to reduce public spending. While the progressive cut in Public Administration pay was seen as a direct component of the drive to reduce the state's operating expenses, the SEE rationalisation measures were also recorded among the various "other spending-reduction measures", indirectly helping to reduce public expenditure by cutting the amount of compensatory payments and subsidies transferred to SEE companies by the State Treasury.

The cut in the basic monthly pay of the staff and members of the governing bodies of companies in which the state holds a majority or 100% stake was attributed an ambivalent budgetary status. On the one hand, the measure would directly affect the state's operational expenditure, which it was expected to help reduce; on the other, by cutting the companies' operating costs, it would also reduce the need to transfer funds to them from the state (in the form of compensatory payments and subsidies). This dual budgetary effect associated with the cut in the pay of the companies' agents was then maintained in subsequent Budget Laws.

The budgetary legislator has been making an assumption – that there is a clear link between the financial balance of the Public Business Sector and the effort to consolidate the public finances. This is based on the idea that the greater the economic and financial self-sustainability of the companies in the sector, the smaller the amount of the transfers they will need from the State Budget (not only in the form of operating subsidies and compensatory payments, but also when the state takes responsibility for their liabilities).

In past cases the Court had already recognised a nexus or co-respective relationship between the financial self-sustainability of state-owned companies and the interest in balancing the state's finances; it had already emphasised that the objective of the reform of the legal regime governing the Public Business Sector was to help control public sector debt, and to subject the core matters regarding all the business organisations directly or indirectly held by public sector entities to a single regime; and it had already found that it was constitutionally permissible to transpose the regimes applicable to public sector staff with regard to the award of expense and travel allowances for trips in Portugal and abroad and the rates of additional pay for night-time and overtime working, to entities in the national, regional and local Public Business Sectors and companies in which the state holds either a simple majority or a 100% stake. The Court noted that although the business entities addressed in the present Ruling are as a rule subject to the private law, they constitute instruments for the pursuit of the public interest and contribute to the indices that measure the state's financial sustainability. The Court thus considered that this transposition of regimes was justified by the goal of helping to safeguard the state's financial integrity by reducing the business entities' operating expenses.

III. Six Justices dissented from the Ruling, one of them partially. In essence, two main objections were raised in the dissenting opinions. Some disagreed with the position the Court has taken in a number of recent Rulings: that the current need to reduce the budget deficit constitutes a general national interest capable of justifying measures which cut the pay of only those workers who are paid out of public funds (and not of private sector staff, for example), without respecting the principle that the burden of paying for public costs must be shared out fairly among all taxpayers, and without considering each worker's capacity to contribute to that burden. These Justices took the view that this interpretation conflicts with the applicable dimension of the principle of equality. Others emphasised that the norm which imposes a transitional pay cut on the staff of companies in which the public sector holds a majority does not require the resulting value to be paid into the state purse. In their opinion, this solution does not exclude the possibility that such a company could allocate a proportion of this benefit to its private shareholders in the shape of dividends or other material advantages, thereby, and to that partial extent, failing to achieve the aim of cutting public spending.

Cross-references:

Constitutional Court:

- nos. 634/93, 04.11.1993; 1182/96, 20.11.1996; 187/01, 02.05.2001; 396/11, 21.09.2011; 353/12, 05.07.2012; 187/13, 05.04.2013; 413/14, 30.05.2014; 574/14, 14.08.2014; 260/15, 05.05.2015 and 509/15, 13.10.2015.

Languages:

Portuguese.



Identification: POR-2015-3-019

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 17.11.2015 / **e)** 595/15 / **f)** / **g)** *Diário da República* (Official Gazette), 252 (Series II), 28.12.2015, 35135 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.
- 4.8.4 Institutions – Federalism, regionalism and local self-government – **Basic principles**.
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Local community, common land / Community means of production / Common land, economic use, assignment / Commoner / Land, customary rules.

Headnotes:

The Constitution guarantees the coexistence of three sectors of ownership of the means of production – the public sector, the private sector, and the cooperative and social sector. The latter is made up of four subsectors, one of which is the community subsector. It is doctrinally consensual that the Constitution does not allow the ordinary legislator to do away with any of these sectors and subsectors or reduce them to marginal realities.

The ordinary legislator's power to shape the legislation in this field is subject to the limits derived from the constitutional guarantee that dominion over this type of community asset must possess a collective or civic nature: inasmuch as the Constitution attributes the ownership and useful possession of common land to the local community, defined as a community of inhabitants, when the legislator defines the universe of members of such communities it cannot do so in such broad and all-encompassing terms that the collectivity of reference is turned into a mere simulacrum of the concept of community because its material reality has been taken away or its operability has been diminished.

Summary:

I. This abstract *ex post facto* review was requested by two groups of Members of the Assembly of the Republic, who both sought a declaration of the unconstitutionality of norms amending certain provisions of the Law governing Common Land. The President of the Constitutional Court ordered that the two requests be combined under the terms of a norm contained in the Organic Law governing the Constitutional Court whereby subsequent petitions with the same object as one that has already been admitted are incorporated into the first case file.

The challenged norms concern: the concept of 'commoner'; the rental or assignment contracts of which common land can be the object; the competences of the assembly of commoners and its executive council; the inclusion of common land in the Land Exchange; and the assignment of such land to third parties for use on a precarious basis.

In the case of the community subsector, which encompasses the "Community means of production possessed and managed by local communities", the constitutional norm indicates that the ownership of such assets must be of a community nature, and that they cannot belong to public-sector entities. The norm attributes the rights to use, enjoy the benefit of and hold dominion over community means of production to local communities, defined as communities of inhabitants, in an area in which the principles of self-administration and self-management apply.

The 2014 revision of the regime governing common land was intended to update the existing legal framework in the light of the fact that in virtually every case, such land was no longer being used and managed in ways that generated the previously idealised types of benefit.

The initial (1976) legal definition of common land was: "pieces of land used by the community and whose benefit is enjoyed by the residents of one or more given parishes or part thereof". Commoners were defined as residents who engage in an occupation or business and who possess the right to enjoy the benefit of them under the usages and customs recognised by the community. The law attributed the possession of this right to persons who fulfilled all the following requisites:

1. they lived in the parish or parishes in which the common land was located;
2. they engaged in their occupation or business there; and
3. they were entitled to enjoy the benefit of the land under local usages and customs.

In 1993, the concept of commoner was expanded to include all the residents of the parish or parishes whose territory included the common land and who were entitled to use it by local tradition. The amendments made in 2014 changed this to the voters who are registered in the parish and live in the local community area and/or engage in an agro-forestry or woodland grazing occupation or business there. The concept also covers emancipated minors who reside in the local communities in question. Commoners must use the common land in accordance with local usages and customs and manage the rural resources associated with the land sustainably and in accordance with both the law and any decisions taken by the assembly of commoners. To the extent that attribution of the status of commoner has now become structured in accordance with a precise and complete legal criterion that is applied automatically, no one can establish another procedure for identifying or registering commoners, nor can the bodies that administer common land be given any competence to intervene in this respect.

As configured by both groups of petitioners, the issue of constitutionality raised by the change in the concept of commoner was whether broadening the concept and excluding the ability to self-delimit it which local usages and customs had previously attributed to the members of each community, annulled or invalidated the autonomous dominion over, and/or the community nature of, the ownership or possession of this particular means of production.

II. The Court emphasised that these community assets continue to belong to the respective local communities, and so the holders of the rights are not the local territorial entities or local authorities. This means that the fact that the concept of commoner has been expanded to encompass all the voters who are registered and resident in the parish in which the

common land is located, or who engage in certain occupations or businesses there, and the resulting match that tends to exist between the statuses of local parishioner and commoner, do not in their own right imply that the law no longer attributes the dominion over and ownership of a piece of common land to a community/collectivity of inhabitants and instead transfers it to one of the parish's representative bodies.

The Constitution predetermines very little in this field, so the ordinary legislator has a lot of room in which to model the universe of members of those communities. It is the legislator that must determine both the type of rules to be used, and the element(s) which concretely serve(s) to link a member to the community.

Both the general amendment of the legal regime governing common land and the reconfiguration of the concept of commoner are linked to a profound change in society's relationship with the territory it lives in. In virtually every situation common land is no longer used and managed in the ways it was in the past. It has instead become the object of a type of economic use that is providing growing revenues – particularly as the site of wind farms or hydropower facilities.

The reasons given for the reform made by the 2014 Law in general and the reconfiguration of the concept of commoner in particular are similar to those which legal doctrine is advancing to support the view that the traditionally closed nature of local communities is now “rather questionable”.

The changes brought in by the 2014 Law also affected the regime governing the use and enjoyment of the benefit of common land by third parties. In this respect the number of forms of title that allow enjoyment of the benefit of common land to be assigned was doubled, and the limits on that assignment under the only contractual format that was previously admissible (an assignment of economic use, excluding the parts of the common land that are suitable for farming) were reduced. This alteration has made it possible for all or part of a piece of common land to be either assigned for economic use or rented out, and in both cases without now excluding the parts of the land that are fit for farming purposes.

Because of the introduction of this ability to assign the use and enjoyment of the benefit of common land under either an assignment or a rental format, the legal competences of the assembly of commoner and its executive council have been increased in such a way as to enable them to implement the new possibilities.

The 2014 Law also extended the competences of the assembly and the council to allow them to enter into rental contracts.

After considering all these changes, the Court took the view that the fact that the 2014 Law prohibits common-land rental or assignment contracts from including terms and conditions that would prejudice the land's traditional use by its commoners in ways dictated by local usages and customs, ensures that it is still possible for local communities to use their common land in accordance with consuetudinary practice, and for the members of the local collectivity to exercise the *de facto* powers needed to pursue the consuetudinary form of enjoyment of that land.

As such, the Constitutional Court declined the requests for a declaration of unconstitutionality.

Cross-references:

Constitutional Court:

- nos. 325/89, 04.04.1989; 240/91, 11.06.1991.

Languages:

Portuguese.



Identification: POR-2015-3-020

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 18.11.2015 / **e)** 596/15 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**

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

3.13 General Principles – **Legality.**

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

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

4.7.2 Institutions – Judicial bodies – **Procedure.**

4.7.4 Institutions – Judicial bodies – **Organisation.**

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

Keywords of the alphabetical index:

Extradition, treaty / Lawful judge principle, nature.

Headnotes:

The Portuguese constitutional-law principle of the ‘natural judge’ or ‘legal judge’, which is intended to ensure that no case is ever judged by an *ad hoc* court set up for the purpose, or by any court other than the one that is competent on the date of the crime, with that competence decided by the application of the organic and procedural norms containing rules designed to use objective criteria to determine the court that must intervene in each case. The content of this principle does not signify that the judge to whom a given case was distributed necessarily has to intervene in the respective trial. What is essential is that the competent judge be determined on the basis of rules set out in either legislation or other appropriate rules which decide the concrete composition of the judicial body that is going to try a case.

The ‘natural judge’ principle cannot prohibit changes in the law governing the organisation of the judiciary (including the competence to hear given cases), or the possibility of their immediate implementation, even if this means that specific cases may be heard by a court other than the one that would have been competent at the time when the fact in question occurred.

Such changes in legal rules or the procedural rules governing the way cases are divided up between courts and/or judges can even be valid for pending cases. The point is that a new regime must be valid in general, encompassing an indeterminate number of future cases, and cannot be based on arbitrary reasons which permit the conclusion that the resulting judiciary composition was formed on in an *ad hoc* way.

The important thing when it comes to respecting the natural judge principle is that the judge(s) who is(are) to intervene in a given procedural act must be determined on the basis of rules set out in legislation, or other rules that decide who is going to hear a case, in such a way as to avoid any arbitrariness or discretionary choices when a specific case is attributed to one or more specific judges. This requirement is met by the rules on the choice of judges during court vacations.

Summary:

I. The appellant in this concrete review case was an Italian national awaiting extradition to Brazil. The appeal was against a Ruling of the Supreme Court of Justice (hereinafter, “STJ”) confirming a decision of the Lisbon Court of Appeal (hereinafter, “TRL”) to grant the Brazilian extradition request and authorise the extradition itself. The Constitutional Court was asked to decide on the constitutionality of a provision of the Extradition Convention between the Member States of the Community of Portuguese-Speaking Countries.

Because the requesting state in this extradition was Brazil, the TRL considered that the Extradition Convention between the Member States of the Community of Portuguese-Speaking Countries (CEEM-CPLP) was applicable, and that if the Convention was insufficient in any respect, the subsidiary authority would be the Law governing International Judiciary Cooperation in Penal Matters. The latter expressly states that the forms of cooperation it covers (which include extradition) are governed: by the norms contained in the international treaties, conventions and agreements that are binding on the Portuguese State; if these are lacking or insufficient, by its own provisions; and subsidiarily, by the provisions of the Code of Criminal Proceedings (CPP). The Convention says that extradition requests must be transmitted by the central authority of the requesting state to that of the requested state, without prejudice to the possibility of using diplomatic channels to that end. Portugal indicated that its central authority for this purpose is the Attorney General’s Office (hereinafter, “PGR”).

The appellant argued before the TRL that the requesting authority’s formal extradition request should have reached that court by 26 June 2015, but that the PGR communication containing the request was drawn up on 30 June 2015 and received by the TRL on 2 July 2015. The TRL held that the actual request admitted by the Minister of Justice reached it on 25 June 2015 – i.e. within the time limit – and was then complemented by additional documentation at a later time. The STJ concluded that there had been no breach of any constitutional or ordinary-law precepts, and that the judicial request for extradition had been submitted in a timely manner.

II. The Constitutional Court entirely refuted the appellant’s argument that the decision to extradite was in violation of the concept of public order upheld by the Portuguese State, inasmuch as the vision underlying the Portuguese legal system is one in which the key goal of criminal sentences is not just to punish the offender by imprisoning him or her, but

also to reintegrate him or her into society – a principle which the appellant alleged the Brazilian penal process does not respect. The Court recalled that it is only competent to address questions which require it to determine whether or not given legal norms or normative interpretations are in conformity with the Constitution; it does not control alleged situations of unconstitutionality directly derived from judicial decisions themselves.

In the Portuguese constitutional-law system there is no such thing as an '*amparo* remedy' or 'constitutional complaint' designed to investigate the possibility that an act or decision – particularly by a jurisdictional authority – has directly violated fundamental rights to which the Constitution affords its protection.

The Constitutional Court noted that the extradition process includes an administrative phase and a judicial one. In the present case the Minister of Justice reviewed the extradition request, considered it to be admissible, and sent it to the representative of the Public Prosecutors' Office at the TRL.

The Court rejected the appellant's argument that there had been a violation of constitutional norms regarding the integration of General International-Law norms and principles into Portuguese Law and the automatic incorporation of the norms included in duly ratified or approved international agreements. The fact that a party disagrees with the way in which a jurisdictional instance interprets convention norms does not mean that those norms are not applicable in the Portuguese legal system, and the Court found no evidence of any breach of the applicable constitutional precepts in this respect. On the alleged violation of the direct applicability, subject to certain preconditions, of the constitutional norms that enshrine rights, freedoms and guarantees, the Court said that this requirement imposes a duty on courts to review the constitutionality of laws and to refuse to apply a legal norm if they conclude that it is not in conformity with the Constitution. In this regard, and given that the applicant did not invoke any other constitutional parameters he believed to have been breached, the Court was unable to find any unconstitutionality in this respect.

The TRL only decided whether the extradition request was submitted in a timely manner; it did not address the legitimacy to make the request in the first place. This position did not conflict with either the constitutional parameters invoked by the appellant, or any other constitutionally protected right pertaining to persons who are the object of extradition proceedings. The appellant was guaranteed the ability to access all the information needed to oppose

the extradition request, the opportunity to be heard by the court, and then the possibility of actually opposing the request as part of the same proceedings. He was specifically able to challenge both the grounds for the request and its format and the way in which it was processed – an ability of which he took advantage.

For all these reasons, the Court denied the appeal.

Cross-references:

Constitutional Court:

- nos. 193/97, 11.03.1997; 614/03, 12.12.2003; 162/09, 25.03.2009; 7/12, 11.01.2012; 21/12, 12.01.2012 and 482/14, 25.06.2014.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2015-3-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 06.10.2015 / **e)** 603/2015 / **f)** Decision on the exception of unconstitutionality of Articles 301.1 and 308.1 of the Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 845, 13.11.2015 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.10 General Principles – **Certainty of the law**.
 3.12 General Principles – **Clarity and precision of legal provisions**.
 3.13 General Principles – **Legality**.
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Law, foreseeability / Criminal Code / Criminal law / Conflict of interest, private sector, public sector / Restriction, freedom.

Headnotes:

The term “business relationships” in Article 301.1 of the Criminal Code is not clear, precise nor foreseeable regarding the criminal offence of conflict of interest. Because the addressee of the rule cannot adapt his or her conduct to the rule, this article infringes upon the principle of legality of criminal offences provided for in Article 1 of the Criminal Code and in Article 7 ECHR and consequently, the provisions of Article 1.5 of the Constitution.

The criminalisation of the conflict of interest in the private sector is an unjustified infringement on economic freedom and the right to work in relation to persons exercising, permanently or temporarily, with or without remuneration, a task of any kind, within any legal entity. The aforementioned

fundamental rights are provided for in Articles 41.1 and 45 of the Constitution.

Summary:

I. Pursuant to Article 146.d of the Constitution, the Constitutional Court was asked to review provisions of Article 301 of the Criminal Code, specifically Article 301.1 of the Criminal Code, which reads as follows:

“the conduct of the public officer who, in the performance of his duties, has fulfilled an act or has participated in a decision from which he has obtained, directly or indirectly, material gain for himself, for his spouse, a relative or relatives by affinity up to second degree or for another person with whom he has had business or labour relationships in the last five years, or from which he has obtained or continues to obtain advantages of any kind, shall be punished with imprisonment from one to five years and with the withdrawal of the right to occupy a public office”.

It was argued that the impugned text is poorly drafted and lacks clarity, precision and foreseeability. It criminalises any person who exercises a public function and performs specific activities of this function if he or she has conducted past business activities or other private activities resulting in advantages of any kind, contrary to Article 1 of the Constitution (on the Romanian State), Article 16 of the Constitution (on equal rights) and Article 53 of the Constitution (on restrictions of the exercise of certain rights and freedoms).

II. The Court held as follows:

Under Article 37.2 of Law no. 24/2000 on legislative technique for drafting normative acts, republished in the Official Gazette of Romania, Part I, no. 260 of 21 April 2010, if a concept or term is not well-established or can lead to different meanings, its significance in a specific context is clarified in the implementing legislation. Clarity can be found in the general provisions thereof or in an appendix on the specific lexicon and becomes mandatory for the legislation issued in the same field. In the same vein, by Decision no. 390 of 2 July 2014, published in the Official Gazette of Romania, Part I, no. 532 of 17 July 2014, paragraph 31, the Constitutional Court stated that a legal concept may have a different content and autonomous meaning from one law to another, provided that the law using the respective term also provides a definition.

In light of the aforementioned, the Court found that if, until the entry into force of the Civil Code on 1 October 2011, the concept “business relationship” had a determined and determinable regulatory meaning by virtue of the provisions of the Commercial Code, this concept is now inapplicable following the repeal, by the provisions of Law no. 71/2011 for implementation of the Civil Code, of the Commercial Code (1887 Commercial Codices and of the Carol II Commercial Code). Given that the current Criminal Code has come into force later than the Civil Code, where it relates to specific concepts of civil law, it must do so by using positive legal terms and concepts and not by recourse without a just reason to autonomous terms and concepts where the regulatory situation does not require it.

For that reason, the Court found that the term “business relationships” under the provisions of Article 301.1 of the Criminal Code lacks clarity, foreseeability and precision for a determination of the regulatory content of the offence of conflict of interest. As such, it is contrary to the principle of legality of criminalisation set forth in Article 1 of the Criminal Code, Article 7 ECHR and Article 1.5 of the Constitution concerning the quality of the law. The impugned text also renders unclear and unforeseeable the conditions restricting individual freedom as laid down in Article 23 of the Constitution.

The Court also found that it necessarily and obviously follows that the provisions of Article 301.1 of the Criminal Code, governing the conflict of interest, cannot be seen in isolation from the provisions of Article 308.1 of the Criminal Code on corruption offences and service offences committed by other persons. The reason is that the latter also criminalises corruption and service acts with reference to Article 301 of the Criminal Code. Hence, under Article 31.2 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, this Court has also adjudicated on the constitutionality of the provisions of Article 308.1 of the Criminal Code in terms of the reference therein to the provisions of Article 301 of the Criminal Code.

In accordance with Article 308.1 of the Criminal Code, “the provisions of Articles 289 to 292, 295, 297 to 301 and 304 on civil servants shall apply accordingly to offences committed by or in relation to persons carrying out, permanently or temporarily, with or without remuneration, a task of any kind in the service of one of the natural persons referred to in Article 175.2 or within any legal entity”. According to this rule, in addition to civil servants defined in Article 175 of the Criminal Code, the provisions also apply to those referred to in Article 308.1 of this Code. The difference between the two categories consists in the penalties regime laid

down in Article 308.2 of the Criminal Code. Under Article 175.2 of the Criminal Code, the persons providing a service in the public interest entrusted to them by the public authorities or persons subject to control over or supervision of the fulfilment of the public service are assimilated to civil servants in terms of criminal treatment.

The situation is, however, different regarding the criminalisation of the same acts committed by persons exercising, permanently or temporarily, with or without remuneration, a task of any kind within any legal entity. In the current legislative context, the inclusion, under the provisions of Article 308 of the Criminal Code, of private persons as active subjects of the criminal offence of conflict of interests is excessive. The reason is that State coercion is unduly extended, using criminal means against the freedom of action of the persons concerned, as part of the economic freedom and the right to work, without any criminological justification in this respect.

However, pursuant to Articles 61.1 and 73.3.h of the Constitution, the legislator does not have the constitutional competence to regulate offences in such a way as to enshrine a manifest disproportion between the importance of the social value that needs to be protected and the one that needs to be limited, otherwise the latter would be ignored. In this case, the social value that needs to be protected is the one that refers expressly to the private sector and therefore the State has no interest to criminalise the conflict of interest. As a result, the legislator has qualified the provisions of Article 308.1 of the Criminal Code (criminally penalising a conduct that contravenes solely private interests) as having a public character, resulting in a disproportionate limitation on the right to work and economic freedom of persons operating in the private sector. In those circumstances, such criminal protection, while appropriate in terms of purpose (i.e., protect social values, even private values) is not necessary and does not maintain a fair balance between the severity of the measure that can be taken and the interests of individuals. If the acts of private persons are causing injury, they can be subject to civil liability to labour law rules or any other form of liability, which do not involve the coercive force of the State through criminal law. That being so, the Court found that the criminalisation of the conflict of interest in the private sector is an unjustified infringement on the economic freedom and of the right to work of persons exercising, permanently or temporarily, with or without remuneration, a task of any kind within any legal entity.

For the reasons outlined above, the Court upheld the exception of unconstitutionality and found unconstitutional the term “business relationships” under the provisions of Article 301.1 of the Criminal Code and the words “or within any legal entity” under the provisions of Article 308.1 of the Criminal Code, with reference to Article 301 of the Criminal Code.

Languages:

Romanian.



Identification: ROM-2015-3-007

a) Romania / **b)** Constitutional Court / **c)** / **d)** 18.11.2015 / **e)** 799/2015 / **f)** Decision on the exception of unconstitutionality of the provisions of the Law on postal voting, as well as an amendment and supplement to Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, and for the organisation and operation of the Permanent Electoral Authority / **g)** *Monitorul Oficial al României* (Official Gazette), 862, 19.11.2015 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

3.21 General Principles – **Equality.**

4.9.9.1 Institutions – Elections and instruments of direct democracy – Voting procedures – **Polling stations.**

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

4.9.9.5 Institutions – Elections and instruments of direct democracy – Voting procedures – **Record of persons having voted.**

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – **Nationals living abroad.**

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

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

5.3.41.4 Fundamental Rights – Civil and political rights – Electoral rights – **Secret ballot.**

5.3.41.5 Fundamental Rights – Civil and political rights – Electoral rights – **Direct / indirect ballot.**

Keywords of the alphabetical index:

Election, law, universal suffrage / Vote, mail, accommodate, residence abroad.

Headnotes:

The regulation of postal voting for Romanian citizens domiciled and residing abroad is aimed at ensuring the highest citizen participation in the electoral process and takes into account the principle of universal suffrage. The regulation shall ensure a fair balance between universal suffrage and free and fair elections, as well as direct, secret and free suffrage.

Summary:

I. Pursuant to Article 146.a of the Constitution, the Constitutional Court was requested to review provisions of the Law on postal voting, as well as an amendment and supplement to Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, and on the organisation and operation of the Permanent Electoral Authority. As grounds for the referral it was essentially claimed that the contested Law does not guarantee free parliamentary elections, direct and secret ballot, equality before the law, proportionality of the mandates obtained with the will of the electorate, thereby violating Articles 2.1, 16.1, 62.1 and 62.3 of the Constitution.

II. The Court found groundless the challenge that the contested Law fails to ensure the integrity of postal voting. The Court considered that unlike the fixed number of polling stations in the country, the number of electoral offices for postal voting is not fixed and all voters are included on a non-permanent list, which is practically provisional. The Court concluded that, indeed, an electoral list is drawn up containing a variable number of voters. Depending on the option for postal voting and the proof of receipt of documents necessary for the exercise of the right to postal voting, eligible voters should not appear more than once on the permanent electoral lists laid down by Article 49 of Law no. 208/2015. Such a provision takes into account the need for a control framework to prevent voting by the same voter both by post and at the polling station. If there were no lists referred to above, the voter could vote more than once. However, there are clear records of those who have expressed the wish for postal voting (i.e., alternative to voting at the polling station) and the fact that the voter is not on the permanent electoral list shall prevent the exercise of a new vote at the polling station.

Furthermore, the permanent electoral lists abroad shall be submitted to the electoral office for Romanian citizens domiciled and residing outside the country [Article 49.3 of Law no. 208/2015]. The lists in the country shall also be received by the electoral offices of the polling stations of mayors [Article 18.a of Law no. 208/2015]. The establishment of electoral offices for postal voting for every 10.000 voters who have opted for this vote is also a matter pertaining to the nature of the situation. This means the number will be known only after the expiry of the time-limit, which could be chosen for this vote. The difference between the establishment of these electoral offices and of the offices in the country does not necessarily mean there are issues with the integrity of elections. Rather, the difference should be viewed as a purely organisational measure to ensure system functionality in relation to the number of citizens who choose postal voting.

With regard to actual voting and the transmission of the ballot by post, the Court noted that the Law imposes certain requirements on the voter. The outer envelope must be delivered up to three days before the vote, inclusively at the electoral office for postal voting – in other words by the Thursday, at midnight, of the week in which the elections are being held. Hence, the voters who chose postal voting have already been identified, making it impossible for them to go to the polling station and vote on additional lists. Furthermore, the three-day-period is necessary to verify the barcodes printed on the outer envelopes and the registration of their receipt [Article 15.1 of the Law] and to prevent fraudulent exercise of the right to vote at the polling station. Consequently, the delivery of the outer envelope within three days before the election date is to guarantee the election has been properly conducted, avoiding the possibility of electors voting twice.

The Court also considered whether it was unconstitutional that Romanian citizens domiciledv and residing abroad who choose postal voting have the right to vote by mail unlike Romanian citizens domiciled and residing in the country who possess no such right. The Court held that the difference in the legal treatment of the two categories of citizens in terms of the access to postal voting stems from different objective situations. The criterion of the domicile in the country/abroad is objective and reasonable for such legal treatment.

As for the infringement of Article 62.1 of the Constitution, in terms of the direct nature of the ballot, the Court notes that it concerns the direct expression of the voting right. This is the consequence of its personal nature as opposed to mediated or delegated voting, elements that circumscribe indirect voting. In

other words, between the voter expressing his or her voting right and the representative body under election, no other persons or structures interfere to change the option of the voter. In the postal voting procedure, the voter is the one who, by placing the sticker on his or her electoral option in the postal voting ballot [Article 10.1.b of the Law], expresses his or her vote directly. Between his or her vote and the end of the operation, respectively the election of members of the Chamber of Deputies or of the Senate, as appropriate, there is no intervention from any person/electoral body. As for the fact that the voter does not have an adequate civic conduct or for the factual issues that may be encountered in the electoral process, they are issues that do not concern the legislative text of the law, but elements external to it. As a result, no criticism of unconstitutionality is noted for the breach of the direct nature of the ballot.

Concerning the violation of Article 62.1 of the Constitution, as regards the secrecy of the ballot, the Court held that it is the expression of the will of the voter in order to ensure the protection of his or her freedom and privacy against all forms of pressure that he or she might face, as a consequence of the disclosure of his or her electoral option. The voter's right to express a secret vote also entails the obligation to respect the voting right of others i.e. the voter should not exercise pressure on other persons in order to know, influence or control their voting option. Postal voting, as a voting arrangement, in addition to the voter's responsibility to protect the secrecy of his or her own ballot, is accompanied by a series of legal guarantees from public authorities to protect the secrecy of the ballot. Thus, the requirements of placing the sticker on the option in the ballot paper, putting the ballot paper in the inner envelope and then introducing the inner envelope in the outer envelope (both envelopes being duly sealed) are guarantees to ensure the secrecy of the ballot.

Moreover, the electoral office for postal voting after receiving the outer envelope, unseals it without unsealing the inner envelope containing the ballot with the voter's option. The sealed inner envelopes shall be placed in the ballot box, which shall be sealed at the end of each day and unsealed at the start of each day, where appropriate, for the introduction of other inner envelopes. It should be noted that the damaged inner envelopes not ensuring the secrecy of the ballot are cancelled and are not placed in the ballot box. When introduced in the ballot box, the inner envelopes shall be "depersonalised", meaning that the identity of the person who voted can no longer be controlled/known/revealed/verified.

Furthermore, voting at the polling stations ends, pursuant to Article 82.3 of Law no. 208/2015, on the voting day at 9 p.m., when the ballot boxes and the inner envelopes shall be unsealed. If the outer envelope is unsealed or damaged in such a way that it would be liable to affect the integrity of postal voting or if the inner envelope is unsealed or damaged to the extent that it is likely to affect the integrity of postal voting, the outer/inner envelope shall be cancelled by the decision of the electoral office for postal voting. The fact that the voter does not have an adequate civic conduct or the references to the factual issues which may be encountered in the electoral process (“family voting” or “under the supervision of the employer”) are issues which do not concern the legislative text of the law, but elements external to it.

Regarding the requirements laid down by the Constitutional Court Decision no. 51 of 25 January 2012 and the Code of Good Practice in Electoral Matters relating to amending the electoral framework one year before the date of the elections, the Court held that the Law analysed in this case facilitates the voting right of the citizens domiciled and residing abroad. This is meant to ensure, for the Romanian citizens, the universality of the constitutional voting right. Therefore, in principle, the time to materialise the analysed regulation does not have any significant relevance. Even so, it was adopted on 28 October 2015, thus observing the constitutional requirement not to change the electoral framework less than 1 year before the date of the elections.

Indeed, the analysed law changes the substance of the exercise of the right to vote by introducing the postal voting system, which has not been applied within the constitutional system established in 1991. It therefore had to be adopted at least one year before the date of the elections, as is the case here. The grounds for adopting this Law do not constitute an obstacle liable to lead to the non-application of postal voting in the parliamentary elections of 2016. Of course, the one-year period should be calculated from the entry into force of the Law, in accordance with Article 78 of the Constitution, so that a period of one year exists between this date and the elections day.

For these reasons, by unanimity, the Court rejected, as unfounded, the exception of unconstitutionality. It noted that the provisions of the Law on postal voting, as well as an amendment and supplement to Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, and for the organisation and operation of the Permanent Electoral Authority are constitutional in relation to the challenges formulated.

Languages:

Romanian.



Identification: ROM-2015-3-008

a) Romania / **b)** Constitutional Court / **c)** / **d)** 24.11.2015 / **e)** 814/2015 / **f)** Decision on the exception of unconstitutionality of the provisions of Article 60.1.g of Law no. 53/2003 – Labour Code / **g)** *Monitorul Oficial al României* (Official Gazette), 950, 22.12.2015 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.20 General Principles – **Reasonableness**.
 3.21 General Principles – **Equality**.
 5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.
 5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Employee, dismissal, exception, privilege / Employer, burden, excessive, exception / Equality, rights, protection / Property, right / Trade, union, activity, protect.

Headnotes:

The prohibition of dismissal of persons occupying eligible positions in a trade union is unconstitutional in cases where dismissal is not related to trade union activity. Such a general, absolute prohibition of dismissal both for reasons relating to the employee and for reasons unrelated to the employee violates the principle of equality before the law, the right to private property and the constitutional principles relating to economic activity.

Summary:

I. Pursuant to Article 146.d of the Constitution, the Constitutional Court was asked to review the provisions of Article 60.1.g of Law no. 53/2003 – Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of 18 May 2011, which reads as follows:

“(1) The dismissal of the employees may not be decided: [...] g) during the exercise of an elective office in a trade union, except for the case where the dismissal is decided for serious or repeated disciplinary offences of that employee”.

It was claimed that the impugned legal provisions are contrary to Article 16 of the Constitution, as they establish a privilege for trade union leaders. Other employees in the same situation would not enjoy such privilege and as a result, their positions would be abolished or they would be dismissed. It was also argued that the impugned legal provisions are contrary to Article 41 of the Constitution concerning the right to work and social protection in labour, as the establishment of trade union leaders’ immunity to dismissal affects the right to protection in case of dismissal of the other employees who are in the same objective situation. Article 44 of the Constitution (protection of private property) is also violated because, in the objective situation in which the position held by the trade union leader employee is abolished, the duties of that position automatically disappear. Hence, the employee can no longer work for the employer, since the object of the work is lacking.

II. Examining the exception of unconstitutionality, the Court held, in essence, as follows:

The provisions of Article 60.1.g of the Labour Code regulate a general, absolute prohibition of dismissal of persons occupying eligible positions in a trade union. The reasons may or may not be related to the employee. The only exceptions being the dismissal for serious or repeated disciplinary offences and the dismissal for reasons arising as a result of judicial reorganisation, bankruptcy or the dissolution of the employer.

According to the impugned legal text, the persons occupying eligible positions in a trade union may not be dismissed for the other reasons relating to the employee, provided by Article 61 of the Labour Code [namely (b) – “when the employee has been taken into preventive custody for more than 30 days, under the terms of the Code of Criminal Procedure”; (c) – “when, by decision of the competent medical

examination bodies, a physical and/or mental inability of the employee is found, not allowing him or her to fulfil the duties corresponding to the position held”; (d) “when the employee is not professionally fit to the workplace where he or she is employed”], or for reasons unrelated to the employee, provided by Article 65 of the Labour Code (i.e. “the elimination of the workplace must be effective and have a real and serious cause.”).

The Court also held, on the one hand, that the impugned legal provisions state that the prohibition of dismissal applies throughout the exercise of an eligible function within a trade union body for an unlimited duration. On the other hand, there is no provision of law specifying the categories of eligible functions that may enjoy that protection. Therefore, the persons protected are determined exclusively by the trade union body.

The impugned legal text does not distinguish between situations where dismissal on one of the grounds set out in Articles 61 and 65 of the Labour Code is related to trade union activity and where there is no such link. Yet, only in these latter cases can dismissal on any of the grounds set forth in Articles 61 and 65 be justified. Thus, the impugned legislative text establishes an irrefutable presumption of the existence of the link between trade union activity and the grounds for dismissal. However, the protection of persons in senior positions in the trade union body shall operate exclusively in relation to the trade union activity actually carried out (as provided for by Article 220.2 of the Labour Code), and not in relation to the professional activity of the employee.

That being said, the Court found a breach of the principle of equality before the law. Where there is no link between trade union activity and dismissal on one of the grounds specified in Articles 61 and 65 of the Labour Code, the different legal treatment of persons occupying eligible positions within a trade union (i.e., prohibition to dismiss them) has no objective and reasonable justification. This privilege (i.e., no restriction on the right to work) is contrary to the provisions of Article 16 of the Constitution.

Regarding Article 44 of the Constitution, the Court held that the legal provisions in question oblige the employer to pay a remuneration that does not take into account the concrete and objective situation of the employee who also occupies an eligible position within a trade union. They include instances where the employee is under police custody or under house arrest for a period exceeding 30 days; has been found physically and/or mentally unfit for the job and therefore, cannot perform the job, his or her duties or meet the professional standards; or the position was

eliminated from the organisational chart. In the absence of work performed, the employer may not be required to pay a remuneration in these specific and objective situations. Thus, the purpose of the regulation (i.e. to protect trade union activity) collides with the employer's interests, which is to bear an excessive burden that likely affects the substance of its right to property. Therefore, the legal provisions subject to criticism breach Article 44 of the Constitution.

The Court also found that absolute prohibition of dismissal both for reasons relating to the employee (i.e., pre-trial detention or house arrest for a period exceeding 30 days, physical and/or mental unfitness of the employee preventing him or her from performing the job duties corresponding; the professional unfitness to the job) and for reasons unrelated to the employee (i.e., elimination of the position from the organisational chart) limits the employer's right to organise the work internally. That is, limitation on its right to dismiss the employees – even under strict conditions laid down by law.

According to Article 45 of the Constitution, the free access of persons to economic activities and the exercise thereof under the law are guaranteed, whilst the legislator has the right to lay down the conditions and limits for the exercise of economic activities. Applying the proportionality test, the Court considered whether such a limitation is justified in light of the aim pursued and its reasonableness. The Court took into account that the limitation on the employer's economic activity through the prohibition to dismiss persons occupying eligible positions within a trade union body is justified by the interest of ensuring freedom of association. The prohibition protects employees who have a role of representation, promotion and defence of professional and economic rights and interests of employees and therefore, the regulatory purposes set out in Article 60.1.g is legitimate.

The limitation is appropriate as it is able to fulfil the purpose of protecting trade union activity and it is necessary to achieve that purpose. However, since the impugned provisions are based on the irrefutable presumption that there is a link between the ground for dismissal and the trade union activity, banning the employer from dismissing an employee who occupied an eligible position within a trade union body, for reasons unrelated to the trade union activity, imposes on the employer an unreasonable and excessive burden in relation to the aim pursued – protection of trade union freedom. Therefore the balance between the competing interests is not fair. Accordingly, the Court found that the impugned legal solution is not proportionate to the aim pursued.

For the reasons outlined above, the Court, by majority vote, upheld the exception of unconstitutionality and found unconstitutional Article 60.1.g of Law no. 53/2003 – the Labour Code.

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-2015-3-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 06.10.2015 / **e)** 24 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 235, 19.10.2015 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Status of unemployed / Social protection / Employment services.

Headnotes:

Citizens recognised as being unemployed are entitled to social protection even if they are unable to produce a certificate of earnings for the past three months.

Summary:

The applicant, who had previously worked as a sole trader, attempted to register as unemployed in order to be officially recognised as such.

The employment service rejected his application because he was unable to produce a certificate of earnings for the past three months. The applicant instituted legal proceedings, but to no avail.

In his view, the law is in violation of the Constitution, as it imposes undue restrictions on persons who are unable to produce a certificate of earnings.

The Court's position

1. The Constitution of the Russian Federation states that the Russian Federation is a democratic state with a social market economy whose policy is aimed at creating conditions ensuring a worthy life and the free development of humankind (Articles 1.1 and 7.1). It guarantees citizens the freedom to work, the right freely to use their labour skills and to choose the type

of activity and occupation, as well as the right to protection against unemployment (Article 37.1 and 37.3).

Citizens recognised as being unemployed are entitled to social protection, including notably unemployment benefits, the right to occupational training, free medical check-ups, etc.

According to paragraph 1 of Article 3.2 of the Law of the Russian Federation "on employment in the Russian Federation", the list of documents applies to all categories of citizens, irrespective of the type of activity and the length of time for which the person is unemployed. The employment service cannot refuse to register a person as unemployed on the ground that he or she is unable to produce certificates of earnings for the past three months.

The Court concluded that the impugned provisions of the law were compatible with the Constitution. Under the regulatory system in place, the employment service did not have the right to refuse to register a person as unemployed on the ground that he or she was unable to produce certificates of earnings for the past three months.

Languages:

Russian.



Identification: RUS-2015-3-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17.12.2015 / **e)** 33 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 296, 30.12.2015 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Search / Lawyer, professional secrecy.

Headnotes:

When authorising a search to be carried out at a law firm, the Court must state the specific purpose of the search and any seizures must be directly related to the acts being prosecuted and be limited to the necessary documents.

Summary:

As part of a criminal investigation, the Court authorised an investigative body to carry out a search at a law firm. The investigators seized dozens of records pertaining to companies and individuals.

The lawyers challenged these actions in court. The Court rejected the challenge, pointing out that there was nothing in the Code of Criminal Procedure to prohibit the seizure of lawyers' records. The materials that were seized could be relevant in a criminal investigation.

According to the applicants, the search allowed the investigator to seize documents containing confidential information about the lawyers and their clients. Protecting professional secrecy is considered to be one of the duties of a lawyer and, at the same time, a basic principle of the legal profession.

The Constitutional Court ruled that trust was essential and indispensable to the client-lawyer relationship. It was a major safeguard enshrined in the Constitution but it was not absolute. In exceptional circumstances, if there were reasonable grounds to suspect that an abuse had been committed by a lawyer, the authorities could intervene in the client-lawyer relationship. Such intervention was permitted for the purpose of protecting the constitutional order, morality, the health of others, the rights and lawful interests of others and national security. Accordingly, the confidentiality policy applied only to client-lawyer relationships which did not extend beyond the bounds of professional legal assistance and which were not criminal in nature. Investigations, including searches at law firms, could be carried out solely on the basis of a court order.

The Court emphasised that the Court must state the specific purpose of the search and that any seizures must be directly related to the acts being prosecuted and be limited to the necessary documents. Otherwise, the obligation on lawyers to observe professional secrecy, the right to private life, personal and family privacy, the presumption of innocence and the right of the individual not to testify against himself or herself would be infringed.

Accordingly, in taking into account the Constitutional Court's considerations, as expressed in the present decision, the impugned provisions were compatible with the Constitution of the Russian Federation.

At the same time, the Court proposed that federal lawmakers provide additional safeguards to preclude the possibility of a breach of the lawyer's professional duty to observe secrecy.

Languages:

Russian.

*Identification:* RUS-2015-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 22.12.2015 / **e)** 34 / **f)** / **g)** Government agency responsible for publishing legislation online – www.pravo.gov.ru / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**
5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Candidate / Home arrests / Electoral commission.

Headnotes:

When introducing a general rule requiring candidates to submit documents in person, the legislator must provide rules for those who, for practical reasons, are unable to meet this requirement.

Summary:

According to the law “On basic guarantees for electoral rights and the right of Russian citizens to participate in a referendum”, candidates must submit the necessary documents to the electoral commission in person. If a candidate is ill, or if he or she has been

placed in a detention facility, the documents may be submitted by other persons. The authenticity of the candidate's signature must be certified by a notary or by the administration of the hospital or detention facility concerned.

The applicant is an individual who has been placed by a court under house arrest, with limited access to the outside world, telephone and email.

The investigator refused to grant the applicant's request to go to the electoral commission in person. The relevant documents were therefore submitted by his representative. The commission refused to register the candidate because the documents were not submitted according to the correct procedure. The applicant appealed to the Court, which dismissed his application, saying that if the applicant were unable to appear in person or arrange for himself to be represented by a proxy, he could appeal against the investigator's decision or arrange for a notary to make the request.

The Constitutional Court pointed out that under Article 32.2 of the Russian Constitution, citizens of the Russian Federation had the right to elect and be elected to state authorities and local self-government bodies.

When introducing a general rule requiring that documents be submitted in person, the legislator must provide rules for those who, for practical reasons, were unable to meet this requirement.

Since a person who had been placed under house arrest has effectively been deprived of the possibility of submitting documents himself or herself, he or she must have the option of using a notary or submitting the documents via his or her lawyer.

Languages:

Russian.



Serbia Constitutional Court

Important decisions

Identification: SRB-2015-3-003

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 25.03.2015 / **e)** UŽ-1413/2011 / **f)** / **g)** / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

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

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

Keywords of the alphabetical index:

DNA sample.

Headnotes:

The sphere of private life includes physical and moral integrity. The acquisition and retention of DNA samples amounts to interference in this sphere. Such interference is justified if it is in accordance with the law, meets a legitimate aim and is necessary in a democratic society.

Summary:

I. The applicants filed a constitutional appeal against an investigating judge's approval of taking DNA samples.

Following the commission of a criminal act, investigation at the scene of the crime resulted in several objects being identified, set aside and preserved. The police filed a request with an investigating judge of the High Court to issue an order for DNA profiling on the basis of the fixed traces on the objects. Following a High Court injunction, expert-witness examination of the DNA samples was entrusted to a Clinical Centre. Its findings and opinion were submitted to the High Court. The police, pursuant to Article 231.2 of

the Law on Criminal Procedure (hereinafter, the "LCP"), filed a request with the High Court, seeking prior approval of DNA profiling of the suspects. The request had been approved by an investigating judge.

Pursuant to Article 226.1 of the LCP, the applicants were summoned to the police station regarding a robbery. The applicants and their lawyer went to the police station where, they were shown the approval for DNA profiling, they consented to giving samples. The police filed a request with an investigating judge for issuing an order for the comparison of the DNA evidence with the DNA samples. The results were negative and criminal proceedings against the applicants were therefore not instituted.

II. The Constitutional Court noted that the sphere of private life, within the meaning of Article 8.1 ECHR, includes both physical and moral integrity, and that acquisition and retention of DNA samples amounts to interference in the sphere of an individual's private life (see *S and Marper v. United Kingdom*, *Van der Velden v. Netherlands* and *Peruzzo and Uwe Martens v. Germany*). Such interference is justified if it is in accordance with the law, meets a legitimate aim and is necessary in a democratic society.

"In accordance with the law" means that the measure applied must be legally grounded in law, and that the law is accessible to the person in question and foreseeable regarding its expected consequences.

The first question was whether the provision under Article 231.2 of the LCP was and could form the legal basis for taking DNA samples. This Article authorises police to undertake other necessary actions with a view to establishing identity, where this is necessary for identification purposes or in other areas of interest for the conduct of proceedings, provided that there has been prior approval by an investigating judge. Due to the nature and quantity of information contained in a DNA profile, taking DNA samples represents an action which serves identification purposes, but also serves to rule particular persons out as possible perpetrators of criminal offences. The Constitutional Court reiterated the European Court of Human Rights' position that the Constitutional Court must deal not with the law as such, but with the way this law has been applied to the concrete circumstances (see *Goranova-Karaeneva v. Bulgaria*). In view of the facts outlined above, the goal the relevant action served, the gravity of the criminal offence, and the fact that the request for taking a DNA sample from the applicants had the prior approval of a competent investigating judge, the Constitutional Court found that the legal grounds for taking a DNA sample from the applicants were contained in Article 231.2 of the LCP.

The requirement of accessibility of the law has been met, as the LCP has been published in the Official Gazette.

The Constitutional Court referred to the European Court of Human Rights' standpoint that a rule (norm) is to be considered "foreseeable" if it has been formulated with sufficient precision to enable an individual – if necessary also aided by someone else's advice – to regulate their behaviour, and that there must exist a certain level of legal protection from arbitrary interference with the right guaranteed under Article 8.1 ECHR (see *Malone v. the United Kingdom*).

An authorisation to take a DNA sample has been conditioned by prior approval of an investigating judge, which satisfies the principle of judicial control. The norm in question defines in a sufficiently clear and foreseeable manner the scope of the margin of appreciation of the police when taking DNA samples.

The Constitutional Court concluded that the DNA sample was taken in accordance with the law, and that the allegations of a violation of the right to respect for private life were unfounded.

Regarding their allegations of a violation of the right to inviolability of physical and psychological integrity under Article 25.1 of the Constitution, the applicants stated that they did not have a clear idea of how their biological samples would be kept and by whom.

The Constitutional Court noted that the European Court of Human Rights in the case *Lakatoš and Others v. Serbia* found that in the Republic of Serbia there were no specific laws on retention and destruction of DNA samples, but that applicants could in litigation proceedings claim reimbursement or some other form of compensation, including a request for the destruction of DNA samples. However, the applicants, before filing the constitutional appeal, had not exhausted the regular legal course of action.

Article 42.4 of the Constitution stipulates that everyone has the right to be notified about personal data taken from them, in accordance with the law, and the right to judicial protection in case of abuse of this right.

The Law on Personal Data Protection secures the mechanisms of administrative and judicial control. In the absence of any evidence that the applicants availed themselves of the prescribed legal remedies, the Constitutional Court dismissed this part of the constitutional appeal.

The applicants claimed that it was not possible to object to DNA samples being taken, and this was in violation of the right to a legal remedy under Article 36.2 of the Constitution.

However, Article 231.4 of the LCP provides that a person against whom police actions has been taken, such as the taking of a DNA sample, based on a request approved by an investigating judge, has the right to file a complaint with a competent public prosecutor or an immediately higher interior affairs body.

Cross-references:

European Court of Human Rights:

- *S and Marper v. United Kingdom*, nos. 30562/04 and 30566/04, 04.12.2008, *Reports of Judgments and Decisions* 2008;
- *Van der Velden v. Netherlands*, no. 29514/05, 07.12.2006, *Reports of Judgments and Decisions* 2006-XV;
- *Peruzzo and Uwe Martens v. Germany*, nos. 7841/08 and 57900/12, 04.06.2013;
- *Rotaru v. Romania*, no. 28341/95, 04.05.2000, *Reports of Judgments and Decisions* 2000-V;
- *Goranova-Karaeneva v. Bulgaria*, no. 12739/05, 08.03.2011;
- *Malone v. United Kingdom*, no. 8691/79, 02.08.1984, Series A, no. 82; *Special Bulletin Leading Cases – ECHR* [ECH-1984-S-007];
- *Lakatoš and Others v. Serbia*, no. 3363/08, 07.01.2014.

Languages:

English, Serbian.



Identification: SRB-2015-3-004

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 11.06.2015 / **e)** Už-1696/2013 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 60/2015 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Procedural rules, application.

Headnotes:

In their application of the rules of procedure, courts must avoid both excessive formalism, which would impair the fairness of the proceedings, and excessive flexibility, which would render nugatory the procedural requirements laid down in statutes. The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a barrier preventing a person from having their case determined by the competent court.

Summary:

I. The applicant, through his authorised representative, filed an enforcement motion with the Commercial Court, based on an authentic document, against an enforcement debtor, with a view to settling a monetary claim. The applicant proposed in the motion that the Commercial Court, following conducted proceedings and presentation of evidence, should rule on the matter “and enforce as follows”.

The Commercial Court dismissed the enforcement motion in its first instance ruling as irregular, on the basis that the enforcement creditor had not specified whether the enforcement was to be conducted by the court or an enforcement officer.

The Commercial Court, in the ruling under dispute, rejected the enforcement creditor’s complaint and upheld the first-instance ruling.

The applicant submitted a constitutional appeal against the Commercial Court ruling, alleging a violation of the right to a fair trial guaranteed under Article 32.1 of the Constitution.

II. The Constitutional Court noted that there are two phases of enforcement proceedings. During the first phase, the enforcement motion is accepted and decided upon and evidence is assessed (in enforcement proceedings, the court acts on the basis of submissions and other documents; a hearing is held only when it deems it appropriate). In the second phase, enforcement is conducted, either by a court,

when the court will issue a court enforcement officer with an order to begin enforcement and will schedule the place, date and time of enforcement, or by an enforcement officer, who will conduct the enforcement directly.

Article 35.6 of the Law on Enforcement and Security provides that a motion to enforce must state whether physical enforcement is to be carried out by the court or by an enforcement officer. The enforcement debtor cannot choose the manner of enforcement in areas where the Law on Enforcement and Security has envisaged exclusive jurisdiction of courts or enforcement officers. Enforcement in family relations and reinstatement of employees to work falls within the exclusive jurisdiction of the courts, while the enforcement of claims based on the provision of utility and other services (such as telephone, electric power, heating, maintenance charges and parking charges) fall within the exclusive remit of the court enforcement officer.

In this case, the motion was filed on the basis of an authentic document (an invoice for the delivery of office material), which meant that the subject matter did not fall under the exclusive enforcement jurisdiction of either courts or enforcement officers. The applicant had stated in the enforcement claim that the enforcement court was to decide the claim, and subsequently conduct the enforcement. The enforcement court stated that the manner of enforcement could not be considered as having been specified, i.e. as to whether a court or an enforcement officer should carry it out.

The Constitutional Court explained that according to the case-law of the European Court of Human Rights, courts are bound to apply the rules of procedure avoiding both excessive formalism that would impair the fairness of the proceedings and excessive flexibility such as would render nugatory the procedural requirements laid down in statutes (see Case of *Eşim v. Turkey*, 59601/09, 17 September 2013).

The dismissal of an enforcement motion based on an authentic document for the enforcement of which no exclusive jurisdiction has been envisaged, either by courts or enforcement officers, in which it was indicated that the enforcement court was to rule on the motion, and then enforce the ruling, cannot be described as “excessive flexibility”.

In the Constitutional Court’s opinion, dismissal of an enforcement motion based on an authentic document, in which it has been indicated that the court is to conduct enforcement as being incomplete, with a reasoning that such motion “cannot be

considered specific regarding the manner of enforcement in respect of who shall enforce the ruling, a court or enforcement officer”, represents excessive formalism on the part of the enforcement court, contravening the applicant’s right to a fair trial, protected under Article 32.1 of the Constitution, and more specifically, the right to access to court.

The Constitutional Court assessed that the detrimental consequences of the violation of this right could only be removed if the Commercial Court’s ruling were annulled and it was ordered to make a fresh decision on the complaint the applicant had filed against the first-instance ruling.

Pursuant to Article 49.2 of the Law on the Constitutional Court, the Constitutional Court also resolved to publish this decision in the Official Gazette of the Republic of Serbia, in view of its wider relevance for the protection of human rights and civil freedoms, guaranteed by the Constitution.

Cross-references:

European Court of Human Rights:

- *Eşim v. Turkey*, no. 59601/09, 17.09.2013.

Languages:

English, Serbian.



Slovenia

Constitutional Court

Statistical data

1 May 2015 – 31 August 2015

In this period, the Constitutional Court held 19 sessions – 9 plenary and 10 in panels: 3 in the civil, 4 in the administrative and 3 in the criminal panel. It received 61 new requests and petitions for the review of constitutionality/legality (U-I cases) and 332 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 38 cases in the field of the protection of constitutionality and legality, as well as 236 cases in the field of the protection of human rights and fundamental freedoms.

Statistical data

1 September 2015 – 31 December 2015

In this period, the Constitutional Court held 20 sessions – 12 plenary and 8 in panels: 3 in the civil, 3 in the administrative and 2 in the criminal panel. It received 88 new requests and petitions for the review of constitutionality/legality (U-I cases) and 373 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 110 cases in the field of the protection of constitutionality and legality, as well as 439 cases in the field of the protection of human rights and fundamental freedoms.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovene full text versions, including dissenting/concurring opinions, and English abstracts);

- In the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts of decisions issued in the field of the protection of constitutionality and legality, with full-text version of the dissenting/concurring opinions);
- On the website of the Constitutional Court (full text in Slovene, English abstracts and a selection of full texts): www.us-rs.si;
- In the IUS-INFO legal information system on the Internet, full text in Slovene, available through www.ius-software.si;
- In the CODICES database of the Venice Commission (a selection of cases in Slovene and English).

Important decisions

Identification: SLO-2015-3-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 28.05.2015 / **e)** Up-1177/12, Up-89/14 / **f)** / **g)** *Uradni list RS* (Official Gazette), 42/15 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Liability, state / Limitation period / “Erased” person, compensation.

Headnotes:

Courts must apply the rules regarding limitation periods with respect to the circumstances of the individual case and in such a manner that the filing of claims is not rendered excessively difficult or even impossible.

Summary:

I. In Decision no. Up-1177/12, Up-89/14, dated 28 May 2015, the Constitutional Court decided on constitutional complaints of “erased persons” (Slovene: *izbrisani*; citizens of former Yugoslavia who

lived in Slovenia but did not accept Slovenian citizenship, were removed from the register of permanent residents in 1992 and found themselves in a state of extreme legal uncertainty; See, e.g., SLO-2004-1-001). The applicants challenged the Supreme Court decisions which rejected their claims for damages resulting from the unlawful actions of the state (i.e. their removal from the register of permanent residents) because they were allegedly time-barred.

II. The Constitutional Court further clarified the content of the right to compensation for unlawful actions of the state determined by Article 26 of the Constitution. It explained that the classic rules of civil liability for damage do not suffice for the assessment of the liability of the state for damage. In such instances, the specificities that originate from the authoritative nature of the functioning of state authorities must be taken into consideration.

The Constitutional Court noted that by adopting a special regulation regarding the issuing of permanent residence permits and by *ex tunc* recognition of actual residence, the legislator provided moral satisfaction to the “erased” persons as a special form of remedying the consequences of violations of human rights that occurred due to their removal from the register of permanent residents. It stressed, however, that this does not impede claims for monetary compensation by “erased” individuals who suffered damage because they were deprived of the rights that are conditional upon permanent residence in the Republic of Slovenia. The Constitutional Court also referred to the judgment in *Kurić and others v. Slovenia*, wherein the European Court of Human Rights confirmed that “erased” persons were entitled to appropriate monetary compensation. The Constitutional Court further recalled that according to the case law of the European Court of Human Rights a too rigid application of limitation periods, where the national courts do not take into account the circumstances of the concrete case, can entail an inadmissible interference with the right of access to court (Article 6.1 ECHR).

With regard to the applicants, the courts should have adapted their assessment of the liability of the state to the particular circumstances in which the “erased” persons found themselves after their removal from the register of permanent residents. In the case at issue, however, the courts failed to appropriately consider the position of legal uncertainty in which the “erased” persons found themselves when interpreting the limitation periods for their claims for damages for unlawful actions of the state. As a result, the Constitutional Court concluded that by its strict interpretation of the rules regarding time-barring, the

Supreme Court rendered it excessively difficult for the applicants to effectively invoke the right to compensation for damage against the state or even prevented them from invoking such a right altogether. It established a violation of Article 26 of the Constitution, abrogated the challenged decisions, and remanded the cases for new adjudication.

III. The decision was adopted unanimously.

Cross-references:

Constitutional Court:

- no. U-II-1/04, 26.02.2004, *Bulletin* 2004/1 [SLO-2004-1-001].

European Court of Human Rights:

- *Kurić and others v. Slovenia*, no. 26828/06, 26.06.2012, *Reports of Judgments and Decisions* 2012.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2015-3-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.06.2015 / **e)** U-I-294/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 46/15 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

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

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

Keywords of the alphabetical index:

Detention, healthcare institution / Detention, judicial control / Detention, psychiatric hospital / Guardian / Legal capacity, lack / Legal capacity, restricted.

Headnotes:

Interference with personal liberty is only admissible in such cases and pursuant to the procedures provided by law. A procedure can only be deemed to be regulated by law in a constitutionally consistent manner, if it provides the constitutional procedural safeguards that follow from the Constitution. These safeguards must also be guaranteed in procedures for the committal of persons who have been deprived of their legal capacity to a secure ward in a social care institution.

Summary:

I. The Human Rights Ombudsperson asked the Constitutional Court to review the constitutionality of the Mental Health Act, as there were concerns over the constitutionality of provisions that regulate the procedure for the committal of persons who have been deprived of legal capacity to a secure ward in a social care institution. Under these provisions, the legal representative or guardian of such a person can give consent for their committal to and discharge from a secure ward, rather than the person concerned. In such instances, the committal was considered voluntary and the affected person was not ensured judicial protection against the committal.

II. The Constitutional Court noted that sometimes individuals suffering from a mental disorder must be committed to a secure ward in a social care institution so that they can be provided with proper health care and social care. It further noted that in procedures for the committal of persons who have been deprived of legal capacity, it is the legal representative or guardian of the person concerned who submits consent for committal to and discharge from a secure ward, not the person in question. This results in an encroachment on the right to personal liberty as determined by Article 19.1 of the Constitution of individuals being committed in this way.

Under Article 19.2 of the Constitution, interference with personal liberty is only admissible in such cases and pursuant to such procedures as are provided by law. The Constitutional Court found that the challenged regulation did not satisfy the second requirement, in accordance with which deprivation of liberty is only admissible pursuant to such procedure as is provided by law. It clarified that a procedure can

only be deemed to be regulated by law in a constitutionally consistent manner if it guarantees the constitutional procedural safeguards that follow from Article 22 of the Constitution. The challenged provisions failed to guarantee these safeguards, as persons who have been deprived of their legal capacity were completely excluded from participating in the process of their committal. The Constitutional Court emphasised that the fact that a person has been deprived of legal capacity does not relieve the legislator of the obligation to regulate their position and rights in a manner that would enable them to independently invoke and protect their human rights to the greatest extent possible. In fact, the legislator is specifically bound to do so by Article 52.1 of the Constitution and the Convention on the Rights of Persons with Disabilities.

The Constitutional Court abrogated the challenged provisions of the Mental Health Act and delayed the effects of the abrogation for a period of one year following the official publication of the decision. It also determined that until the legislator remedies the established unconstitutionality, in all instances of committal of persons who have been deprived of legal capacity to a secure ward of a social care institution, timely judicial control of the committal must be ensured.

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).



Spain

Constitutional Court

Important decisions

Identification: ESP-2015-3-010

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 05.10.2015 / **e)** STC 203/2015 / **f)** Trade union freedom and freedom of expression / **g)** *Boletín Oficial del Estado* (Official Gazette), 272, 13.11.2015; www.boe.es/buscar/doc.php?id=BOE-A-2015-12288 / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24634>; CODICES (Spanish).

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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

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

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

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

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

Keywords of the alphabetical index:

Dismissal, employee's conduct / Freedom of expression, protection, scope / Insult / Union, representativeness.

Headnotes:

Trade union freedom cannot be permitted to exceed the limits of the freedom of expression; in particular, when a representative of employees does not express opinions against a business situation but against the behaviour of a worker. The adjectives used to define the action of a worker criticised by a trade union representative were completely outside of the labour conflict and were offensive, and this could seriously damage the reputation of the worker within her working environment. Offensive opinions in this context are absolutely proscribed and may result in lawful dismissal for misconduct.

Summary:

I. A worker, who was also a union representative, had written a release concerning a labour conflict. The document criticised both the behaviour of the Chairman of the works council related to an imposition of a penalty, and the participation of another worker as a witness in the trial for the same issue. This release was posted in a board and distributed by its author and by a union delegate. As a result, the union representative was dismissed due to a serious misconduct of "verbal or physical ill-treatment or a gross disrespect for his superiors, colleagues and subordinates".

The ordinary courts considered the dismissal lawful because the behaviour of the worker was not protected by the freedom of expression.

II. The Constitutional Court rejected the *amparo* appeal. The Court held that there was no infringement of freedom of expression related to trade union freedom. The adjectives used to define the action of the worker were completely outside of the labour conflict and were offensive, and this could seriously damage the reputation of the worker within her working environment.

Furthermore, the Court also rejected argument that the trade union freedom connected to the indemnity guarantee had been violated. The Constitutional Court considered that there are no facts attesting to the link between the previous labour conflicts and the dismissal.

Moreover, the Court found that the principle of non-discrimination in trade union matters had been respected, despite the fact that other workers, who participated in the conflict, had not been fired. In the Court's view, it was not possible to equate the distribution of the release with its preparation. Both actions do not together constitute a unique collective expression.

Finally, the Court held that the special constitutional significance of the *amparo* appeal lies in the necessity of bringing up to date the constitutional case-law on freedom of expression related to trade union freedom; in particular, when a representative of employees does not express opinions against a business situation but against the behaviour of a worker.

Cross-references:

- Articles 14, 20, 24 and 28 of the Constitution.

Constitutional Court:

- no. 213/2002, 11.11.2002;
- no. 198/2004, 15.11.2004;
- no. 56/2008, 14.04.2008;
- no. 65/2015, 13.04.2015.

European Court of Human Rights:

- *De Diego Nafría v. Spain*, no. 46833/99, 14.03.2002;
- *Haldimann and Others v. Switzerland*, no. 21830/09, 24.02.2015 (in particular paragraph 46), *Reports of Judgments and Decisions* 2015.

Languages:

Spanish.

**Identification: ESP-2015-3-011**

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 05.11.2015 / **e)** 232/2015 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 296, 11.12.2015; www.boe.es/boe/dias/2015/12/11/pdfs/BOE-A-2015-13479.pdf / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24698>; CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Law of the European Union/EU Law – **Secondary legislation.**

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the EU.**

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

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

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

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

Keywords of the alphabetical index:

European Union, law, primacy / Preliminary question, obligation to request a preliminary ruling / Effective judicial protection, right / Education, teacher, employment, system / Treatment, discriminatory.

Headnotes:

The European Union law, as interpreted in the European Union Court of Justice's case-law, must be given primacy by national courts over any incompatible national law. The failure by a national court to take into account a Community directive when resolving an employment dispute constituted a violation of the right to an effective judicial remedy.

Summary:

I. The Administration of the Autonomous Community of Madrid rejected the *amparo* appellant's claim for recognition of the specific financial supplement due to his professional training ("*sexenios*"), to which he would have been entitled if he had been a civil servant and not an interim employee. Against this decision, the applicant filed an administrative appeal, which was eventually dismissed. The Appeal Court judgment did not take into account Community Directive 1999/70/CE and Community case-law that equate civil servants with interim employees for the purposes of recognising such supplements. Also, the Chamber did not file a request to the European Court of Justice for a preliminary ruling.

II. On the basis of Constitutional Court Judgment 145/2012, of 2 July 2012, the Constitutional Court upheld the *amparo* appeal, declaring that there had been a violation of the right to an effective judicial remedy.

Before the appeal was resolved, the European Court of Justice had already rendered a judgment on the correct interpretation of the non-discrimination principle settled in the Community Directive. In the *Lorenzo Martínez* case, among others, it was stated that when it comes to "*sexenios*", the Spanish law, which recognises the specific financial supplement only to civil servants excluding interim employees, violates the non-discrimination principle. The Constitutional Court considered that the contested decision ignored the above-mentioned Directive, "without giving reasons of the convenience of filing a new request for a preliminary ruling", violating the principle of primacy of the European Union Law and selecting arbitrarily the rule applied to the case.

Finally, the Court held that the special constitutional significance of the *amparo* appeal lies in the opportunity to develop the constitutional case-law on the importance of the infringement of European Union Law, as well as to assess the need to maintain or adjust Court doctrine about the right to equality between civil servants and interim employees.

Cross-references:

- Article 24.1 of the Constitution;
- Article 4.1 of the Council Directive 1999/70/EC of 28.06.1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

Constitutional Court:

- no. 145/2012, 02.07.2012;
- no. 290/2006, 09.10.2006.

Court of Justice of the European Union:

- C-556/11, *Lorenzo Martínez* [2012], 09.02.2012;
- C-307/05, *Cerro Alonso* [2007], 13.09.2007;
- C-444/09, *Gavieiro Gavieiro and Iglesias Torres* [2010], 22.12.2010;
- C-283/81, *Cifit* [1982], 06.10.1982.

Languages:

Spanish.



Identification: ESP-2015-3-012

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 02.12.2015 / **e)** 259/2015 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 10, 12.01.2016; www.boe.es/boe/dias/2016/01/12/pdfs/BOE-A-2016-308.pdf / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24722>; CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

3.8.1 General Principles – Territorial principles – **Indivisibility of the territory.**

3.13 General Principles – **Legality.**

4.1.1 Institutions – Constituent assembly or equivalent body – **Procedure.**

4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers.**

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

4.8.6.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Deliberative assembly.**

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

5.5.4 Fundamental Rights – Collective rights – **Right to self-determination.**

Keywords of the alphabetical index:

Autonomy, secession, unilateral / Constitution, amendment / Constitution, supremacy / Legality, nationality, element / Loyalty, constitutional, principle / Sovereign power, limitation / Sovereignty, nation / Unity, principle.

Headnotes:

The entitlement of sovereignty in the people of an Autonomous Community always constitutes a denial of national sovereignty. A constituent process of an Autonomous Community that modifies the constitutional order can be defended, but only insofar as it respects the Constitution and the formal procedures for amending the Constitution. The democratic legitimacy of a legislative body does not exclude the necessary respect for constitutional legality.

Summary:

I. The Government of the Nation challenged Resolution 1/XI of the Parliament of Catalonia, 9 November, on the beginning of a political process about the creation of an independent Catalan State in form of a republic, as the consequence of the autonomic electoral results of 27 September 2015.

The Government of the Nation considered that this Resolution is a secession act imposed unilaterally, with no respect for the principles of the Constitution and the Rule of Law. The Parliament of Catalonia defended the lawfulness of its Resolution considering that it was based on the democratic mandate received by the Catalan people. It also questioned the possibility for the challenged Resolution to be the object of the constitutional process.

II. As a preliminary ruling, the Constitutional Court examined the dispute concerning the possibility for the challenged Resolution to be a suitable subject-matter for constitutionality proceedings held under Article 161.2 of the Constitution and Articles 76 and 77 of the Organic Law of the Constitutional Court. In Judgment 42/2014 of 25 March, the Constitutional Court had already decided the question expressing the concurring requirements to challenge acts of Autonomous Communities without force of law. According to this case-law, such acts can be the object of the said constitutional proceedings, firstly, if they constitute a conclusive expression of the Chamber's intent and, secondly, if they have the capacity to produce legal effects. The Constitutional Court declared that the challenged Resolution fulfils the two requirements and it can be suitable object of the constitutional process. On one hand, the Resolution 1/X1 expresses the conclusive intent of the Catalan Parliament; on the other hand, it is able to produce, not only political, but also legal effects.

Having resolved this procedural question, the Constitutional Court declared the unconstitutionality of the challenged Resolution and its nullity. The Court affirmed that this parliamentary act infringes the constitutional rules concerning national sovereignty and the unity of the State. In fact, the Parliament of Catalonia operates akin to the titular of a constituent power that emanates from the Catalan people, recognised like a sovereign juridical subject. However, the Constitutional Court declared that the entitlement of sovereignty in the people of an Autonomous Community always constitutes a denial of national sovereignty, because it cannot be assigned to any entity or body of the State or to any fraction of the national people. According to the Court, a similar political process must respect the Constitution and the formal revision procedures.

The Constitutional Court also considered that the challenged Resolution infringes the principle of the unconditional supremacy of the Constitution. First, because the Parliament of Catalonia acts through its own parliamentary procedure and not through the constitutional proceedings. Second, because it announces that its democratic legitimacy allows it to adopt all the necessary decisions, even without respecting those decisions assumed by the other institutions of the State. In sum, the Constitutional Court affirmed that the democratic legitimacy of a legislative body does not exclude the necessary respect of the constitutional legality, because the lawfulness of an act of a public power stands on its conformity to the Constitution and the legal order. In this sense, the Constitutional Court declared that the Resolution also attacks the principle of democracy. By infringing the supremacy of the

Constitution, the challenged Resolution is contrary to the relevant manifestations of democracy contained in the Constitution.

Finally, the Court affirmed that the Resolution violates the constitutional rules concerning the procedure for constitutional reform. The Constitutional Court considered that the Parliament of Catalonia did not follow the constitutional channels explicitly provided to modify the constitutional order. Starting the political process through its own parliamentary procedure is incompatible with the social and democratic State of Law.

Cross-references:

- Articles 1, 2, 9.1, 161.2 and 168 of the Constitution.
- Articles 76 and 77 of the Law of the Constitutional Court of Spain (Organic Law 2/1979 of 03.10.1979 on the Constitutional Court).
- Articles 1, 2.4 and 4.1 of Catalonia Autonomy Statute (Organic Law 6/2006 of 19.07.2006 of Reform of the Catalonia Autonomy Statute).

Constitutional Court:

- no. 31/2010, 28.06.2010, *Bulletin* 2010/2 [ESP-2010-2-005];
- no. 42/2014, 25.03.2014.

Languages:

Spanish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2015-3-006

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 06.11.2015 / **e)** 1B_169/2015 / **f)** A. and B. v. C. / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 141 I 211 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.13 General Principles – **Legality.**
- 3.16 General Principles – **Proportionality.**
- 3.18 General Principles – **General interest.**
- 5.3.13.9 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Public hearings.**
- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.22 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:

Address / IP address / Fine / Public hearing / Court reporter / Personal data, information on the subject / Internet, racist remarks, dissemination / Journalist, access to information / Surname / Photograph, publication / Defendant / Criminal proceedings, hearing / Publication, ban.

Headnotes:

Articles 16, 17 and 36 of the Federal Constitution, Articles 69 *et seq.* of the Swiss Code of Criminal Procedure, § 11 *et seq.* of the Zurich cantonal order on consultation of a case-file, restriction on the reporting of a public criminal hearing.

Due to lack of sufficient legal basis, the criminal court could not prohibit court reporters, under the threat of an administrative fine, from publishing information concerning the defendant (recital 3).

Summary:

In 2013 C. was prosecuted for having published Islamophobic remarks on Twitter. At C.'s request, a single judge ordered the court reporters and representatives of the press to respect the defendant's anonymity. The judge prohibited them from revealing the defendant's name, age, address, blog address and employer and from publishing his photo in their reporting. Reporters or representatives of the press who did not respect this order risked a fine of 1 000 Swiss francs. The single judge communicated his decision in writing to the defendant, the prosecution service and the claimants. The court reporters were orally informed of the decision at the hearing. The accredited court reporters A. and B. appealed against this decision before the cantonal court, which partially allowed the appeal: it lifted the ban on publishing the name and age of the defendant.

A. lodged a criminal appeal with the Federal Court seeking a ruling on whether the order given by the Canton of Zurich on consultation of the case-file constituted a sufficient legal basis for limiting the freedom of the press and the freedom of information of court reporters. B. also appealed and asked for the ban on publishing the defendant's blog address to be lifted. The Federal Court joined the two cases.

Freedom of information is guaranteed by Article 16 of the Federal Constitution. Each individual has the right to freely receive information, to obtain it from generally accessible sources and to disseminate it. Article 17 of the Federal Constitution guarantees freedom of the media and prohibits censorship. The free movement of information and the exchange of opinions form the core elements of freedom of the media. Investigative work carried out by journalists and public dissemination of the result is safeguarded. Freedom of opinion and freedom of information play an important social and political role. As conveyors of information, the media form a link between the State and the public and contribute to scrutiny of State activities.

The ban preventing the court reporters from publishing information concerning defendant C. was an infringement of freedom of the media. Under Article 36 of the Federal Constitution, restrictions on fundamental rights must have a legal basis, be justified by a public interest or by the protection of the fundamental rights of others and be proportionate. Serious restrictions on fundamental rights require a clear, explicit provision contained in a law in the formal sense.

Article 69 of the Swiss Code of Criminal Procedure (CCP) implements Article 30.3 of the Federal Constitution, in particular, and establishes the public nature of proceedings. As citizens are unable continuously to follow proceedings, the media plays an important role in making the work of judges accessible to a wider audience. Through their court reporters, the media makes the justice system and case law more transparent. On certain conditions, a court can restrict the public nature of a hearing or order an in camera hearing (Article 70 CCP). Court reporters can, however, be granted permission to attend hearings held in camera. They are therefore in a more privileged position than the public.

In this instance, the proceedings taking place before the single judge were public. However, the ban on revealing information about the defendant, decided by the single judge, concerned only the court reporters, but not the rest of the public. The court reporters were therefore placed in a less favourable position. Such a situation was contrary to the principle whereby court reporters must be in a more privileged position than the public.

The ban decreed by the single judge considerably restricted the content of reports on the hearing. Such State interference in media content requires a specific reason. The infringement of media freedom can be seen to have been even more significant as the defendant is a public figure, who was looking for public attention through his blog, by raising political themes, particularly immigration and criminal proceedings. Lastly, the court reporters risked a fine of 1000 Swiss francs. This is a considerable sum that would have a dissuasive effect on court reporters.

Article 72 CCP permits cantons to lay down rules relating to court reporters. However, the Zurich cantonal legislation, in particular the order on consultation of the case-file, was devoid of a sufficient legal basis to justify restricting the freedom of the media.

The Federal Court therefore ruled that restricting the media freedom of the two court reporters was unlawful and allowed their appeal.

Languages:

German.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2015-3-004

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 18.02.2015 / e) U.br.48/2013 / f) / g) / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Defamation / Insult / Civil liability.

Headnotes:

The Law on Civil Liability for Defamation and Insult, which decriminalised defamation and insult, is a material and not a procedural law and therefore the two-third majority votes requirement under Amendment XXV of the Constitution does not apply to its enactment.

Summary:

I. The applicants (twelve associations of citizens and foundations organised into an informal coalition under the name of "Front for Freedom of Expression") requested the Constitutional Court to consider the constitutionality of the Law on Civil Liability for Defamation and Insult ("Official Gazette of the Republic of Macedonia", no. 143/2012), hereinafter, "LCLDI".

The LCLDI was adopted in 2012 with the purpose of decriminalising defamation and insult. Article 1 of the

LCLDI regulates the civil liability for damage inflicted to the honour and reputation of a natural or legal person by defamation and insult. It also establishes rules regarding the reimbursement of damages and other legal consequences of liability for insult and defamation and regulates the procedure for determination of liability and compensation for damage.

The applicants contended that the challenged law was unconstitutional because it had been adopted by a simple majority of votes in Parliament, contrary to Amendment XXV of the Constitution, which requires two-third majority of votes for laws that regulate procedures before the courts. They also challenged several separate provisions of the LCLDI.

II. The main findings of the Court may be summarised as follows:

1. The LCLDI regulates material issues related to liability and requirements for determining and for exemption from liability for defamation and insult. The LCLDI also refers to the application of procedural rules laid down in the Civil Procedure Law, which is adopted by a two-third majority vote. Since it is a material and not procedural law, the requirement of Amendment XXV of the Constitution for two-third majority votes for its enactment does not apply.

2. The fact that the Law on Obligations regulates in a general manner, *inter alia*, the grounds for compensation of damage, is not an obstacle for the legislator within its constitutional powers (Article 68.1.2 of the Constitution) to further regulate certain issues by *lex specialis* such as the contested LCLDI.

3. Various forms of artistic and satirical expression could not in advance and automatically be regarded as inoffensive. Their impact should be assessed on a case-by-case basis, taking into account the specific circumstances of the case (e.g. subject-matter of artistic expression, context, status of person involved, author's intention to violate the rights of another person, and form of expression).

4. The reputations of legal persons and groups of people should also be protected. As holders of honour and reputation, they must enjoy protection as stipulated in the contested Articles 6.2 and 8.2 of the Law. The courts should apply the Law based on the specific circumstances of each individual case and from the factual material available to them in order to strike a right balance between the protection of these people's reputation and freedom of expression.

5. The disputed provisions of Articles 6.3 and 8.3 of the Law define the general liability for libel and insult committed through the mass media. However, it does

not automatically follow that the editor or the person who replaces him or her will always and in any case be responsible for the statement given by another person (the author of the statement) in a live broadcast show. The reason is that it is a factual issue that should be determined by the court in each concrete case.

6. The grounds for exclusion of liability for insult for a statement made in the work of the Assembly, in the work of municipal councils and the City of Skopje, in administrative or judicial proceedings or before the Ombudsman, apply to persons who enjoy immunities pursuant the Constitution and laws. They are worded in a way that is consistent with the constitutional provisions.

7. The contested Article that places the burden of proof in defamation cases on the defendant is in accordance with Article 10 ECHR and the case-law of the European Court of Human Rights.

8. Taking into consideration the special role played by the media in a democratic society, the Court found that the determination of the highest amount of compensation for non-material damage for insult and defamation committed by a journalist, editor or legal entity arises from the need for them to be protected from excessively high amounts of compensation. The question as to whether the concrete amounts set down in the Law are high or not is a matter of expediency that is appraised by the legislator. The question of their application in practice is within the competence of the regular courts and not the Constitutional Court.

9. Article 23.3 of the LCLDI precisely defines the grounds when the court may pronounce interim measures (statement to be already published and to have reasonable assurance that its further publication will inflict irreparable damage to the injured party). The Court also considered that the defendant's right to appeal is not violated, given that in the appeal against the judgment he or she may also appeal the resolution ordering an interim measure.

The Constitutional Court held that the disputed LCLDI as a whole and also the disputed articles thereof do not contravene the Constitution, and did not initiate a procedure for constitutional review.

III. Judge Natasha Gaber-Damjanovska disagreed with the majority and submitted a separate opinion attached to this Resolution.

Supplementary information:

- Parliamentary Assembly Resolution 1577 (2007) "Towards decriminalisation of defamation".

Venice Commission documents:

- *CDL-AD(2013)024 – Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan;*
- *CDL-AD(2014)011 – Report on the scope and lifting of parliamentary immunities.*

Cross-references:

European Court of Human Rights:

- *Vereinigung Bildener Künstler v. Austria*, no. 68354/01, 25.01.2007;
- *Otto-Preminger-Institut v. Austria*, no. 13470/87, 20.09.1994, Series A, no. 295-A;
- *Muller and others v. Switzerland*, no. 10737/84, 24.05.1988, Series A, no. 133;
- *Jersild v. Denmark*, no. 15890/89, 23.09.1994, Series A, no. 298;
- *Lionarakis v. Greece*, no. 1131/05, 05.07.2007;
- *Gunduz v. Turkey*, no. 3507/97, 04.12.2003;
- *Fuentes Bobo v. Spain*, no. 39293/98, 29.02.2000;
- *Filatenko v. Russia*, no. 73219/01, 06.12.2007;
- *A. v. United Kingdom*, no. 3537, 17.12.2001;
- *McVicar v. United Kingdom*, no. 46311/99, 07.05.2002, *Reports of Judgments and Decisions 2002-III*;
- *Steel and Morris v. United Kingdom*, no. 68416/01, 15.02.2005, *Reports of Judgments and Decisions 2005-II*;
- *Bladet Tromso and Stensaas v. Norway*, no. 21980/93, 20.05.1999, *Reports of Judgments and Decisions 1999-III*;
- *Times Newspaper Ltd. v. United Kingdom*, nos. 3002/03, 23676/03, 10.03.2009, *Reports of Judgments and Decisions 2009*;
- *Tolstoy Miloslavsky v. United Kingdom*, no. 18139/91, 13.07.1995, Series A, no. 316-B;
- *Kasabova v. Bulgaria*, no. 22385/03, 19.04.2011.

German Federal Constitutional Court:

- BVerfGE 75, 369 1 BvR 313/85.

Languages:

Macedonian, English (translation by the Court).



Turkey Constitutional Court

Important decisions

Identification: TUR-2015-3-003

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 14.01.2015 / **e)** 2015/12 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 22.05.2015, 29263 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
- 5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law.**
- 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**
- 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

Keywords of the alphabetical index:

Judiciary, independence / Impartiality, institutional.

Headnotes:

The “criminal judicature of peace” was established as a new judicial institution “to take decisions which need to be taken by the judge in the investigation phase”. This new institution aims to serve the public interest by ensuring that investigation phase decisions are taken by judges specialised in taking such decisions and, therefore, it does not contradict the principle of the rule of law. The impersonal and predetermined allocation of cases to judges (principle of natural judge) prohibits the creation of judicial authorities or appointment of judges with competence to try conflicts or crimes that took place before their creation. The criminal judicatures of peace are not

created or appointed for trying a specific case, person or group. They have jurisdiction over all conflicts and crimes which fall within their scope and, therefore, no aspect of these institutions is contrary to the guarantees of a legal judicial process.

Summary:

I. Eskişehir 1st Criminal Judicature of Peace applied to the Constitutional Court claiming that the legal provision establishing a new judicial organ, the “criminal judicature of peace” (authorised to take decisions which need to be taken by a judge in the investigation phase), leaves the outcome of the investigations conducted in Turkey to the initiative of the political power and that this situation breaches the principle of the rule of law, the right to legal remedies, personal security and freedom, and the principles of judicial independence and natural judge.

The applicant organ also claimed that, as any objection made to the decisions given by any of the criminal judicatures of peace in limited numbers are finally concluded by an authority within the same system, this would render the objection process ineffective, which is in breach of the principle of the rule of law, the principle of natural judge, personal freedom and security and the right to a fair trial.

II. Rendering its judgment on 14 January 2015, the Constitutional Court emphasised that it falls into the discretionary power of legislator to determine the establishment, structure, functions and powers and operation and trial procedures of the courts as per Article 142 of the Constitution. Taking into account the legislative intent of the provision and its objective content, the Constitutional Court established that the criminal judicatures of peace have been established with a view to enabling these judges to specialise in taking decisions required to be taken at the investigation stage by a judge.

The Constitutional Court noted that in practice, dealing with cases is regarded as the main task while the decisions required to be taken at the investigation stage are regarded as a subsidiary task and that there have been significant right violations as the actions required to be carried out at the investigation stage could not be adequately addressed. The Court also indicated that the practice whereby the same judges, who have previously issued their opinions on the imputed offence and the suspect, sit on the court which deals with the merits of the case, has been criticised by the European Court of Human Rights.

Accordingly, the Court observed that the task of “taking decisions required to be rendered by the judge at the investigation stage”, which was

previously performed by the Criminal Courts of Peace and has now been assigned to the criminal judicatures of peace, and that the establishment of the latter organs, which are entrusted with only the task of giving decisions required to be taken by the judge at the investigation stage with a view to enabling such specialised judges to deal with only these decisions, has pursued the aim of serving the public interest. Therefore, the establishment of criminal judicatures of peace does not constitute any contradiction of the principle of the state based on the rule of law (hereinafter, “the state of law”).

The Court emphasised that the impersonal and predetermined allocation of cases to judges (principle of natural judge) prevents the establishment of a judicial authority and appointment of a judge after an offence is committed or a dispute occurs. However, the guarantee of the natural judge should not be understood in the manner that newly established courts or judges recently appointed to the existing courts can under no circumstances participate in proceedings concerning offences previously committed. It does not contradict the principle of the natural judge in cases where a newly-established court or a judge newly appointed to an existing court tries conflicts or crimes that took place before their creation or appointment, provided that such courts or judges are not created or appointed for trying a specific case, person or group. To hold the contrary would result in a failure to establish new courts. The Court concluded that the provision is not, in any aspect, in breach of the guarantee of the natural judge by taking into account the facts that the contested provision does not aim to determine the place of jurisdiction where the relevant case would be handled after committing of a certain offence and that it has been applied in respect of all conflicts which fall into its scope following its entry into force.

Considering that such judges are appointed by the High Council of Judges and Prosecutors (the HCJP) and have the legal guarantee of judges enshrined in the Constitution as all other judges, the Court indicated that there is no ground which would lead to the conclusion that these judges’ offices are considered to have a different status to those of other judges in respect of independence and that guarantees for their independence have been undermined. The Court indicated that it cannot be asserted that these criminal judicatures of peace suffer from a lack of objective impartiality *vis-à-vis* the regulations ensuring independency and included in the Constitution and law provisions to which criminal judicatures of peace are subject and the guarantees ensuring independence and impartiality of judges to take office therein. The Court also specified that the allegation of subjective independence, which is

completely associated with the personal conduct of the judge, may only be asserted in the cases being dealt with on the basis of concrete, objective and plausible evidence, and that the matter of subjective impartiality, which is discussed in the relevant procedural law, falls outside the scope of constitutional review. Consequently, the Court rejected the request for annulment of the provision relying on the above-mentioned grounds.

Other contested provisions set out that, where there is more than one criminal judicature of peace in a given district, the objections to a decision given by the criminal judicature of peace shall be reviewed by the judge's office with the consecutive number. Objections to any decision given by the judge's office of the last number shall be reviewed by criminal judicatures of peace no. 1. Where there is only one criminal judicature of peace office in regions where there is no assize court, objections shall be reviewed by the criminal judicature of peace located in the district of jurisdiction of the relevant assize court. Where there is only one criminal judicature of peace in regions where there is an assize court, objections shall be reviewed by the criminal judicature of peace in the region where the closest assize court is located.

In the application, it was maintained that as any objection made to the decisions given by any of the criminal judicatures of peace in limited numbers are finally concluded by an authority within the same system, this would render the objection process ineffective, which is in breach of the principle of the state of law, the principle of the natural judge, personal freedom and security and the right to a fair trial.

The Constitutional Court noted that the right to legal remedies and the right to a fair trial are among the most efficient guarantees which would ensure proper enjoyment and protection of fundamental rights and freedoms and that the right to legal remedies falls within the scope of the right to a fair trial.

Emphasising the requirement that the appeal courts are entitled to amend the decision being reviewed when necessary with a view to ensuring efficient implementation of the right to legal remedies guaranteed under Article 36 of the Constitution, the Court ascertained that the criminal judicatures of peace are entitled to review the contested decision and give decision as to the merits of the case and it has therefore concluded that the legal remedy provided is an efficient one.

The Court indicated that there is no constitutional norm which requires review of the objections to the decisions rendered by the criminal judicature of peace's offices by another court of higher jurisdiction and noted that the authority reviewing the contested decision must not be necessarily an authority of higher jurisdiction provided that an effective review is ensured.

On the other hand, the Court indicated that conclusion of the objections to a court's decision by the court with the consecutive number in the same place is an established practice in both criminal and civil justice law.

The Court finally noted that the method in which an objection to the decisions given by the criminal judicatures of peace considered to become specialised in the security measures as they are entrusted independently with this duty is raised before and concluded by another criminal judicature of peace, which has specialised in the same issue aims to serve the public interest. The Constitutional Court accordingly held that this provision is not unconstitutional.

Languages:

Turkish, English (unofficial translation by the Court).



Identification: TUR-2015-3-004

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 27.05.2015 / **e)** 2015/51 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.06.2015, 29382 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation**.
 5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Marriage and family, protection / Marriage, right, limitation criteria / Religion, neutrality of the state.

Headnotes:

Imprisonment of those who marry by arranging a religious ceremony without executing an official civil marriage, and of those who conduct a religious marriage ceremony without seeing the certificate of civil marriage, is a violation of the freedom of conscience and the right to family life. Under Article 13 of the Constitution, the right to demand respect for private and family life and the freedom of religion and conscience may be restricted only by law and to the extent that it is necessary in a democratic society. In addition, these restrictions must not be contrary to the letter and spirit of the Constitution, the requirements of the democratic order of the society, the secular republic, and the principle of proportionality.

Summary:

I. Pasinler District Chief Public Prosecutor Office filed a public case against the defendant alleging that he committed the crime of getting married with a religious ceremony without obtaining a civil marriage, which is an offence under Article 230.5 of the Turkish Penal Code (hereinafter, "TCK") and against another defendant alleging that he committed the crime of conducting a religious wedding ceremony without a civil marriage as per Article 230.6 TCK.

During the hearing of the case on 24 January 2014, the court of first instance considered the challenged provisions, namely Article 230.5 and 230.6 TCK, to be contrary to the Constitution and referred the case file to the Constitutional Court for constitutionality review.

The contested provisions of law criminalise the acts of marrying by arranging a religious ceremony without executing official marriage transactions and of conducting such a religious ceremony. The applicant court of first instance argued that marrying by arranging a religious ceremony and conducting such a ceremony are issues of private life and of the freedom of religion and conscience. Living together without an official marriage contract does not constitute a crime under the Turkish legal system. The applicant court claimed, under these conditions, that imposing an imprisonment sanction on marriage by arranging a religious ceremony and conducting such a ceremony is contrary to the right to respect to private life and family life under Article 20 of the

Constitution, freedom of religion and conscience under Article 24 of the Constitution, the principle of equality before law under Article 10 of the Constitution and the right to protect and improve one's material and spiritual entity under Article 17 of the Constitution.

II. The Constitutional Court decided that the application should be examined from the standpoint of the right to demand respect for private and family life under Article 20 of the Constitution and the freedom of religion and conscience guaranteed under Article 24 of the Constitution. The application was found to be irrelevant to Articles 5 and 17 of the Constitution. Furthermore, given that Article 13 of the Constitution includes the criteria to be observed in limiting fundamental rights and freedoms, it was also decided to carry out an assessment under this Article.

First, the Constitutional Court emphasised that "the right to demand respect for private and family life" aims to protect the secrecy of private and family life and to prevent it from being exposed publicly. In other words, it protects the individual's right to demand all issues and events in his or her private life to be known to only himself or herself or those he or she wishes to reveal and disclose. Furthermore, it aims to prevent public authorities from interfering in any individual's private life; i.e. it guarantees the individual's right to control and live his or her personal and family life according to his or her own sense and understanding. In this context, the Constitutional Court noted that Article 20 of the Constitution protects private life and family life against the State, society and other people, subject to the exceptions under Constitution.

Second, the Constitutional Court assessed the freedom of religion and conscience guaranteed under Article 24 of the Constitution and noted that this freedom is "one of the foundations of a democratic society" and a fundamental right that goes "to make up the identity of people and their conception of life". The Court also noted that, in a similar manner to the right to demand respect for private and family life, the freedom of religion and conscience constitutes, in principle, a space that cannot be interfered with by the State and others.

On the other hand, the Constitutional Court noted that the right guaranteed under Articles 20 and 24 of the Constitution is not absolute, by stating that certain limitations may be introduced to this right. However, the Court emphasised that such limitations must be in accordance with Article 13 of the Constitution, i.e. they shall not impair the essence of the right, and shall not be contradictory to the requirements of the democratic order of the society and the principal of proportionality.

The Constitutional Court noted that, under the principle of proportionality, there must be a requirement of the democratic order of the society in order to interfere in the right to demand respect for private and family life and the freedom of religion and conscience, and there must not be any other means available to protect the rights of spouses arising from the establishment of conjugal community other than the said limitation.

The Court noted that the legal order allows for legal arrangements for the protection of people's rights arising from the establishment of conjugal community, that the relevant provisions of the Turkish Civil Code require the spouses to have their official marriage transactions completed in order to claim their rights arising from matrimony, that they would be deprived of certain rights if they do not have official marriage transactions, that this deprivation of rights constitutes a civil sanction for those who do not execute official marriage transactions and this sanction is adequate to ensure that people execute these transactions, and, therefore, there is no need to impose penal sanctions on the acts of marrying by arranging a religious ceremony or conducting a religious marriage ceremony in accordance with people's religious beliefs.

Consequently, the Constitutional Court concluded that the measures were not necessary in a democratic society; in particular, the contested provisions of law are not necessary for the protection of family order, which is the purpose of the limitation introduced with those provisions. The Court also concluded that, under these circumstances, given that marrying by arranging a religious ceremony or conducting a religious marriage ceremony falls into the scope of the right to demand respect for private and family life and the freedom of religion and conscience, criminalising such acts and introducing a penal sanction against these acts constitute a disproportionate interference to the said rights and thereby contradict the principle of proportionality. The Constitutional Court ruled for annulment of the contested legal provisions.

III. Out of seventeen justices, four delivered two dissenting opinions. The three dissenting judges disagreed on the grounds that one of the reform laws protected under Article 174.4 of the Constitution prescribes "the principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official adopted with Turkish Civil Code no. 743 of 17 February 1926, and the provisions of Article 110 of the Code. They also argued that "freedom of religion and conscience" cannot be given precedence against this reform law as Article 174.4 of the Constitution must be interpreted together with the principles stated in the Preamble and Articles 2, 4, final paragraph of 24 and 41 of the Constitution.

The other dissenting judge reasoned that this regulation imposes a sanction in the nature of "coercive detention" for the said crime, which is different from effective repentance and extenuating circumstances. The purpose of this regulation is not to punish someone for conducting a religious ritual, but to ensure that a religious ceremony is conducted after the official proceedings of civil marriage. This regulation aims to prevent possible losses of rights of women and children, which may arise when the religious marriage remains ineffective due to deferral of the official civil marriage.

Languages:

Turkish, English (unofficial translation by the Court).



Identification: TUR-2015-3-005

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 04.06.2015 / **e)** 2014/12151 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 01.07.2015, 29403 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Criticism / Freedom of the media / Political expression, freedom.

Headnotes:

Freedom of expression and the freedom of political discussion is "the basic principle of all democratic systems". The public authorities must tolerate the severest criticism directed towards them by virtue of the public power vested in them. Even if the execution of a sanction is postponed, the risk of a new investigation has a deterrent effect ("chilling effect") on the journalist to express their opinions or press activities.

Summary:

I. In the incident giving rise to the present application, which was concluded by the Constitutional Court in its plenary sitting on 4 June 2015, the applicant is a columnist in a nationwide daily newspaper called “*Cumhuriyet*” (the Republic). The applicant penned an article entitled “Painted Stairs” in the issue of the newspaper dated 4 July 2013 on the protests of painting the stairs which started in Istanbul and spread nationwide. In the article, the applicant criticised the politicians and deputies in a strong language. Making reference to the red colour of chairs in parliament, he or she implied that deputies get angry and attack colours. A criminal case was filed against the applicant on account of said article with the allegation of “insulting public officers who were working as a committee”. The Criminal Court of First Instance sentenced the applicant for the thoughts which he or she expressed in his or her article and subsequently decided to suspend the pronouncement of the judgment. The applicant argued that his or her punishment for the thoughts he or she expressed in the article constituted a violation of his freedom of expression and freedom of the press.

II. The Constitutional Court noted that Articles 26.1 and 28.1 of the Constitution guarantee freedom of expression; and that the freedom of expression applicable for both real and legal persons includes all forms of expression such as political, artistic, academic or commercial opinions and convictions.

The Constitutional Court observed that, in the present application, the interference in the applicant’s freedom of expression was a part of measures aiming at the “protection of the reputation or rights of others”. The Court recalled that its duty is to make an assessment concerning whether a fair balance was struck in a democratic society between the applicant’s freedom of expression and the protection of the reputation or rights of others.

Recalling that before the publishing of said article in the newspaper, a series of social protests publicly known as the “Gezi demonstrations” took place in June 2013, the Court indicated that the acts of painting staircases, also called the “rainbow protest”, started in various places of Turkey for the alleged purpose of increasing awareness of protecting the environment; and that on the date of the incidents, some of the municipalities did not permit the act of painting staircases and repainted the staircases in their original colours.

In the Court’s opinion, the article which was at the centre of the application was penned as a part of the on-going discussions in the press and media organs and political spheres at the time of the incidents. The applicant’s expressions that led to his or her conviction criticise waggishly the reactions by some municipal officials and politicians against the protest of painting the cities’ staircases initiated by individuals to draw attention in their way to the environmental problems subsequent to the incidents known as “Gezi demonstrations”, which occupied the public agenda for quite a long period of time. Making a reference to news appearing in the media stating that colours of the General Assembly Hall of the Turkish Grand National Assembly, especially the red colour of the seats, have a negative impact on the mood of the parliamentarians, the applicant had made the criticism that a colourful environment was not welcomed by the politicians.

The Constitutional Court emphasised that freedom of expression mainly guarantees the freedom of criticism and, therefore, the severe expressions used in the course of disclosure or dissemination of the opinions must be deemed natural; and that on the other hand, it must be taken into account that the freedom of political discussion is “the basic principle of all democratic systems”.

Noting that the public authorities must tolerate the severest criticism directed towards them by virtue of the public power vested in them, the Constitutional Court has recalled that a sound democracy requires the supervision of a body exercising public power not only through judicial authorities, but also by non-governmental organisations, media and press or other actors of the political sphere, such as political parties. Likewise, tolerable limits of criticism towards politicians are wider than those of other individuals. Unlike other individuals, a politician intentionally makes each of his or her statements and actions open to the public, as well as other politicians’ scrutiny. That is why they must have a wider tolerance to criticism. Therefore, political expression must not be restricted unless there are compelling reasons.

In the Court’s opinion, although the probationary measure was applied in respect of the applicant upon the pronouncement of the suspension of judgment, the applicant, who is a writer, would always face a risk of the execution of his or her sentences during this probation period. The anxiety regarding being subject to sanctions has a disruptive effect on people and, although the person concerned is likely to complete his or her period of probation without a new conviction, there is always a risk for the person under the effect of such anxiety to refrain from expressing his or her opinions or performing press activities.

Consequently, the Court held that the interference in the applicant's freedom of expression and the freedom of the press for the purpose of the "protection of the reputation or rights of others" was not necessary in a democratic society. The Court accordingly held that the applicant's freedom of expression and freedom of the press guaranteed under Articles 26 and 28 of the Constitution had been violated.

Languages:

Turkish, English (unofficial translation by the Court).



United States of America Supreme Court

Important decisions

Identification: USA-2015-3-008

a) United States of America / **b)** Supreme Court / **c)** / **d)** 05.10.2015 / **e)** 14-848 / **f)** Maryland v. Kulbicki / **g)** 136 *Supreme Court Reporter 2* (2015) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

Keywords of the alphabetical index:

Counsel, effective assistance / Evidence, ballistics / Evidence, forensic.

Headnotes:

The constitutional right to a fair trial guarantees the right of a criminal defendant to effective assistance of counsel.

In evaluating a claim of ineffective assistance of counsel, a court first must determine whether counsel's performance fell below an objective standard of reasonableness, making the errors so serious that he or she no longer functioned as "counsel", and if so, whether the conduct was prejudicial, meaning that the errors deprived the defendant of a fair trial.

For purposes of the constitutional guarantee of effective assistance of counsel, the proper measure of attorney performance is reasonableness under prevailing professional norms.

In assessing whether defence counsel's representation was constitutionally ineffective, the reasonableness of counsel's challenged conduct must be judged from the perspective of the time when that conduct took place, not from that of a later date.

The right to effective counsel guarantees that counsel will act with reasonable competence, not perfect advocacy.

Summary:

I. In 1995, a jury in a State of Maryland trial court convicted James Kulbicki of murder for the shooting of Gina Nueslein. In 2006, Kulbicki supplemented a pending petition for post-conviction relief by adding a claim that his defence attorneys had been ineffective in their conduct of his defence during the trial. The Sixth Amendment to the U.S. Constitution states that a criminal defendant “shall enjoy the right to have the Assistance of Counsel for his defence”. Under the case law of the U.S. Supreme Court, this right requires effective assistance of counsel in both state and federal prosecutions. Kulbicki based his claim on the fact that testimony of a prosecution expert witness in his trial, an agent of the Federal Bureau of Investigation (FBI) named Ernest Peele, employed a method of ballistics analysis known as Comparative Bullet Lead Analysis (hereinafter, “CBLA”). Earlier in 2006, in an unrelated case, the Court of Appeals of Maryland had ruled for the first time that CBLA evidence was no longer generally accepted by the scientific community and was therefore inadmissible.

In 2010, the Court of Appeals of Maryland vacated Kulbicki’s conviction on the grounds that his trial attorneys’ conduct of his defence had fallen short of prevailing professional norms and that this deficiency had deprived Kulbicki of his right to a fair trial. The decision of the Court of Appeals centred on a 1991 report, co-authored by Agent Peele, that did not fully explore the scientific implications of one of the report’s findings concerning the composition of lead in bullets. That failure should have led the authors, according to the Court of Appeals, to question the validity of the CBLA method. The Court of Appeals concluded that the defence attorneys had failed to meet prevailing professional norms because their research had not uncovered the 1991 report and because they had not used the apparent methodological flaw to cast doubt on CBLA during their cross-examination of Peele.

II. The Supreme Court accepted review of the Maryland Court of Appeals decision, and reversed it. The Supreme Court concluded that the defence attorneys’ performance had not been deficient under the prevailing constitutional standards for reviewing claims of ineffective counsel.

The Supreme Court’s prevailing standard for assessing claims of ineffective counsel was set forth in its 1984 decision in *Strickland v. Washington*. Under that standard, a court must determine if

counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, making the errors so serious that he or she no longer functioned as “counsel”, and if so, whether the conduct was prejudicial, meaning that the errors deprived the defendant of a fair trial.

In the instant case, the Supreme Court determined that the Maryland Court of Appeals had misapplied the first prong of the *Strickland* test by erroneously speculating as to whether a different trial strategy might have been more successful. By engaging in such speculation, the Court of Appeals had disregarded the Supreme Court’s so-called “rule of contemporary assessment of counsel’s conduct”, adopted in a 1993 decision, *Lockhart v. Fretwell*. According to the Supreme Court, if the Court of Appeals had observed the contemporary assessment rule, it would have judged the reasonableness of counsel’s challenged conduct from the perspective of the time when that conduct took place, not from that of a later date. In this regard, the Supreme Court noted that the validity of CBLA was widely accepted at the time of Kulbicki’s trial in 1995, and that courts regularly admitted CBLA evidence for at least eight years after that. Therefore, the defence attorneys had not performed deficiently by focusing on elements of the defence that did not seek to cast doubt on a method of ballistics analysis that was not controversial at the time.

The Supreme Court also disagreed with other elements of the Court of Appeals’ reasoning. For one thing, there was no reason to believe that a diligent search would have discovered the 1991 report. In addition, the 1991 report had concluded that CBLA was a valid methodology, and it was not reasonable to expect that the defence attorneys would have identified one of the report’s many findings as contrary to the scientific method. In sum, the Supreme Court concluded, the Court of Appeals had erroneously demanded something close to “perfect advocacy”, which is a standard far more exacting than the “reasonable competence” that the right to effective counsel guarantees.

III. Because the Supreme Court concluded that the defence attorneys’ performance had not fallen below an objective standard of reasonableness under prevailing professional norms, it did not address the question of whether Kulbicki had been prejudiced by their conduct of his defence. The Supreme Court’s decision was set forth in a *per curiam* opinion that did not identify a particular Justice as the author. The Supreme Court’s opinion was unanimous.

Cross-references:

Supreme Court:

- *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984);
- *Lockhart v. Fretwell*, 506 U. S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2015-3-004

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 01.09.2015 / **e)** C 298 / **f)** *Gonzales Lluy et al. v. Ecuador* / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

5.2.2.5 Fundamental Rights – Equality – Criteria of distinction – **Social origin**.

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

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

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

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

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

Keywords of the alphabetical index:

Non-discrimination / Equality before the law / Rights of the child / HIV/AIDS / Right to Personal Integrity / Judicial guarantees / Judicial protection.

Headnotes:

Regarding the rights to life and personal integrity, the Court recalled that the State has a duty of supervision and control even when health services are provided by a private entity. The State retains the obligation of providing public services and of protecting the public good. The private sector, in a complementary

manner, and by signing agreements or contracts with the State, also provides health services under the auspices of the State. In both situations, whether the patient is admitted to a public hospital or a private hospital with an agreement or contract with the State, the person is under the care of the State.

The right to education epitomises the indivisibility and interdependence of all human rights. As set forth by the UN Committee on Economic, Social and Cultural Rights, in order to ensure the right to education, four essential and interrelated characteristics should be fulfilled in all educational levels:

- i. availability;
- ii. accessibility;
- iii. acceptability; and
- iv. adaptability.

In this regard, there are three obligations inherent to the right to education of people living with HIV/AIDS:

- i. the right to receive timely and unprejudiced information on HIV/AIDS;
- ii. the prohibition against banning access to educational centres to people with HIV/AIDS; and
- iii. the right that the education promote their inclusion and non-discrimination within the social environment.

Persons infected with the HIV virus are a protected class under Article 1.1 ACHR (obligation to respect rights), which prohibits discrimination based on "any other social condition". When differential treatment on the part of the State is based on the fact that a person belongs to this protected class, the State has the burden of showing that this difference in treatment did not have a discriminatory purpose or effect.

Summary:

I. Talía Gabriela Gonzales Lluy was born on 8 January 1995, in Cuenca, Ecuador. Her mother is Teresa Lluy, her father is SGO and her brother is Iván Lluy. In 1998, when Talía was three years old, she was infected with the HIV virus while receiving a transfusion of blood on which serological tests were not done. The blood was obtained from a blood bank of the Red Cross of the province of Azuay and the transfusion was done in a private clinic in Ecuador. At the time of the events, the Ecuadorian Red Cross had exclusive authority to manage blood banks.

After Talía was infected, her mother filed several criminal and civil actions seeking punishment for those responsible for her infection, as well as payment of damages. However, the criminal proceedings ended

with the tolling of the statute of limitations of the action because the defendant did not appear in the proceedings and was not captured. Likewise, the civil proceedings did not advance because, according to the First Chamber of the Superior Court of Justice of Cuenca, a civil compensation arising from a criminal offense could not be claimed while there was no enforceable criminal conviction.

When Talía was five years old, she was enrolled in a public primary school, which she attended for two months, until the principal informed her mother that Talía would not be admitted any longer. This decision was taken after a teacher told him that Talía was a person living with HIV. On 8 February 2000, Talía's mother filed a writ of *amparo* against the Ministry of Education and Culture, the school principal, and the teacher, alleging a deprivation of Talía's right to education, and requested her reintegration into school, as well as the reimbursement of damages. Nonetheless, the domestic court determined that "there was a conflict of interest between Talía's individual rights and the interests of a student conglomerate, and this collision caused social or collective rights to prevail, as it is the right to life *vis-à-vis* the right to education". Moreover, the domestic court maintained that Talía could exercise her right to education through special education and distance learning.

According to the statements by Talía and her family, they were forced to move multiple times due to the exclusion and rejection they were subjected to because of Talía's condition.

On 18 March, 2014, the Inter-American Commission on Human Rights submitted the case, alleging violations of Talía's rights to a life with dignity, personal integrity, judicial guarantees, and judicial protection, established in Articles 4, 5, 8 and 25 ACHR, in relation to Article 1.1 ACHR, as well as the rights of the child established in Article 19 ACHR. It also alleged violations of Articles 5, 8 and 25 ACHR to the detriment of Talía's mother and brother.

The State raised two preliminary objections:

- i. partial lack of jurisdiction of the Court to decide on facts that were not part of the factual framework of the case and on alleged violations of rights that were not established by the Inter-American Commission in its merits report; and
- ii. non-exhaustion of domestic remedies.

II. The Court held that the first preliminary objection was not an issue of either admissibility or jurisdiction of the Tribunal that had to be resolved as a "preliminary objection". Instead, it analysed the

objection as a “preliminary consideration” because it referred to the factual framework of the case. The Court found that the representatives’ allegations were based on facts that were part of the factual framework submitted by the Commission in its merits report, and that said allegations were considerations of law and not new facts. With regard to the second preliminary objection, the Court deemed some of the arguments to be time-barred. Also, the Court found that the remedies invoked by the State were not adequate or effective in light of the facts of the case.

On the merits, the Court found that the State was internationally responsible for the violation of Talía Gonzales Lluys’ rights to life and personal integrity, recognised in Articles 4 and 5 ACHR. The Inter-American Court recalled that the State bears a duty of supervision and control of health services, even if offered by a private entity. The Court found that the blood bank that provided the blood that was transfused to Talía was insufficiently monitored and inspected by the State. This allowed the blood bank to continue providing services under irregular conditions. This serious omission by the State allowed blood which had not been subjected to the most basic security tests, such as HIV tests, to be delivered to Talía’s family for transfusion, resulting in her infection and consequent permanent damage to her health. The Court also concluded that this damage to Talía’s health, because of the severity of the disease and the risk involved at various times in the applicant’s life, constituted a violation of the right to life, given the danger of death that she has faced at various times and may face in the future because of her illness.

Moreover, the Court determined that Talía’s family suffered stigmatisation as a result of her condition as a person living with HIV. The Court noted the constant situation of vulnerability of the applicant’s mother and brother, as they suffered discrimination, were ostracised from society, and lived in precarious economic conditions, in addition to having to devote great physical, material, and financial efforts to ensure Talía’s survival and a dignified life for her. In the case at hand, the Court verified that there were many differences in treatment to Talía and her family related to housing, work and education derived from her status as a person living with HIV. The State did not take the necessary measures to ensure Talía and her family access to their rights without discrimination, so that the State’s acts and omissions constituted discriminatory treatment against Talía, her mother and her brother. Consequently, the Court concluded that the State was responsible for the violation of the right to personal integrity of Talía’s mother and brother, protected under Article 5.1 ACHR, in relation to Article 1.1 ACHR.

In addition, the Court recalled that the right to education is contained in Article 13 of the Protocol of San Salvador and established that it has jurisdiction to decide on the right to education in contentious cases under Article 19.6 of the Protocol of San Salvador.

The Court found that the decision to expel Talía from school constituted a difference in treatment based on her health condition. To determine whether that difference in treatment constituted discrimination, the Court reviewed the State’s justification therefor, and concluded that the real and significant risk of contagion that would put the health of Talía’s classmates at risk was extremely low. The Court highlighted that under a test reviewing the necessity and strict proportionality of the measure, the means chosen by the domestic authorities constituted the most damaging and disproportionate alternative available in order to protect the integrity of other pupils. Such treatment also evidenced that there was no adaptability of the educational environment to Talía’s situation through biosecurity or other, similar measures that must exist in any educational establishment for the general prevention of disease transmission. Consequently, the Court declared that the State was responsible for the violation of Article 13 of the Protocol of San Salvador, in relation to Articles 1.1 and 19 ACHR. The Court also held that the fact that Talía, her family, and some of her teachers had to hide that Talía was living with HIV in order to enter and remain in the educational system constituted a disregard of the value of human diversity. Furthermore, in Talía’s case, multiple vulnerabilities and the risk of discrimination converged intersectionally. The discrimination that Talía suffered was not only caused by multiple factors, but led to a specific form of discrimination that resulted from the intersection of these factors. In that regard, the Court concluded that Talía suffered discrimination resulting from her status as a female child living in poverty and with HIV.

In addition, the Court found a violation of the guarantee of a determination of responsibility within a reasonable time, established in Article 8.1 ACHR, in relation to Articles 1.1 and 19 ACHR, with respect to the criminal proceedings. Citing the jurisprudence of the European Court of Human Rights, the Inter-American Court found that there was a special obligation to act with due diligence under the particular circumstances of the case:

- i. that Talía’s integrity was at stake;
- ii. the consequent urgency due to her status as a child with HIV; and
- iii. the crucial importance of concluding the proceedings so that Talía and her family could gain access to compensation for damages.

The Court concluded that this obligation was not fulfilled by the State. After analysing the four elements to determine the reasonableness of length of criminal proceedings, and considering that there was a duty to act with exceptional due diligence, the Court concluded that Ecuador violated the judicial guarantee of a determination of responsibilities within a reasonable time.

Regarding the civil proceedings, the Court held that the evidence before it was insufficient to conclude that their duration violated the guarantees of due diligence and a determination of rights within a reasonable time. The Court also deemed that there was insufficient evidence to conclude that the existence of incidental proceedings (*prejudicialidad*) in Ecuadorian legislation constituted, in itself, a violation of judicial guarantees. The Court also concluded that the State did not infringe the right to judicial protection in relation to the *amparo* proceedings, as well as the criminal and civil proceedings.

Finally, the Court established that the Judgment constituted *per se* a form of reparation and ordered that the State:

- i. provide, in a timely manner, free medical and psychological or psychiatric treatment to Talía Gabriela Gonzales Lluy, as well as any medicines she requires;
- ii. publish the judgment and its official summary;
- iii. carry out a public act of recognition of international responsibility;
- iv. grant a scholarship to Talía that is not subject to obtaining qualifications that make her deserving of a scholarship of excellence, so that she may continue her university studies;
- v. grant a scholarship to Talía so that she may pursue postgraduate studies, that is not conditional on her academic performance while studying;
- vi. provide Talía with decent housing;
- vii. conduct a program to train health staff on best practices and the rights of HIV patients; and
- viii. pay the amount stipulated in the Judgment as compensation for pecuniary and non-pecuniary damages and the reimbursement of costs and expenses.

Languages:

Spanish, English.



Identification: IAC-2015-3-005

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 08.10.2015 / **e)** C 304 / **f)** Punta Piedra Garifuna Community v. Honduras / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

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

5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Title clearing / Right, use and enjoyment / Indigenous people, collective territory / Right, use and enjoyment, collective property / Consultation process / Cultural identity, right / Domestic measures, duty to adopt / Due diligence / Judicial guarantees / Judicial protection.

Headnotes:

The State's failure to provide clear title, as well as the lack of implementation of conciliatory agreements, obstructs the indigenous people's use and enjoyment of the possession and effective protection of their territory against third parties, in violation of their right to collective property.

One of the appropriate measures to ensure the effective use and enjoyment of the collective territory of indigenous and tribal Peoples is "title clearing". For the purposes of the case, the Court understood that "title clearing" (*saneamiento*) is a process that derives from the obligation of the State to remove any interference regarding the territory, in particular, granting plenary possession to the legal owner and, if applicable, by paying for the improvements made by third party occupants and for their relocation. Also, even though title clearing is a measure that usually

must be executed before title is transferred, once this occurred, the State had the undisputable obligation to clear title, in order to guarantee the use and enjoyment of the collective property of the victims. This obligation must be fulfilled by the State *ex officio* and with extreme diligence, protecting the rights of third parties as well.

Regarding the duty to ensure a consultation process and the right to cultural identity, exploratory mining concessions can directly affect the territory of an indigenous community. Therefore, the State has the duty to perform a consultation process before the exploratory stage, as well as in subsequent stages that may affect the territory.

Regarding the right to judicial protection, all public authorities must execute the decisions within their jurisdiction that are adopted by means of extrajudicial conciliatory agreements. Moreover, public authorities must fulfil and implement the extrajudicial conciliatory agreements without obstructing their purpose or unlawfully delaying their enactment, in order to grant the indigenous and tribal peoples certainty of their rights. Also, extrajudicial conciliatory agreements in which the obligations must be fulfilled by the State must be operative, and therefore should be adopted by mechanisms that guarantee their direct execution, without requiring other administrative or judicial proceedings for that purpose.

In order to find a State responsible for failing to guarantee the right to life, there should be enough evidence prior to a death of the alleged victim to determine that the State knew or should have known of a situation of real and immediate risk for that person.

Summary:

I. The Garifuna people are a culture and a distinct ethnic group, originated as a syncretism between indigenous and African people, who have asserted their rights as an indigenous people in Honduras. In 1993, the State of Honduras granted a property title to the Punta Piedra Garifuna Community; the title was later expanded in 1999. Nevertheless, at the moment that the Community received title, part of the territory was occupied by peasants of the Río Miel Village. As a result, multiple conciliatory proceedings were held. In 2001, the State committed to clearing the title over the territory in favour of the Punta Piedra Community by paying for improvements to the property done by the peasants of Río Miel, as well as for their relocation. However, these commitments were not fulfilled, thus generating greater conflict between the communities. As of that moment, acts of violence and intimidation occurred, and a leader of the Punta

Piedra Community, Mr Félix Ordóñez Suazo, was killed. In the course of the proceedings, the information disclosed to the Court showed that an exploratory mining concession granted by the State could also affect part of the territory titled in favour of the Punta Piedra Community.

On 1 October 2013, the Inter American Commission of Human Rights submitted the case, alleging violations to Articles 21 and 25 ACHR.

II. For the purposes of this specific case, the Court requested a report from the American Association for the Advancement of Science (AAAS) in order to obtain additional information, by means of satellite imagery analysis, on the territory belonging to the Punta Piedra Community. Moreover, a delegation of the Tribunal headed by the President of the Court held an on-site visit to the territory in order to observe some of the claimed areas, hear testimonies from the villagers and meet with the parties of the case.

The State submitted two preliminary objections regarding the non-exhaustion of domestic remedies, which were rejected the grounds that part of Honduras's argument was time-barred and that there had been unwarranted delay in rendering a final judgment with regard to the investigation on the death of Mr Ordóñez Suazo.

Moreover, the Court accepted the acknowledgment of international responsibility expressed by the State, in that it did not clear the Punta Piedra Community's title, and thus it did not guarantee the Community peaceful possession of the territory. For the Court, that recognition had legal consequences regarding the violation of the right to collective property of the Community.

On the merits, the Court found the State internationally responsible for the violation of Article 21 ACHR in relation to Articles 1.1 and 2 ACHR. The Court established that the State failed to provide clear title. Additionally, even when the conciliatory agreements adopted in this case were appropriate in order to obtain the title clearing of the indigenous territory, its lack of direct execution rendered them ineffective and obstructed the use and enjoyment of the territory titled in favour of the victims, generating greater conflict between the Punta Piedra Community and the peasants of Río Miel. This situation obstructed the victims' use and enjoyment of the possession and effective protection of their territory against third parties, in violation of their right to collective property. Furthermore, the State failed to perform a consultation process before issuing an exploratory mining concession. On that point, the Court examined the domestic law and found that it

was imprecise regarding the initial stages of the consultation process, as it did not establish the need for a consultation before the exploratory stage.

Also, the Court found the State internationally responsible for the violation of Article 25.1 and 25.2.c ACHR in relation to Article 1.1 ACHR. The Court held that due to the lack of a collective remedy in Honduras at that time, the conciliatory agreements, which were *ad hoc* procedures, should have been adopted by mechanisms that guarantee their direct execution, without requiring other administrative or judicial proceedings for that purpose. Thus, even when the conciliatory agreements adopted in this case were appropriate in order to obtain the title clearing of the indigenous territory, their lack of direct execution rendered them ineffective and obstructed the use and enjoyment of the territory titled in favour of the victims.

Additionally, the Court found the State internationally responsible for the violation of Articles 8 and 25 ACHR in relation to Article 1.1 ACHR. The Court found that the complaints filed by the victims regarding the usurpation of territories, threats, and the murder of Félix Ordóñez Suazo were not duly processed by the State, because it did not comply with its obligation of due diligence and its duty of carrying out the investigation within a reasonable time. Specifically, the State did not execute relevant actions or collect fundamental evidence in order to process, in a reasonable time, the multiple complaints and punish those responsible.

The Court did not find the State responsible for the alleged violation of Article 4 ACHR in relation to Article 1.1 ACHR. The Court held that there was not enough evidence to determine that the State knew or should have known of a situation of real and immediate risk to the detriment of Mr Félix Ordóñez Suazo prior to his death.

Accordingly, the Court established that the judgment constituted *per se* a form of reparation and ordered that the State:

- i. guarantee the use and enjoyment of the traditional territory of the Punta Piedra Community by clearing its title;
- ii. cease any activity regarding the exploratory mining concession that has not been previously consulted;
- iii. establish a community development fund for the members of the Punta Piedra Community;
- iv. publish the summary of the judgment and broadcast it by radio;

- v. adopt measures so that domestic legislation regarding mining does not affect the right to consultation;
- vi. establish an appropriate mechanism to regulate the property register system;
- vii. continue and conclude, in a reasonable time, the investigation for the death of Mr Félix Ordóñez Suazo and, if applicable, punish those responsible; and
- viii. pay pecuniary and nonpecuniary damage.

Languages:

Spanish, English.



Identification: IAC-2015-3-006

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 19.11.2015 / **e)** C 307 / **f)** Velásquez Paiz *et al.* v. Guatemala / **g)** Secretariat of the Court / **h)** CODICES (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**.

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

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

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:

Due diligence, strict duty / Gender, stereotyping / Gender, discrimination, access to justice / Violence, sexual / Rights to humane treatment / Judicial guarantees / Judicial protection / Rights to honour and dignity.

Headnotes:

A State cannot be held responsible for every violation of human rights committed between individuals within its jurisdiction. Thus, in order to establish a breach of the duty to prevent violations of the rights to life and personal integrity, it must be verified that:

- i. the State authorities knew, or should have known, of the existence of a real and immediate risk to the life and / or personal integrity of an individual or group of individuals; and
- ii. those authorities failed to take the necessary measures within the scope of their powers which, judged reasonably, might have been expected to prevent or avoid that risk.

In a context of increased violence against women that the State is aware of, there arises a duty of strict due diligence when State authorities are alerted that a woman's life or personal integrity is in danger. This duty requires an exhaustive search during the first few hours and days, following adequate procedures. The authorities must presume that the missing person is still alive until they are certain about the victim's fate.

Gender stereotyping refers to a preconception regarding the attributes, behaviours, characteristics, or roles that are or should be performed by men and women respectively, and it is possible to associate the subordination of women to practices based on socially dominant and persistent gender stereotypes. The creation and use of gender stereotypes becomes one of the causes and consequences of gender violence against women, and this is aggravated when such stereotypes are reflected, implicitly or explicitly, in policies and practices, particularly in the reasoning and the language of state authorities.

The Court recognised, highlighted, and rejected the gender stereotypes present in cases of violence against women where victims are profiled as gang members, prostitutes, and/or labelled as "easy," resulting in victim blaming and in the idea that their cases are not sufficiently important to investigate. The Court rejected any state practice that justifies violence against women and in which women are blamed for such violence, since assessments of this nature are discretionary and discriminatory, based on the victim's origin, condition, and/or behaviour and the fact that she is a woman. Consequently, these gender stereotypes are incompatible with international human rights law and states should take steps to eradicate them where they occur.

The characterisation of a crime as a possible "crime of passion" is based on a stereotype that justifies the conduct of the aggressor.

Funeral rites are acts by which the relatives of a deceased person pay tribute to their loved ones, according to their beliefs, seeking to obtain solace during the last moments that they will be in the physical presence of the deceased.

Summary:

I. The facts of this case occurred in a context of increased violence against women and gender-based homicides in Guatemala. It was shown that the State became aware of this situation by at least December 2001. In 2004 and 2005, the numbers of such homicides increased and remain high to date, and these are accompanied by high levels of impunity.

Claudina Isabel Velásquez Paiz was a 19 year old law student who informed her family that she was at a party on the night of 12 August 2005. Around 11:45 p.m., and after several mobile phone calls, her parents held a last call with her and subsequently lost communication. Approximately at 2:00 a.m. on 13 August 2005, Claudina's parents were informed that she might be in danger and thus began searching for her. Around 2:50 or 2:55 a.m., the victim's parents called the National Civil Police and, in response, at approximately 3:00 a.m. a patrol arrived at the Panorama Neighborhood, where the police officers were informed by Claudina's parents that they were searching for her and that she could be in danger. The officers escorted them from the Panorama Neighborhood to the entrance of the Pinares Neighborhood. Once there, the police officers told the victim's parents that there was nothing else that they could do, that they had to wait at least 24 hours to report Claudina Velásquez as missing, and that meanwhile the officers were going to keep patrolling. Between 3:00 and 5:00 a.m., the victim's parents continued their search with the help of family and friends. Around 5:00 a.m., they went to the police station to report her disappearance but were again told to wait 24 hours. Finally, at 8:30 a.m., their claim was received in writing at Police Sub-Station San Cristobal 1651.

Around 5:00 a.m., the Volunteer Fire Department of Guatemala received an anonymous call regarding the discovery of a corpse in the Roosevelt Neighborhood, and so they rushed to the scene. Later, two police officers, the assistant prosecutor, and other investigative authorities arrived. The victim's body, which was found on the asphalt covered with a white sheet, was identified as "XX". She had sustained injuries and had been shot in the forehead, her clothes were covered in blood, and there were signs to indicate probable sexual violence.

Claudina Velásquez's parents received a call from a friend telling them that an unidentified body that looked like their daughter was in the morgue of the Forensic Medical Service. Around noon, they identified their daughter and her body was given to them by the forensic doctor. Later, the assistant prosecutor and Technicians in Criminal Investigations arrived at Claudina's wake and collected her fingerprints, after threatening her family that they would be accused of obstructing justice if they refused the procedure.

Criminal proceedings were initiated in 2005 before the Tribunals of First Instance in Criminal Matters, Narcotics, and Crimes against the Environment; nine persons were linked to the investigations, but no one has been charged. Also, in 2006, the Human Rights Ombudsman initiated an investigation and issued a resolution declaring violations to Claudina Velásquez's rights to life, personal security, and justice within a reasonable time, as well as her and her family's right to judicial protection. The resolution also declared several State authorities as liable for these violations. Additionally, disciplinary proceedings were initiated that resulted in a verbal admonishment against two investigators and a twenty-day suspension against a forensic doctor.

On 5 March 2014, the Inter American Commission of Human Rights submitted the case, alleging violations to Articles 1.1, 4, 5.1, 8.1, 11, 24 and 25 ACHR and Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter, the "Belém do Pará Convention").

The State submitted two preliminary objections:

- i. lack of jurisdiction *ratione materiae* over Article 7 of the Belém do Pará Convention; and
- ii. non-exhaustion of domestic remedies.

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. The second preliminary objection was also rejected because the State implicitly admitted that at the moment the petition was filed, the domestic remedies had unjustified delays or lacked effectiveness. Also, the State did not mention what remedies were available, or whether they were adequate, appropriate, and effective.

II. On the merits, the Court found the State internationally responsible for the violation of the rights to life and personal integrity established in Articles 4.1 and 5.1 ACHR, in relation to Articles 1.1

and 2 ACHR and Article 7 of the Belém do Pará Convention, to the detriment of Claudina Velásquez, because:

- i. In the time before Claudina's disappearance, despite the known context of violence against women, the State did not implement the measures necessary so that authorities responsible for receiving missing persons complaints had the capacity and sensitivity to understand the seriousness of such claims, and the willingness and training to act immediately and effectively.
- ii. Once alerted that Claudina Velásquez was in danger, Guatemalan authorities did not act with the due diligence required to adequately prevent her injuries and death, as they did not act as would be reasonably expected given the context of the case and the allegations before them. For instance, they initially refused to take the complaint, indicating that the parents had to wait 24 hours to report her as missing; they did not collect data and descriptions that would permit her identification; they did not undertake a systematic, strategic, exhaustive, and coordinated search with other State authorities, covering areas that she was likely to be; and they did not interview persons that could logically have information on her whereabouts.

The Court also established that the State violated Articles 8.1, 24, and 25.1 ACHR, in relation to Articles 1.1 and 2 ACHR and Article 7 of the Belém do Pará Convention, to the detriment of Claudina Velásquez's family members, because, first of all, the criminal investigation should have initiated with the claims that Claudina was missing; however, they initiated only with the discovery of her body. Additionally, the State did not investigate with due diligence, as the Court found several irregularities in the collection of evidence at the crime scene and at later stages of the investigation. Also, it found that over 10 years, investigative actions had been tardy and repetitive, without a clear objective, violating the family's right to access to justice within a reasonable time.

Furthermore, given all of the signs that Claudina had suffered sexual violence, the State violated its obligation to investigate her death as a possible manifestation of violence against women and with a gender perspective. Additionally, it found that State authorities did not investigate diligently and rigorously due to gender stereotypes and prejudices regarding her attire and the place where she was found that allowed the victim to be viewed as a person whose death did not deserve to be investigated or as

someone who could be blamed for the attacks committed against her. Also, they characterised the crime as a possible “crime of passion,” based on a stereotype that justifies the conduct of the aggressor. All of this constituted violence against women and a form of gender discrimination in access to justice.

In addition, the Court determined that the way the investigation of the case was conducted, in particular, the way in which the prosecutors intruded upon the victim’s wake in order to obtain her fingerprints, the way she was labelled as a person whose death did not deserve to be investigated, and the irregularities and deficiencies throughout the investigation, in which Claudina’s father was particularly active, violated the family’s right to personal integrity established in Article 5 ACHR. Also, the Court indicated that when the prosecutors arrived at the wake to take Claudina’s fingerprints and threatened her parents with charges of obstruction of justice if they refused, the former intruded upon an intimate and painful moment in order to manipulate Claudina’s remains once again, even though this procedure should have been carried out before the body was delivered to her family, affecting their right to honour and dignity established in Article 11 ACHR.

Also, the Court held that there was no need to analyse the alleged violation of Claudina Velásquez’s right to privacy under Article 11 ACHR, because it had already analysed the State’s duty to investigate the signs that Claudina Velásquez had possibly been subjected to sexual violence. Moreover, the Court held that the alleged violations of the rights to freedom of thought and expression and of movement and residence established in Articles 13 and 22 ACHR had already been duly considered in the chapter of the Judgment on access to justice; thus, it was unnecessary to rule thereon.

Finally, the Inter-American Court established that the judgment constituted per se a form of reparation and ordered, among other measures, that the State:

- i. open, conduct, and conclude, as appropriate and with due diligence, criminal investigations and proceedings in order to identify, prosecute, and, if applicable, punish those responsible for Claudina’s injuries and death, as well as evaluate the conduct of public servants involved in the investigation of the case in accordance with pertinent disciplinary norms;
- ii. provide free medical and psychological or psychiatric treatment to the victims that require it;
- iii. publish the Judgment and its official summary;
- iv. perform an act of public apology;
- v. incorporate a continuing education program on the need to eradicate gender discrimination,

- gender stereotypes, and violence against women in Guatemala into the curriculum of the National Education System;
- vi. develop a timetabled plan to strengthen the National Institute of Forensic Sciences;
- vii. implement the full functioning of the “specialised courts” and specialised prosecution throughout the Republic of Guatemala;
- viii. implement permanent programs and courses for the judiciary, prosecutors, and National Civil Police on the investigation of killings of women and on standards on the prevention, punishment, and eradication of killings of women, as well as train them on the proper implementation of international law and jurisprudence of this Court on the matter;
- ix. adopt a strategy, system, mechanism, or national program, through legislative or other measures, in order to ensure the effective and immediate search of missing women; and
- x. pay pecuniary and non-pecuniary damages, as well as costs and expenses.

Languages:

Spanish, English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2015-3-018

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 03.09.2015 / **e)** C-309/14 / **f)** CGIL and INCA / **g)** ECLI:EU:C:2015:523 / **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:

European Union, border, check, asylum / Immigration, residence, permit / Residence, permit, fee, amount.

Headnotes:

Directive 2003/109 concerning the status of third-country nationals who are long-term residents precludes national legislation which requires third-country nationals, when applying for the issue or renewal of a residence permit in the Member State concerned, to pay a fee which varies in amount between EUR 80 and EUR 200, inasmuch as such a fee is disproportionate in the light of the objective pursued by that directive and is liable to create an obstacle to the exercise of the rights conferred by that directive.

Therefore, while it is open to Member States to make the issue of residence permits under Directive 2003/109 subject to the levying of charges, nevertheless, in accordance with the principle of proportionality, the level at which those charges are set must not have either the object or the effect of creating an obstacle to the obtaining of the long-term resident status conferred by that directive, and also of other rights which stem from the granting of that status, since both the objective and the spirit of that directive would otherwise be undermined.

The financial impact of such a fee, which varies in amount between EUR 80 and EUR 200, may be significant for certain third-country nationals meeting the conditions laid down by Directive 2003/109 for the granting of residence permits covered by that directive, especially since, given the duration of such permits, those nationals are obliged to seek the renewal of their permits somewhat frequently and the amount of that fee may be in addition to other fees provided for under pre-existing national legislation, with the result that, in such circumstances, the obligation to pay the fee at issue in the main proceedings could constitute an obstacle to the exercise by those third-country nationals of the rights conferred on them by that directive.

Summary:

I. The request has been made in proceedings between the *Confederazione Generale Italiana del Lavoro* ('CGIL') and the *Istituto Nazionale Confederale Assistenza* ('INCA'), on the one hand, and the *Presidenza del Consiglio dei Ministri* (Office of the Italian Prime Minister), the *Ministero dell'Interno* (Ministry of the Interior) and the *Ministero dell'Economia e delle Finanze* (Ministry of the Economy and Finance), seeking annulment of a decree adopted by those two ministries, on 6 October 2011, concerning the fee for the issue and renewal of a residence permit (*GURI* (Official Gazette) no. 304 of 31 December 2011) (the "2011 decree"), and also annulment of any preparatory, consequent or connected act, arguing that the fee which must be paid, pursuant to that decree, for the issue and renewal of a residence permit to third-country nationals is unfair and/or disproportionate.

II. The Court has already recognised that Member States may make the issue of residence permits pursuant to Directive 2003/109 subject to the payment of charges and that, in fixing the amount of those charges, they enjoy a margin of discretion.

However, the Court has stated that the discretion granted to Member States in that respect is not unlimited and that they may not apply national rules which are liable to jeopardise the achievement of the objectives pursued by Directive 2003/109 and, therefore, deprive it of its effectiveness.

Moreover, in accordance with the principle of proportionality, which is one of the general principles of EU law, the measures taken to transpose Directive 2003/109 must be suitable for achieving the objectives of that provision and must not go beyond what is necessary to attain them.

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-2015-3-019

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 09.09.2015 / **e)** C-20/13 / **f)** Unland / **g)** ECLI:EU:C:2015:561 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**
5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**

Keywords of the alphabetical index:

Employment, remuneration, discrimination / Employee, discrimination, age.

Headnotes:

Articles 2 and 6.1 of Directive of Council 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, under which the basic pay of a judge is determined at the time of his appointment solely according to the judge's age. The fact that the aim of the provisions at issue in the main proceedings is to reward the professional experience and social skills of judges is irrelevant in that regard.

However, those articles of Directive 2000/78 must be interpreted as not precluding a provision of national law, such as that at issue in the main proceedings, establishing the detailed rules governing the reclassification of existing judges within a new remuneration system under which the pay step that they are now to be allocated is determined solely on

the basis of the amount received by way of basic pay under the old remuneration system, notwithstanding the fact that that system was founded on discrimination based on the judge's age, provided the different treatment to which that law gives rise may be justified by the aim of protecting acquired rights.

Articles 2 and 6.1 of Directive 2000/78 must be interpreted as not precluding a provision of national law, such as that at issue in the main proceedings, laying down detailed rules for the career progression of judges already in post before the entry into force of that law within a new remuneration system and securing faster pay progression from a certain pay step onwards for such judges who had reached a certain age at the time of transition to the new system than for such judges who were younger on the transition date, provided the different treatment to which that law gives rise may be justified in the light of Article 6.1 of that directive.

Aims such as those pursued by the domestic legislation at issue in the main proceedings, as to bring the structure of pay increases for judges in line with that for civil servants, the latter having previously been modernised in 1997, and, ultimately, to make the position of judge more attractive than previously, by ensuring *inter alia* that income increases more rapidly at the beginning of a judge's career and also to ensure that no existing judge should suffer a drop in salary, either in the immediate short term or in his career as a whole, and that all judges had, by the age of 49, reached the final pay step., must, in principle, be regarded as capable of justifying 'objectively and reasonably' and 'within the context of national law' a difference in treatment on the grounds of age, as provided for by the first subparagraph of Article 6.1 of Directive 2000/78.

Summary:

I. The request was made in proceedings between Mr Unland and the *Land* Berlin concerning the detailed rules governing the reclassification and career progression of judges in that region under the new remuneration system applicable to such judges.

Mr Unland then brought an action before the *Verwaltungsgericht* Berlin (Germany), by which he claims that he has been discriminated against on the grounds of age as a result of the rule under which remuneration is geared to age.

Until July 2011, the Federal law on the remuneration of civil servants provided that basic pay of a judge was calculated on the basis of age. However, under the new regime, basic pay is determined by reference to periods of experience. With regard to judges already in post, transitional provisions applied.

The applicant considers, *inter alia*, that not only the old Federal law on the remuneration of civil servants but also the rules on reclassification under the new remuneration system are contrary to EU law and, as a consequence, claims he is entitled to remuneration at the highest step in his pay grade. He claims such remuneration for the future and also, retrospectively, in the form of arrears dating back to at least 2009.

II. The Court recalled that if Article 153.5 TFEU, which lays down an exception to the competences enjoyed by the European Union in social policy matters in that it does not have the right to intervene in matters relating to pay, it is necessary to draw a distinction between the term 'pay' as used in Article 153.5 TFEU and the same term is used in the phrase 'conditions, including ... pay' in Article 3.1.c of Directive 2000/78, the latter term forming part of employment conditions and not relating directly to the setting of the level of pay.

Next, the Court held that the national legislator had not gone beyond what was necessary to achieve the aim pursued by adopting the transitional derogation measures put in place by the new law.

Finally, the Court pointed out that the Member States and the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it.

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-2015-3-020

a) European Union / **b)** Court of Justice of the European Union / **c)** Seventh Chamber / **d)** 01.10.2015 / **e)** C-432/14 / **f)** O v. Bio Philippe Auguste SARL / **g)** ECLI:EU:C:2015:643 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

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

Keywords of the alphabetical index:

Employment, fixed term, discrimination, age / Student, employment, university holidays / Employment, contract, definite period, end of contract payment.

Headnotes:

The principle of non-discrimination on the grounds of age, enshrined in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression by Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, must be interpreted as not precluding national legislation under which an end-of-contract payment, paid in addition to an employee's salary on the expiry of a fixed-term employment contract where the contractual relationship is not continued in the form of a contract for an indefinite period, is not payable in the event that the contract is concluded with a young person for a period during his school or university holidays.

In the present case, the end-of-contract payment intended to compensate for the insecurity of the employee's situation where the contractual relationship is not continued in the form of a contract for an indefinite period, expressly excludes young persons who have concluded a fixed-term employment contract for a period during their school holidays or university vacation from entitlement to that payment.

The national legislature thus, by necessary implication, considered that those young persons are not, on the expiry of their contract, in a situation of job insecurity.

In fact, an employment carried out on the basis of a fixed-term contract by a pupil or student during his school holidays or university vacation is characterised by being both temporary and ancillary, since that pupil or student intends to continue his studies at the end of that holiday or vacation.

It follows that, by holding that the situation of young people who have concluded a fixed-term employment contract for a period during their school holidays or university vacation is not comparable to that of other categories of workers eligible for the end-of-contract

payment, the national legislature in no way exceeded the bounds of its discretion in the field of social policy. Consequently, the difference in treatment between these two categories of employees cannot constitute discrimination on the basis on the age.

Summary:

I. The request for a preliminary ruling was made in proceedings between O and Bio Philippe Auguste SARL concerning the latter's refusal to grant the applicant, on the expiry of his fixed-term employment contract, an end-of-contract payment.

O was recruited by Bio Philippe Auguste SARL under a fixed-term employment contract for a period covering his university holidays.

Contesting the non-payment of the end-of-contract payment, O brought an action before the *Conseil de Prud'hommes de Paris* (Labour Tribunal, Paris) seeking the sum in respect of the end-of-contract payment, the re-classification of his fixed-term contract as a contract for an indefinite period and the redundancy payments in respect of compensation for dismissal without real and substantial cause. O also lodged a preliminary objection that the national provision was unconstitutional.

After the judgment of the Constitutional Court, the *Conseil de Prud'hommes de Paris* decided to ask the Court of Justice whether the general principle of non-discrimination on the grounds of age precludes national legislation which excludes young persons who work during their school or university holidays from entitlement to an insecurity payment payable in the event that employment under a fixed-term contract is not followed by an offer of permanent employment.

II. The Court recalled that while it is true that a person works for only a very limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary, the fact remains that, independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of "worker" within the meaning of EU law.

Next, the Court pointed out that Member States enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable

of achieving it.

In particular, the Court stated that the requirement as to the comparable nature of the situations for the purposes of determining whether there is an infringement of the principle of equal treatment must be assessed in the light of all the factors characterising those situations.

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-2015-3-021

a) European Union / **b)** Court of Justice of the European Union / **c)** Fifth Chamber / **d)** 07.10.2015 / **e)** T-658/14 / **f)** Ivan Jurašinić v. Council of the European Union / **g)** ECLI:EU:C:2015:766 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
 3.19 General Principles – **Margin of appreciation.**
 5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

Keywords of the alphabetical index:

Document, right of access, exception / Judicial review, scope, limit.

Headnotes:

The particularly sensitive and essential nature of the interests protected by Article 4.1.a of Regulation no. 1049/2001, regarding public access to European Parliament, Council and Commission documents, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be

adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation.

Consequently, the General Court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4.1.a of Regulation no. 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.

Summary:

I. By decision of 3 October 2012, *Jurašinić v. Council* (T-63/10, Rec., EU:T:2012:516), the General Court annulled the decision of 7 December 2009, insofar as access to the correspondence exchanged between the Council and the International Criminal Tribunal for the Former Yugoslavia (hereinafter, the "ICTY"), and to documents other than the reports drawn up by the European Community Monitoring Mission during the period of its activity, annexed to that correspondence, had been refused.

After being called upon to act by Mr Jurašinić, pursuant to the second paragraph of Article 265 TFEU, the Council, by decision of 22 July 2013, granted access to the documents sent by the Secretary General and High Representative for Foreign Affairs and Security Policy (SGHR) to the ICTY, insofar as they did not contain the European Community Monitoring Mission's reports.

By decision of 8 July 2014, the Council decided to grant access to two sets of documents listed in appendices 2 and 3 to the said decision, with the exception of the passages in 15 documents referred to in appendix 3 which contained procedural elements concerning the assessment of evidence, the investigation or the strategy adopted during the trial by the ICTY bodies and whose numbering matched that used in the Judgment *Jurašinić v. Council*, paragraph 6 *supra*, which were covered by the exceptions provided for in Article 4.1.a and 4.2, second indent, of Regulation no. 1049/2001.

The present case arose from the appeal lodged by Mr Jurašinić against this decision partially refusing access.

Cross-references:

Court of Justice of the European Union:

- T-63/10, *Jurašinić v. Council*, 03.10.2012.

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-2015-3-022

a) European Union / **b)** Court of Justice of the European Union / **c)** Sixth Chamber / **d)** 11.11.2015 / **e)** C-219/14 / **f)** Greenfield / **g)** ECLI:EU:C:2015:745 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Employment, leave, unused, right to compensation / Employment, working time / Employment, part-time, leave, entitlement, calculation.

Headnotes:

Clause 4.2 of the Framework Agreement on part-time work, annexed to Council Directive 97/81, concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23, and Article 7 of Directive 2003/88, concerning certain aspects of the organisation of working time must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that worker's new work pattern. A new

calculation must, however, be performed for the period during which working time increased.

Clause 4.2 of the Framework Agreement and Article 7 of Directive 2003/88 must be interpreted as meaning that the calculation of the entitlement to paid annual leave is to be performed according to the same principles, whether what is being determined is the allowance in lieu of paid annual leave not taken where the employment relationship is terminated, or the outstanding annual leave entitlement where the employment relationship continues.

However, it is not impossible that the time when that calculation is to be performed may have an effect on the manner in which it is carried out.

Indeed, where remuneration is made up of several elements, the determination of normal remuneration requires a specific analysis. In such a situation it is for the national court or tribunal to assess, in the light of the principles identified in the case-law, whether, on the basis of an average over a reference period which is considered to be representative, the methods of calculating normal remuneration and the allowance in lieu of paid annual leave not taken achieve the objective pursued by Article 7 of Directive 2003/88.

Summary:

I. The request was made in proceedings between Ms Greenfield and The Care Bureau Ltd (hereinafter, "Care Bureau") concerning the calculation of the allowance in lieu of paid annual leave not taken to which Ms Greenfield considers she is entitled following termination of her employment contract.

Ms Greenfield worked under a contract of employment in which it was stipulated that working hours and days differed from week to week. During the 12-week period immediately preceding that holiday, her work pattern was 1 day per week.

From August 2012 Ms Greenfield began working a pattern of 12 days on and 2 days off taken as alternate weekends. In November 2012 Ms Greenfield requested a week of paid leave. Care Bureau informed her that, as a result of the holiday taken in June and July 2012, she had exhausted her entitlement to paid annual leave. The entitlement to paid leave was calculated at the date on which leave was taken, based on the working pattern for the 12-week period prior to the leave. Since Ms Greenfield had taken her leave at a time when her work pattern was one day per week, she had taken the equivalent of 7 weeks of paid leave, and accordingly exhausted her entitlement to paid annual leave. Ms Greenfield left Care Bureau on 28 May 2013.

II. The Court emphasised that the right of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down.

The Court held, furthermore, that the entitlement of every worker to paid annual leave is, as a principle of European Union social law, expressly laid down in Article 31.2 of the Charter of Fundamental Rights of the European Union, which Article 6.1 TEU recognises as having the same legal value as the Treaties.

In addition, the Court noted that as regards the accrual of entitlement to paid annual leave, it is necessary to distinguish periods during which the worker worked according to different work patterns, the number of units of annual leave accumulated in relation to the number of units worked to be calculated for each period separately. That conclusion is not affected by the application of the *pro rata temporis* principle laid down in the Framework Agreement on part-time work. While it is the case that the application of that principle is appropriate for the grant of annual leave for a period of part-time employment, since for such a period the reduction of the right to annual leave, in comparison to that granted for a period of full-time employment, is justified on objective grounds, the fact remains that that principle cannot be applied *ex post* to a right to annual leave accumulated during a period of full-time work.

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-2015-3-023

a) European Union / **b)** Court of Justice of the European Union / **c)** Fourth Chamber / **d)** 17.11.2015 / **e)** C-115/14 / **f)** RegioPost / **g)** ECLI:EU:C:2015:760 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Public procurement, conditions / Service, freedom to provide / Employment, minimum wage.

Headnotes:

Article 26 of Directive 2004/18, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Regulation no. 1251/2011, must be interpreted as not precluding legislation of a regional entity of a Member State which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

It follows that Article 26 of Directive 2004/18, read in conjunction with Directive 96/71, concerning the posting of workers in the framework of the provision of services, permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in the first subparagraph of Article 3.1.c of that directive which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers.

Further, Article 26 of Directive 2004/18 must be interpreted as not precluding legislation of a regional entity of a Member State, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

Exclusion from participation in that contract cannot be regarded as a penalty. It is merely the consequence of the failure to meet a requirement in the contract notice and intended to emphasise, from the outset, the importance of compliance with a mandatory rule for minimum protection expressly authorised by

Article 26 of Directive 2004/18. Such exclusion is appropriate and proportionate, and can be applied only where, after having been invited to supplement its tender by adding the undertaking, the operator concerned refuses to comply.

Summary:

I. The request has been made in proceedings between *RegioPost GmbH & Co. KG* (hereinafter, “*RegioPost*”) and *Stadt Landau in der Pfalz* (municipality of Landau in the Palatinate, Germany, ‘municipality of Landau’) concerning the obligation, imposed on tenderers and their subcontractors in the context of the award of a public contract for postal services in that municipality, to undertake to pay a minimum wage to staff performing the services covered by that public contract.

In July 2013, the municipality of Landau excluded the German undertaking *RegioPost* from participation in a public procurement procedure relating to postal services in that municipality, on the grounds that that undertaking had not declared, contrary to the provisions of the contract notice and despite a reminder letter, that it undertook, if awarded the contract, to pay a minimum wage to staff called upon to perform the services.

Both the contract notice and the specifications referred to a Law of the *Land* of Rhineland-Palatinate under which public contracts may be awarded in that *Land* only to undertakings (and subcontractors) which, at the time of submitting their tender, undertake to pay staff responsible for performing the services a minimum wage of €8.70 gross per hour (rate of pay applicable at the material time). At the time of the facts, there was no collective agreement setting a mandatory minimum wage for the postal services sector in Germany.

II. In its judgment, the Court held that the imposition, under national legislation, of a minimum wage on tenderers and their subcontractors, if any, established in a Member State other than that of the contracting authority and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU.

Nonetheless, this may, in principle, be justified by the objective of protecting workers. This is the case for a legislative provision laying down the minimum rate of pay which, as a mandatory rule for minimum protection, in principle applies generally to the award

of any public contract in the state concerned, irrespective of the sector in question, and which confers a minimum social protection, as no other national legislation provides for a lower minimum wage for the postal services sector.

The Court held furthermore that the limitation of the scope of the national measure to public contracts is the simple consequence of the fact that there are rules of EU law specific to that field, in this case, those laid down in Directive 2004/18.

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

Important decisions

Identification: ECH-2015-3-011

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.10.2015 / **e)** 27510/08 / **f)** *Perinçek v. Switzerland* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest.**
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Genocide, denial, criminal-law response / Hatred, incitement / Human dignity, affront / Intolerance.

Headnotes:

Criminal conviction for rejecting legal characterisation of atrocities committed by Ottoman Empire against the Armenian people from 1915 as “genocide”.

The applicant’s criminal conviction in order to protect the rights of the Armenian community breached Article 10 ECHR since, taking into account all the relevant factors – that the applicant’s statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal-law response in Switzerland, that there was no international obligation for Switzerland to criminalise statements of that nature, that the Swiss courts appeared to have censured the applicant for voicing an opinion that diverged from established views in Switzerland, and that the interference took the serious form of a criminal conviction – the conviction was not necessary in a democratic society.

Summary:

I. The applicant is a doctor of laws and chairman of the Turkish Workers' Party. In 2005 he took part in various conferences during which he publicly denied that there had been any genocide of the Armenian people by the Ottoman Empire in 1915 and subsequent years. In particular, he described the idea of an Armenian genocide as an "international lie". The Switzerland-Armenia Association lodged a criminal complaint against the applicant on account of his comments. The applicant was ordered to pay ninety day-fines of 100 Swiss francs (CHF), suspended for two years, a fine of CHF 3,000, which could be replaced by thirty days' imprisonment, and the sum of CHF 1,000 in compensation to the Switzerland-Armenia Association for non-pecuniary damage.

II. Not only was the Court not required to determine whether the massacres and mass deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards could be characterised as genocide within the meaning of that term in international law; it also had no authority to make legally binding pronouncements, one way or the other, on this point.

Whether the applicant's statements had sought to stir up hatred or violence, and whether by making them he had attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it – was not immediately clear and overlapped with the question whether the interference with the applicant's right to freedom of expression had been "necessary in a democratic society". Accordingly, the question of the application of Article 17 ECHR had to be joined to the merits of the applicant's complaint under Article 10 ECHR.

Article 10: The applicant's conviction and punishment, coupled with the order to pay damages to the Switzerland-Armenia Association, constituted an interference with the exercise of his right to freedom of expression.

a. Prescribed by law" – The applicant could reasonably have foreseen – if need be, with appropriate advice – that his statements in relation to the events of 1915 and the following years might result in criminal liability. The interference with the applicant's right to freedom of expression had thus been sufficiently foreseeable, and therefore "prescribed by law" within the meaning of Article 10.2 ECHR.

b. Legitimate aims – The interference with the statements in which the applicant had denied that the Armenians had suffered genocide had been intended to protect the identity of the descendants of the events in question, and thus the dignity of present-day Armenians. At the same time, it could hardly be said that by disputing the legal characterisation of the events, the applicant had cast the victims in a negative light, deprived them of their dignity or diminished their humanity. Nor did it appear that he had directed his accusation that the idea of the Armenian genocide was an "international lie" towards the victims or their descendants. However, in one of his speeches the applicant had referred to the Armenians involved in the events as "instruments" of the "imperialist powers", and accused them of "carr[ying] out massacres of the Turks and Muslims". That being so, the interference had also been intended to protect the dignity of those persons and thus the dignity of their descendants. The interference with the applicant's right to freedom of expression could therefore be regarded as having been intended "for the protection of the ... rights of others".

c. Necessity of the interference in a democratic society – The Court was not required to determine whether the criminalisation of the denial of genocides or other historical facts could in principle be justified. Being constrained by the facts of the case, it was limited to reviewing whether or not the application of the Criminal Code in the applicant's case had been "necessary in a democratic society" within the meaning of Article 10.2 ECHR. This concerned the rights of Armenians to respect for their and their ancestors' dignity, including their right to respect for their identity, which was constructed around the understanding that their community had suffered genocide. These were rights protected under Article 8 ECHR. The Court was thus faced with the need to strike a balance between two Convention rights: the right to freedom of expression under Article 10 ECHR and the right to respect for private life under Article 8 ECHR.

The Court was aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years were to be regarded as genocide, and of that community's acute sensitivity to any statements bearing on that point. However, it could not accept that the applicant's statements at issue in this case had been so wounding to the dignity of the Armenians who had suffered and perished in those events and to the dignity and identity of their descendants as to require criminal-law measures in Switzerland. The sting of the applicant's statements had not been directed towards those persons but towards the "imperialists" whom he regarded as responsible for

the atrocities. This, coupled with the amount of time that had elapsed since the events to which the applicant had been referring, his statements could not be seen as having had the significantly upsetting effect sought to be attributed to them. Nor was the Court persuaded that the applicant's statements – in which he had denied that the events of 1915 and the following years could be classified as genocide but had not disputed the actual occurrence of massacres and mass deportations – could have had a severe impact on the Armenians' identity as a group. Statements that contested, even in virulent terms, the significance of historical events that carried a special sensitivity for a country and touched on its national identity could not in themselves be regarded as seriously affecting their addressees. The Court did not rule out that there might be circumstances in which, in view of the particular context, statements relating to traumatic historical events could result in significant damage to the dignity of groups affected by such events, for instance if they were particularly virulent and disseminated in a form that was impossible to ignore. The only cases in which the former Commission and the Court had accepted the existence of such circumstances without specific evidence were those relating to Holocaust denial. However, as already noted, this could be regarded as stemming from the very particular context in which those cases had unfolded. Lastly, the applicant's statements had been made at three public events. Their impact was thus bound to have been rather limited.

Given that in the present case there were other factors which had a significant bearing on the breadth of the applicable margin of appreciation, the comparative-law position could not play a weighty part in the Court's conclusion with regard to this issue. And it could not therefore be said that the interference with the applicant's right to freedom of expression had been required, let alone justified, by Switzerland's international obligations.

From the analysis carried out by the domestic courts, it was unclear whether the applicant had been penalised for disagreeing with the legal classification ascribed to the events of 1915 and the following years or with the prevailing views in Swiss society on this point.

Taking into account all the elements analysed above – that the applicant's statements had related to a matter of public interest and had not amounted to a call for hatred or intolerance, that the context in which they had been made had not been marked by heightened tensions or special historical overtones in Switzerland, that the statements could not be regarded as having affected the dignity of the

members of the Armenian community to the point of requiring a criminal-law response in Switzerland, that there had been no international obligation for Switzerland to criminalise statement of that nature, that the Swiss courts appeared to have censured the applicant for voicing an opinion that diverged from established views in Switzerland, and that the interference had taken the serious form of a criminal conviction – the Court concluded that it had not been necessary in a democratic society to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community that were at stake in the present case.

The Court therefore found a violation of Article 10 ECHR and the inapplicability of the Article 17 ECHR.

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- *Zana v. Turkey*, no. 18954/91, 25.11.1997, Reports 1997-VII;
- *Ždanoka v. Latvia* [GC], no. 58278/00, 16.03.2006, ECHR 2006-IV.

Languages:

English, French.



Identification: ECH-2015-3-012

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.10.2015 / **e)** 37553/05 / **f)** Kudrevičius and Others v. Lithuania / **g)** Reports of Judgments and Decisions / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Assembly, traffic, obstruction / Traffic, obstruction, serious / Assembly, freedom, core element.

Headnotes:

Criminal sanctions for farmers blocking traffic on major roads for two days. The intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others is not at the core of freedom of assembly. The Contracting States enjoy a wide margin of appreciation in their assessment of the necessity in taking measures to restrict such conduct. Even in the absence of involvement in or incitement to violence on the part of demonstrators, such disruption to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a “reprehensible act” and therefore justify the imposition of penalties, even of a criminal nature.

Summary:

I. The applicant farmers obtained authority to stage a peaceful protest to draw attention to the Government’s alleged lack of action in response to agricultural sector problems. The demonstrations were initially held peacefully as per the authorisations. However, negotiations with the Government stagnated. In order to put pressure on the Government, the applicants went beyond the authorisations and blocked three major highways for two days causing significant disruption. The blockage ended when their demands were met. The applicants were subsequently convicted of “rioting” and sentenced to 60 days’ imprisonment, suspended for one year. They were also ordered not to leave their places of residence for more than seven days without the authorities’ prior agreement.

In a judgment of 26 November 2013 a Chamber of the Court held, by four votes to three, that there had been a violation of Article 11 ECHR. On 14 April 2014 the case was referred to the Grand Chamber at the Government’s request.

II.a. Applicability – The applicants’ conviction had not been based on any involvement in or incitement to violence, but on the breach of public order resulting from the roadblocks. The disruption of traffic was not a side-effect of a meeting held in a public place, but rather the result of intentional action by the farmers. However, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others was not at the core of freedom of assembly as protected by Article 11 ECHR, which might have implications for any assessment of “necessity” to be carried out under the second paragraph of that provision. At the same time, the applicants’ conduct was not of such a nature and degree as to remove their participation in the demonstration from the scope of protection of the right to freedom of peaceful assembly. There was no indication that they had undermined the foundations of a democratic society. Article 11 ECHR was therefore applicable.

b. Merits – The applicants’ conviction amounted to an interference with their right to freedom of peaceful assembly. The interference had a legal basis in the domestic law. The domestic courts’ interpretation of the relevant provision of the Criminal Code was neither arbitrary nor unpredictable. The permits to hold peaceful assemblies contained a warning about the possible liability of the organisers. Moreover, it should have been clear to the applicants that disobeying the lawful and explicit orders of the police to lift the roadblocks could engage their responsibility. The impugned interference was thus “prescribed by law” and had pursued the legitimate aims of the

“prevention of disorder” and of the “protection of the rights and freedoms of others”.

The moving of the demonstrations from the authorised areas onto the highways had been a clear violation of the conditions stipulated in the permits. That action had been taken without any prior notice to the authorities and without asking them to amend the terms of the permits. The applicants could not have been unaware of those requirements. Furthermore, their action had not been justified by a need for an immediate response to a current event. The Court had no reason to question the assessment of the domestic courts that the farmers had had at their disposal alternative and lawful means to protect their interests, such as the possibility of bringing complaints before the administrative courts.

In so far as the intentional roadblocks were aimed at pressuring the Government to accept the farmers’ demands, that feature distinguished the instant case from those in which the Court had observed that demonstrations might cause a certain level of disruption to ordinary life, including disruption to traffic. In cases where demonstrators tried to prevent or alter the exercise of an activity carried out by others, the Court had concluded that the inflicting of sanctions had been a reaction proportionate to the legitimate aim of protecting the rights and freedoms of others. The same conclusion should a fortiori be reached in the instant case, as the actions of the demonstrators had not been directly aimed at an activity of which they disapproved, but at the physical blocking of another activity which had no direct connection with the object of their protest.

As could be seen from the Court’s case-law, the intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a “reprehensible act” and therefore justify the imposition of penalties, even of a criminal nature. Even though the applicants had not performed acts of violence or incited others to engage in such acts, the almost complete obstruction of three major highways in blatant disregard of police orders and of the needs and rights of the road users had constituted conduct which could be described as “reprehensible”. Bearing in mind the margin of appreciation to be accorded in such circumstances, the respondent State had clearly been entitled to consider that the interests of protecting public order outweighed those of the applicants in resorting to roadblocks as a means for the farmers to achieve a breakthrough in their negotiations with the Government.

As to the conduct of the authorities, the police had confined themselves to ordering the applicants to remove the roadblocks and to warning them about their possible liability. They had chosen not to disperse the gatherings even when the applicants refused to obey their lawful orders. When tensions had arisen between the farmers and the truck drivers, the police had urged the parties to the conflict to calm down in order to avoid serious confrontations. Despite the serious disruptions caused by the applicants’ conduct the authorities had thus showed a high degree of tolerance. They had, moreover, attempted to balance the interests of the demonstrators with those of the users of the highways, in order to ensure the peaceful conduct of the gathering and the safety of all citizens, thus satisfying any positive obligation that they might be considered to have had.

As to the sanctions imposed on the applicants, the penalty applied was a lenient 60-day custodial sentence whose execution had been suspended for one year. The applicants had not been sentenced to pay fines and the only actual consequence of their conviction was the obligation, lasting one year, to obtain authorisation if they wanted to leave their places of residence for more than seven days. Such inconvenience did not seem disproportionate when compared to the serious disruption of public order provoked by the applicants.

Lastly, since there was no uniform approach among the member States as to the legal characterisation – as a criminal or an administrative offence – of the obstruction of traffic on a public highway, the domestic authorities had not overstepped the limits of their wide margin of appreciation by holding the applicants criminally liable for their conduct. The fact that other individuals might have obtained more lenient treatment did not necessarily imply that the sanctions imposed on the applicants had been disproportionate.

In sum, the domestic authorities had struck a fair balance between the legitimate aims of the “prevention of disorder” and of the “protection of the rights and freedoms of others”, on the one hand, and the requirements of freedom of assembly on the other, and based their decisions on an acceptable assessment of the facts and on reasons which were relevant and sufficient.

It was not necessary for the Court to address the arguments put forward by the parties in order to determine whether the measures adopted by the authorities could have been justified in the light of the case-law of the European Court of Justice (ECJ) (*Eugen Schmidberger, Internationale Transporte and Planzüge v. Austria*, C-112/00, judgment of 12 June

2003; and *Commission v. France*, C-265/95, judgment of 9 December 1997). The role of the ECJ had been to establish whether the EU member States had complied with their obligation to ensure the free movement of goods, while the Court's task in the instant case was to determine whether there had been an infringement of the applicants' right to freedom of assembly.

The Court therefore found no violation of Article 11 ECHR.

Cross-references:

European Court of Human Rights:

- *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, 17.05.2011;
- *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, 21.10.2010;
- *Ashughyan v. Armenia*, no. 33268/03, 17.07.008;
- *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, 27.02.2007;
- *Balçık and Others v. Turkey*, no. 25/02, 29.11.2007;
- *Barraco v. France*, no. 31684/05, 05.03.2009;
- *Berladir and Others v. Russia*, no. 34202/06, 10.07.2012;
- *Bukta and Others v. Hungary*, no. 25691/04, 17.07.2007, ECHR 2007-III;
- *Çelik v. Turkey* (no. 3), no. 36487/07, 15.11.2012;
- *Cisse v. France*, no. 51346/99, 09.04.2002, ECH ECHR R 2002-III;
- *Coster v. the United Kingdom* [GC], no. 24876/94, 18.01.2001;
- *Disk and Kesik v. Turkey*, no. 38676/08, 27.11.2012;
- *Djavit An v. Turkey*, no. 20652/92, 20.02.2003, ECHR 2003-III;
- *Drieman and Others v. Norway* (dec.), no. 33678/96, 04.05.2000;
- *Edwards v. the United Kingdom*, no. 13071/87, 16.12.1992, Series A no. 247-B;
- *Éva Molnár v. Hungary*, no. 10346/05, 07.10.2008;
- *Ezelin v. France*, no. 11800/85, 26.04.1991, Series A no. 202;
- *Fáber v. Hungary*, no. 40721/08, 24.07.2012;
- *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, 08.12.1999, ECHR 1999-VIII;
- *Galstyan v. Armenia*, no. 26986/03, 15.11.2007;
- *Gawęda v. Poland*, no. 26229/95, 14.03.2002, ECHR 2002-II;
- *Gerger v. Turkey* [GC], no. 24919/94, 08.07.1999;
- *Gorzelik and Others v. Poland* [GC], no. 44158/98, 17.02.2004, ECHR 2004-I;
- *Gün and Others v. Turkey*, no. 8029/07, 18.06.2013;
- *Güneri and Others v. Turkey*, nos. 42853/98, 43609/98 and 44291/98, 12.07.2005;
- *Huhtamäki v. Finland*, no. 54468/09, 06.03.2012;
- *İzci v. Turkey*, no. 42606/05, 23.07.2013;
- *Karatepe and Others v. Turkey*, nos. 33112/04, 36110/04, 40190/04, 41469/04 and 41471/04, 07.04.2009;
- *Kasparov and Others v. Russia*, no. 21613/07, 03.10.2013;
- *Klaas v. Germany*, no. 15473/89, 22.09.1993, Series A no. 269;
- *Kopp v. Switzerland*, no. 23224/94, 25.03.1998, Reports 1998-II;
- *Kruslin v. France*, no. 11801/85, 24.04.1990, Series A, no. 176-A;
- *Lucas v. the United Kingdom* (dec.), no. 39013/02, 18.03.2003;
- *Maestri v. Italy* [GC], no. 39748/98, 17.02.2004, ECHR 2004-I;
- *Makhmoudov v. Russia*, no. 35082/04, 26.07.2007;
- *Mkrtychyan v. Armenia*, no. 6562/03, 11.01.2007;
- *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, 08.04.2014, ECHR 2014;
- *Nemtsov v. Russia*, no. 1774/11, 31.07.2014;
- *Nurettin Aldemir and Others v. Turkey*, nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, 18.12.2007;
- *Oya Ataman v. Turkey*, no. 74552/01, 05.03.2006, ECHR 2006-XIII;
- *Öztürk v. Turkey* [GC], no. 22479/93, 28.09.1999, ECHR 1999-VI;
- *Plattform "Ärzte für das Leben" v. Austria*, no. 10126/82, 21.06.1988, Series A no. 139;
- *Primov and Others v. Russia*, no. 17391/06, 12.06.2014;
- *Protopapa v. Turkey*, no. 16084/90, 24.02.2009;
- *Rai and Evans v. the United Kingdom* (dec.), nos. 26258/07 and 26255/07, 17.11.2009;
- *Rekvényi v. Hungary* [GC], no. 25390/94, 02.05.1999, ECHR 1999-III;
- *Rohlana v. the Czech Republic* [GC], no. 59552/08, 27.05.2015, ECHR 2015;
- *Rotaru v. Romania* [GC], no. 28341/95, 04.05.2000, ECHR 2000-V;
- *Rufi Osmani and Others v. "The former Yugoslav Republic of Macedonia"* (dec.), no. 50841/99, 06.04.2000, ECHR 2001-X;
- *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 04.12.2008, ECHR 2008;

- *Samüt Karabulut v. Turkey*, no. 16999/04, 27.01.2009;
- *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, 01.12.2011, *ECHR* 2011 (extracts);
- *Sergey Kuznetsov v. Russia*, no. 10877/04, 23.10.2008;
- *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, 09.07.2013, *ECHR* 2013 (extracts);
- *Skiba v. Poland* (dec.), no. 10659/03, 07.07.2009;
- *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 02.10.2001, *ECHR* 2001-IX;
- *Steel and Others v. the United Kingdom*, no. 24838/94, 23.09.1998, *Reports of Judgments and Decisions* 1998-VII;
- *Sunday Times v. the United Kingdom* (no. 1), no. 6538/74, 26.04.1979, série A, no. 30;
- *Taranenko v. Russia*, no. 19554/05, 15.05.2014;
- *United Communist Party of Turkey and Others v. Turkey*, no. 19392/92, 30.01.1998, *Reports* 1998-I;
- *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, 28.06.2001, *ECHR* 2001-VI;
- *Vidal v. Belgium*, no. 12351/86, 28.10.1992, Series A no. 235-B;
- *Vogt v. Germany*, no. 17851/91, 02.09.1996, Series A no. 323;
- *Vyerentsov v. Ukraine*, no. 20372/11, 11.04.2013;
- *Ziliberg v. Moldova* (dec.), no. 61821/00, 04.05.2004.

Languages:

English, French.



Identification: ECH-2015-3-013

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 20.10.2015 / **e)** 11882/10 / **f)** Pentikäinen v. Finland / **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:

Journalist, rights and duties.

Headnotes:

Arrest and conviction of journalist for not obeying police orders during a demonstration. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 ECHR, is not confined to the contents of information which is collected and/or disseminated by journalistic means, but also embraces the lawfulness of the journalist's conduct including his or her public interaction with the authorities when exercising journalistic functions. The fact that a journalist has breached the law in that connection is a most relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly. Journalists exercising their freedom of expression cannot claim immunity from criminal liability for the sole reason that the offence in question was committed during the performance of their journalistic functions.

Summary:

I. In 2006 the applicant was sent to report on a demonstration in his capacity as a journalist and photographer. When the demonstration turned violent, the police decided to prevent the demonstrators from marching and to allow a peaceful demonstration to be held on the spot. They later sealed off the area and ordered the protesters to disperse. Despite being repeatedly asked to leave the scene, the applicant decided to remain with the demonstrators. Shortly afterwards he was arrested along with a number of demonstrators and detained for over 17 hours. He was subsequently found guilty of disobeying police orders, but no penalty was imposed. That decision was upheld on appeal and the applicant's subsequent complaint to the Supreme Court was rejected.

II. When assessing the necessity of the interference with the applicant's freedom of expression the Court had to weigh two competing interests: the interest of the public in receiving information on an issue of general interest and that of the police in maintaining public order in the context of a violent demonstration. In this connection, the Court stressed the "watchdog" role of the media in providing information on the authorities' handling of public demonstrations and the containment of disorder. Any attempt to remove journalists from the scene of a demonstration had therefore to be subjected to strict scrutiny. On the other hand, the protection afforded by Article 10 ECHR to journalists was subject to the proviso that

they act in conformity with the principles of responsible journalism. Accordingly, journalists exercising their freedom of expression undertook “duties and responsibilities” which meant that they could not claim immunity from criminal liability for the sole reason that the offence in question was committed during the performance of their journalistic functions.

As to the applicant’s arrest, the case file disclosed no reason to doubt that the police orders to disperse the demonstration were based on a reasonable assessment of the facts. Moreover, the preventive measures taken against the likelihood of the events turning violent appeared justified. They were directed not only at the “abstract” protection of public order, but also at the safety of individuals at or in the vicinity of the demonstration, including members of the media and, therefore, the applicant himself. As to the applicant’s conduct, the Court first noted that his physical appearance during the demonstration did not clearly distinguish him from the protesters, as he was not wearing any distinctive clothing or other signs capable of identifying him as a journalist. It was thus likely that he was not readily identifiable as a journalist prior to his arrest. Had he wished to be acknowledged as a journalist by the police, he should have made sufficiently clear efforts to identify himself as such by wearing distinguishable clothing, keeping his press badge visible at all times or by any other appropriate means. As a journalist reporting on police actions, he had to have been aware of the legal consequences of disobeying police orders and so, by not doing so, had knowingly taken the risk of arrest. Furthermore, nothing in the case file suggested that the applicant would not have been able to continue to perform his professional duty in the immediate vicinity had he obeyed the order to leave the cordoned-off area.

As to the applicant’s detention, although he was held at the police station for seventeen and a half hours, because of his status as a journalist he was one of the first to be interrogated and released. Further, although it was not entirely clear how his camera equipment and memory cards were treated after his arrest, it did not appear that his equipment was confiscated at any point and he was allowed to keep all the photographs he had taken without any restrictions on their use.

As to the conviction, although the applicant was ultimately found guilty of contumacy towards the police no penalty was imposed. Any interference with his journalistic freedom had been of limited extent, given the opportunities he had had to cover the event adequately. The Court emphasised that the conduct sanctioned by the criminal conviction was not the

applicant’s journalistic activity as such, but his refusal to comply with a police order at the very end of a demonstration which had been judged by the police to have become a riot. In this respect, the fact that the applicant was a journalist did not entitle him to preferential or different treatment in comparison to others at the scene. Indeed, the legislation of the majority of the Council of Europe member States did not confer any special status on journalists when they failed to comply with police orders to leave the scene of a demonstration. Furthermore, the concept of responsible journalism required that whenever journalists had to choose between the general duty to abide by the ordinary criminal law and their professional duty to obtain and disseminate information, and chose the second option, they had to be aware that they assumed the risk of being subject to legal sanctions, including those of a criminal character. Finally, no penalty was imposed on the applicant on the grounds that his act was considered “excusable”: as a journalist, he had been confronted with contradictory expectations arising from obligations imposed on him by the police, on the one hand, and by his employer, on the other. His conviction thus amounted only to a formal finding that he had committed the offence and as such could hardly, if at all, have any “chilling effect” on persons taking part in demonstrations. The applicant’s conviction could therefore be deemed proportionate to the legitimate aims pursued.

The Court therefore found no violation of Article 10 ECHR.

Cross-references:

European Court of Human Rights:

- *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22.04.2013, ECHR 2013 (extracts);
- *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, 20.05.1999, ECHR 1999-III;
- *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, 07.06.2012, ECHR 2012;
- *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, 17.12.2004, ECHR 2004-XI;
- *Dammann v. Switzerland*, no. 77551/01, § 52, 25.04.2006;
- *De Haes and Gijssels v. Belgium*, no. 19983/92, 24.02.1997, *Reports of Judgments and Decisions* 1997-I;
- *Fressoz and Roire v. France* [GC], no. 29183/95, 21.01.1999, ECHR 1999-I;
- *Gsell v. Switzerland*, no. 12675/05, 08.10.2009;
- *Handyside v. the United Kingdom*, no. 5493/72, 07.12.1976, Series A, no. 24;

- *Jersild v. Denmark*, no. 15890/89, 23.09.1994, Series A, no. 298;
- *K. and T. v. Finland* [GC], no. 25702/94, 12.07.2001, ECHR 2001-VII;
- *Kasabova v. Bulgaria*, no. 22385/03, 19.04.2011;
- *Kopp v. Switzerland*, no. 23224/94, 25.03.1998, Reports 1998-II;
- *Krone Verlag GmbH v. Austria*, no. 27306/07, 19.06.2012;
- *Kruslin v. France*, no. 11801/85, 24.04.1990, Series A, no. 176-A;
- *Monnat v. Switzerland*, no. 73604/01, 21.09.2006, ECHR 2006-X;
- *Morice v. France* [GC], no. 29369/10, 23.04.2015;
- *Najafli v. Azerbaijan*, no. 2594/07, 02.10.2012;
- *Novaya Gazeta and Borodyanskiy v. Russia*, no. 14087/08, 28.03.2013;
- *Perna v. Italy* [GC], no. 48898/99, 06.05.2003, ECHR 2003-V;
- *Rotaru v. Romania* [GC], no. 28341/95, 04.05.2000, ECHR 2000-V;
- *Stoll v. Switzerland* [GC], no. 69698/01, 10.12.2007, ECHR 2007-V;
- *Taranenko v. Russia*, no. 19554/05, 15.05.2014;
- *Sunday Times v. the United Kingdom* (no. 1), no. 6538/74, 06.11.1980, Series A, no. 30;
- *Sunday Times v. the United Kingdom* (no. 2), no. 13166/87, 26.11.1991, Series A, no. 217;
- *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), nos. 3002/03 and 23676/03, 10.03.2009, ECHR 2009;
- *Ungváry and Irodalom Kft v. Hungary*, no. 64520/10, 03.12.2013;
- *Yordanova and Toshev v. Bulgaria*, no. 5126/05, 02.10.2012.

Languages:

English, French.



Identification: ECH-2015-3-014

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 20.10.2015 / **e)** 25703/11 / **f)** *Dvorski v. Croatia* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel.**

Keywords of the alphabetical index:

Lawyer, right of choice.

Headnotes:

Denial, without relevant and sufficient reasons, of access to a lawyer of the suspect's own choosing during police questioning. In contrast to cases involving denial of access to a lawyer, where "compelling reasons" are required for questioning a suspect without representation, the more lenient requirement of "relevant and sufficient" reasons applies in situations raising the less serious issue of "denial of choice". While national authorities must have regard to a suspect's wishes as to his or her choice of legal representation, they may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice. Where such grounds are lacking, a restriction on the free choice of defence counsel will entail a violation of Article 6.1 ECHR in conjunction with Article 6.3.c ECHR if it adversely affects the defence, regard being had to the proceedings as a whole.

Summary:

I. In 2007 the applicant was arrested in connection with a number of crimes and questioned as a suspect by the police. During questioning the applicant confessed to the offences with which he was charged, and his confession was admitted in evidence at his trial. In 2008 the applicant was ultimately convicted of aggravated murder, armed robbery and arson and sentenced to forty years' imprisonment.

In his application to the European Court, the applicant complained that following his arrest the police had denied him access to a lawyer (G.M.) his parents had hired to represent him, that he had therefore had to accept the services of a lawyer called in by the police (M.R.), and that he had been forced to incriminate himself without the benefit of a lawyer of his own choice.

II. Unlike the position in *Salduz v. Turkey*, where the applicant was denied access to a lawyer during police questioning, the instant case concerned a situation where the applicant was afforded access from his first interrogation, but not – according to his complaint – to a lawyer of his own choosing. In contrast to cases involving denial of access, where “compelling reasons” were required for questioning a suspect without representation, the more lenient requirement of “relevant and sufficient” reasons was applied in situations raising the less serious issue of “denial of choice”. While national authorities had to have regard to a suspect’s wishes as to his or her choice of legal representation, they could override those wishes when there were relevant and sufficient grounds for holding that this was necessary in the interests of justice. Where relevant and sufficient grounds were lacking, a restriction on the free choice of defence counsel would entail a violation of Article 6.1 ECHR in conjunction with 6.3.c ECHR if it adversely affected the defence, regard being had to the proceedings as a whole.

a. Whether the applicant was represented by a lawyer of his own informed choice – The Court found it established that G.M. had attempted to see the applicant at the police station before the questioning started, but was told to leave, without the applicant being informed of his presence. Accordingly, although the applicant had formally chosen M.R. to represent him during the police questioning, his choice was not an informed one, because he did not know that his parents had hired G.M.

b. Whether there were relevant and sufficient reasons for restricting the applicant’s access to the lawyer of his choosing – The only reason cited by the Government for not allowing G.M. access to the applicant was that he did not have a proper power of attorney to represent him. However, the evidence in the case file indicated that G.M. had been given a written power of attorney by the parents, as permitted by the domestic law. The police had thus been under an obligation to at least inform the applicant that G.M. was at the police station, but this they had omitted to do. In these circumstances, the Court was not convinced that the applicant’s inability, as a result of the police’s conduct, to designate G.M. as his representative was supported by relevant and sufficient reasons.

c. Whether the fairness of the proceedings as a whole was prejudiced – Where, as in the instant case, it was alleged that the appointment or choice of lawyer had influenced or led to the making of an incriminating statement by the suspect at the very outset of the criminal investigation, careful scrutiny by the authorities, notably the national courts, was called for.

However, the reasoning employed by the national courts in relation to the legal challenge mounted by the applicant concerning the manner in which his confession had been obtained by the police was far from substantial. No national authority had taken any steps to establish the relevant circumstances surrounding G.M.’s visit to the police station in connection with the applicant’s questioning by the police. In particular, the national courts had made no real attempt to provide reasons supporting or justifying their decision in terms of the values of a fair criminal trial as embodied in Article 6 ECHR. The Court was therefore not convinced that the applicant had had an effective opportunity to challenge the circumstances in which M.R. was chosen to represent him.

In the instant case, it could be presumed that the consequence of the police’s conduct had been that, instead of remaining silent at his first police interview as he was entitled to do, the applicant had made a confession which was later admitted in evidence against him. He had subsequently contested the manner in which that confession had been obtained by the police. Although there was other evidence against him, the significant likely impact of his initial confession on the further development of the criminal proceedings could not be ignored. In these circumstances, the consequence of the police’s conduct in preventing the chosen lawyer from having access to the applicant had undermined the fairness of the subsequent criminal proceedings taken as a whole.

The Court therefore found a violation of Article 6.1 and 6.3.c ECHR.

Cross-references:

European Court of Human Rights:

- *Airey v. Ireland*, no. 6289/73, 06.02.1981, Series A, no. 32;
- *Aras v. Turkey* (no. 2), no. 15065/07, 18.11.2014;
- *Artico v. Italy*, no. 6694/74, 13.05.1980, Series A, no. 37;
- *Baloga v. Ukraine*, no. 620/05, 16.09.2010;
- *Bandaletov v. Ukraine*, no. 23180/06, 31.10.2013;
- *Bykov v. Russia* [GC], no. 4378/02, 10.03.2009;
- *Croissant v. Germany*, no. 13611/88, 25.09.1992, Series A, no. 237-B;
- *Dayanan v. Turkey*, no. 7377/03, 13.10.2009;
- *De Jong, Baljet and Van den Brink v. the Netherlands*, nos. 8805/79; 8806/79; 9242/81, 22.05.1984, Series A, no. 77;

- *Delcourt v. Belgium*, no. 2689/65, 17.01.1970, Series A, no. 11;
- *Denk v. Austria*, no. 23396/09, 05.12.2013;
- *Erkapić v. Croatia*, no. 51198/08, 25.04.2013;
- *Goddí v. Italy*, no. 8966/80, 09.04.1984, Series A, no. 76;
- *Gürkan v. Turkey*, no. 10987/10, 03.07.2012;
- *Hanif and Khan v. the United Kingdom*, nos. 52999/08 and 61779/08, 20.12.2011;
- *Horvatić v. Croatia*, no. 36044/09, 17.10.2013;
- *Imbrioscia v. Switzerland*, no. 13972/88, 24.11.1993, Series A, no. 275;
- *Klimentyev v. Russia*, no. 46503/99, 16.11.2006;
- *Lisica v. Croatia*, no. 20100/06, 25.02.2010;
- *Magee v. the United Kingdom*, no. 28135/95, 06.06.2000, ECHR 2000 VI;
- *Maresti v. Croatia*, no. 55759/07, 25.06.2009;
- *Martin v. Estonia*, no. 35985/09, 30.05.2013;
- *Mayzit v. Russia*, no. 63378/00, 20.01.2005;
- *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, 26.07.2002, ECHR 2002-VII;
- *Moser v. Austria*, no. 12643/02, 21.09.2006;
- *Panovits v. Cyprus*, no. 4268/04, 11.12.2008;
- *Pavlenko v. Russia*, no. 42371/02, 01.04.2010;
- *Pishchalnikov v. Russia*, no. 7025/04, 24.09.2009;
- *Poitrimol v. France*, no. 14032/88, 23.11.1993, Series A, no. 277-A;
- *Popov v. Russia*, no. 26853/04, 13.07.2006;
- *Prehn v. Germany* (dec.), no. 40451/06, 24.08.2010;
- *Salduz v. Turkey* [GC], no. 36391/02, 27.11.2008, ECHR 2008;
- *Sejdovic v. Italy* [GC], no. 56581/00, 01.03.2006, ECHR 2006-II;
- *Vitan v. Romania*, no. 42084/02, 25.04.2008;
- *Zagorodniy v. Ukraine*, no. 27004/06, 24.11.2011.

Languages:

English, French.



Identification: ECH-2015-3-015

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 20.10.2015 / **e)** 35343/05 / **f)** *Vasiliauskas v. Lithuania* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949**.

2.1.2.2 Sources – Categories – Unwritten rules – **General Principles of law**.

5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law**.

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

Keywords of the alphabetical index:

Genocide, political group / Genocide, definition.

Headnotes:

Conviction in 2004 for alleged genocide of Lithuanian partisans in 1953.

The requirement under Article 7 ECHR that an offence must be clearly defined in the law, be it national or international, is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. That requirement was not satisfied where the applicant was convicted of genocide as a result of an unforeseeable interpretation of that offence under international law that only emerged half a century after he committed the impugned acts.

Summary:

I. In 2004 the applicant was convicted under Article 99 of the new Lithuanian Criminal Code of the genocide of a political group in 1953 and sentenced to six years' imprisonment. That provision entered into force on 1 May 2003 and, unlike the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (hereinafter, "the Genocide Convention"), included political groups among the range of protected groups.

The conviction arose out of the applicant's alleged participation in the killing of two Lithuanian partisans in January 1953. At the time, Lithuania was under Soviet rule and the applicant was a member of the Ministry of State Security (MSB) of the Lithuanian Soviet Socialist Republic. His conviction was upheld on appeal, but the court of appeal noted that, in addition to being members of a political group, the partisans were also "representatives of the Lithuanian nation" and "could

therefore be attributed not only to political, but also to national and ethnic groups” in other words, to groups listed in the Genocide Convention.

In his application to the European Court, the applicant complained of a violation of Article 7 ECHR in that his conviction for genocide had no basis in public international law as it stood in 1953.

II. The Court’s function was to assess whether there had been a sufficiently clear legal basis, having regard to the applicable law in 1953, for the applicant’s conviction of genocide and, in particular, whether the conviction was consistent with the essence of that offence and could reasonably have been foreseen by the applicant at the time of his participation in the operation in which the two partisans were killed.

The conviction was based upon domestic legal provisions (Article 99 of the new Lithuanian Criminal Code) that were not in force in 1953 and had been applied retroactively. There had thus been a violation of Article 7 ECHR unless it could be established that the conviction was based upon international law as it stood at the relevant time.

Genocide was clearly recognised as a crime under international law in 1953: it had been codified in the 1948 Genocide Convention after being acknowledged and condemned by the UN General Assembly Resolution 96(I) of 11 December 1946. The instruments of international law prohibiting genocide had thus been sufficiently accessible to the applicant.

However, in the Court’s view the applicant’s conviction for the crime of genocide could not be regarded as consistent with the essence of that offence as defined in international law at the material time and had therefore not been reasonably foreseeable by him.

Firstly, it was clear that international law in 1953 did not include “political groups” within the definition of genocide. Article II of the Genocide Convention listed four protected groups – national, ethnical, racial or religious – but did not refer to social or political groups. Indeed, the *travaux préparatoires* to the Genocide Convention disclosed an intention by the drafters not to include political groups in the list of protected persons. All references to the crime of genocide in subsequent international law instruments described that crime in similar terms. The fact that certain States had later decided to criminalise genocide of a political group in their domestic laws did not alter the reality that the text of the 1948 Convention did not. Nor was there a sufficiently strong basis for finding that customary international law as it stood in 1953 included “political groups” among those falling within the definition of genocide.

Secondly, as regards the Lithuanian Government’s submission that because of their prominence the partisans were “part” of the national group and thus protected by Article II of the Genocide Convention, the Court noted that in 1953 there was no case-law by any international tribunal to provide judicial interpretation of the definition of genocide and the *travaux préparatoires* provided little guidance on what the drafters meant by the term “intent to destroy, in whole or in part”.

While it was reasonable to find that in 1953 it would have been foreseeable that the term “in part” contained a requirement as to substantiality, it was not until a half a century later that judicial guidance had emerged from cases before the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Court of Justice to indicate that, in addition to its numerical size, the “prominence” of the targeted part within the protected group could also be a useful consideration. That development was not something the applicant could have foreseen in 1953.

Thirdly, although the court of appeal had rephrased the trial court’s finding that Lithuanian partisans were members of a separate political group by stating that they were also “representatives of the Lithuanian nation, that is, the national group”, it had not explained what the notion “representatives” entailed or provided much historical or factual account as to how the Lithuanian partisans represented the Lithuanian nation. Nor did the partisans’ specific mantle with regard to the national group appear to have been interpreted by the Supreme Court. Thus, even if the international courts’ subsequent interpretation of the term “in part” had been available in 1953, there was no firm finding in the establishment of the facts by the domestic criminal courts to enable the Court to assess on which basis they had concluded that the Lithuanian partisans had constituted a significant part of the national group. Nor was it immediately obvious that the ordinary meaning of the terms “national” or “ethnic” in the Genocide Convention could be extended to cover partisans. The domestic courts’ conclusion that the victims came within the definition of genocide as part of a protected group was therefore an interpretation by analogy, to the applicant’s detriment, which had rendered his conviction unforeseeable.

The Court also examined, and rejected, the Lithuanian Government’s argument that the applicant’s acts were criminal according to the general principles of law recognised by civilised nations and thus came within the provisions of the second paragraph of Article 7 ECHR. It confirmed that that provision did not allow for any general exception to the rule of non-retroactivity, but was intended to ensure there was no doubt about

the validity of prosecutions after the Second World War of the crimes committed during that war. The two paragraphs of Article 7 ECHR were interlinked and to be interpreted in a concordant manner. Accordingly, since the applicant's conviction could not be justified under Article 7.1 ECHR, it could not be justified under Article 7.2 ECHR either.

The Court therefore found a violation of Article 7 ECHR.

Cross-references:

European Court of Human Rights:

- *C.R. v. the United Kingdom*, no. 20190/92, 22.11.1995, Series A, no. 335 C;
- *Del Rio Prada v. Spain* [GC], no. 42750/09, 21.10.2013, ECHR 2013;
- *Donohoe v. Ireland*, no. 19165/08, 12.12.2013;
- *Elsholz v. Germany* [GC], no. 25735/94, 13.07.2000, ECHR 2000-VIII;
- *Jorgic v. Germany*, no. 74613/01, 12.07.2007, ECHR 2007-III;
- *K.-H.W. v. Germany*, [GC], no. 37201/97, 22.03.2001, ECHR 2001-II (extracts);
- *Kipritçi v. Turkey*, no. 14294/04, 03.06.2008;
- *Kokkinakis v. Greece*, no. 14307/88, 25.05.1993, Series A, no. 260 A;
- *Kolk and Kislyiy v. Estonia* (dec.), nos. 23052/04 and 24018/04, 17.01.2006, ECHR 2006-I;
- *Kononov v. Latvia* [GC], no. 36376/04, 17.05.2010, ECHR 2010;
- *Korbely v. Hungary* [GC], no. 9174/02, 19.09.2008, ECHR 2008;
- *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and no. 34179/08, 18.07.2013, ECHR 2013 (extracts);
- *Penart v. Estonia* (dec.), no. 14685/04, 24.01.2006;
- *Pessino v. France*, no. 40403/02, 10.10.2006;
- *S.W. v. the United Kingdom*, no. 20166/92, 22.11.1995, Series A, no. 335 B;
- *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, 17.09.2009;
- *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, 22.03.2001, ECHR 2001-II;
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, 18.02.1999, ECHR 1999-I;
- *Ždanoka v. Latvia* [GC], no. 58278/00, 16.03.2004, ECHR 2006-IV.

Languages:

English, French.



Identification: ECH-2015-3-016

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 10.11.2015 / **e)** 40454/07 / **f)** Couderc and Hachette Filipacchi Associés 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:

Right of others, protection / Information, right.

Headnotes:

Court ruling of liability for the publication of an article and photos revealing the existence of a monarch's secret child.

The disclosure of a prince's paternity could have a public interest that ought not to be disregarded by the authorities. The proportionality assessment would then include the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the manner in which the information was obtained and its veracity, the content, form and consequences of the impugned article, and the severity of the penalty.

Summary:

I. On 3 May 2005 the British newspaper the *Daily Mail* published claims by Ms C. that Albert Grimaldi, the reigning Prince of Monaco, was the father of her son. The article referred to the forthcoming report in *Paris Match* magazine and reproduced the main points of the report together with photographs, one of which showed the Prince holding the child in his arms. The interview with Ms C. and the photographs in question also appeared in the German weekly magazine *Bunte* on 4 May 2005.

The applicants are, respectively, the publication director of the weekly magazine *Paris Match* and the company which publishes the magazine. On 6 May 2005 the magazine published an article in which Ms C. gave details about how she had met the

Prince, their meetings, their intimate relationship and feelings, the way in which the Prince had reacted to the news of Ms C.'s pregnancy and his attitude on meeting the child. The Prince brought proceedings against the applicants, seeking compensation for invasion of privacy and infringement of his right to protection of his own image. The French courts granted his request, awarding him EUR 50,000 in damages and ordering that details of the judgment be published, occupying one third of the magazine's front cover.

II. The judgment against the applicants amounted to interference with the exercise of their right to freedom of expression. It had been prescribed by law and had pursued a legitimate aim, namely protection of the rights of others. It remained to be determined whether it was necessary in a democratic society.

a. Contribution to a debate of general interest: The public interest could not be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or even voyeurism. Yet the interview with Ms C. contained numerous details about the Prince's private life and his real or supposed feelings which were not directly related to a debate of public interest. However, it was useful at the outset to point out that although a birth was an event of an intimate nature, it did not come solely within the private sphere of the persons concerned by it, but also fell within the public sphere, since it was in principle accompanied by a public statement (the civil-status document) and the establishment of a legal parent-child relationship. Thus, the purely family and private interest represented by a person's descent was supplemented by a public aspect, related to the social and legal structure of kinship. A news report about a birth could not therefore be considered, in itself, as a disclosure concerning exclusively the details of the private life of others, intended merely to satisfy the public's curiosity. In addition, at the material time the birth of the Prince's child had not been without possible dynastic and financial implications: the question of legitimation by marriage could have been raised, even if such an outcome was improbable. Indeed, the consequences of the birth on the succession had been mentioned in the article. The impugned information was thus not without political import, and could have aroused the public's interest with regard to the rules of succession in force in the Principality (which prevented children born outside marriage from succeeding to the throne). Likewise, the attitude of the Prince, who had wished to keep his paternity a secret and refused to acknowledge it publicly, could, in a hereditary monarchy whose future was intrinsically linked to the existence of descendants, also be of concern to the public. This

was equally true with regard to his behaviour in respect of the child's mother and the child himself: this information could provide insights into the Prince's personality, particularly with regard to the way in which he approached and assumed his responsibilities. In this context, it was important to reiterate the symbolic role of a hereditary monarchy, a system in which the person of the Prince and his direct line were also representative of the continuity of the State. Furthermore, the press's contribution to a debate of public interest could not be limited merely to current events or pre-existing debates. Admittedly, the press was a vector for disseminating debates on matters of public interest, but it also had the role of revealing and bringing to the public's attention information capable of eliciting such interest and of giving rise to such a debate within society. It followed that the national courts ought to have assessed the publication as a whole in order to determine its subject-matter accurately, rather than examining the remarks concerning the Prince's private life out of their context. However, they had refused to take into consideration the interest that the article's central message could have had for the public, and had instead concentrated on the details about the couple's intimate relationship. In so doing, they had deprived the public-interest justification relied upon by the applicants of any effectiveness.

b. How well known was the person concerned and what was the subject of the news report? The domestic courts ought to have taken into account the potential impact of the Prince's status as Head of State, and to have attempted, in that context, to determine the parts of the impugned article that belonged to the strictly private domain and what fell within the public sphere. Yet, although they had reiterated that an exception could be made to the principle of protection of private life whenever the facts disclosed could give rise to a debate on account of their impact given the status or function of the person concerned, they had drawn no conclusion from that consideration.

In addition, the Prince's private life had not been the sole subject of the article, but it had also concerned the private life of Ms C. and her son. Ms C. had certainly not been bound to silence and had been free to communicate about elements relating to her private life. It could not be ignored that the impugned article had been a means of expression for the interviewee and her son. The interview had thus also concerned competing private interests. Admittedly, Ms C.'s right to freedom of expression for herself and her son was not directly in issue in the present case; however, the combination of elements relating to Ms C.'s private life and to that of the Prince had to be taken into account in assessing the protection due to him.

c. Prior conduct of the person concerned: The material in the case file was not sufficient to enable the Court to take cognisance of the Prince's previous conduct with regard to the media.

d. Method of obtaining the information and its veracity: In a decision which appeared to have been personal, deliberate and informed, Ms C. had herself contacted *Paris Match*. The veracity of Ms C.'s statements with regard to the Prince's paternity had not been contested by him, and he himself had publicly acknowledged it shortly after the impugned article was published. As to the photographs which illustrated the interview, they had been handed over voluntarily and without charge to *Paris Match*. They had not been taken without the Prince's knowledge or in circumstances showing him in an unfavourable light.

e. Content, form and consequences of the impugned article: Journalists' duties and responsibilities implied that they were required to take into account the impact of the information to be published. In particular, certain events relating to private and family life enjoyed particularly attentive protection under Article 8 ECHR and therefore obliged journalists to show prudence and caution. The tone of the interview with Ms C. appeared to be measured and non-sensationalist. Her remarks were recognisable as quotations and her motives were also clearly set out for the readers. Equally, readers could easily distinguish between what was factual material and what concerned the interviewee's perception of the events, her opinions or her personal feelings. Admittedly, the interview was placed in a narrative setting accompanied by graphic effects and headlines which were intended to attract the reader's attention and provoke a reaction. However, this narrative setting did not distort the content of the information and did not deform it, but had to be considered as its transposition or illustration. The magazine could not be criticised for enhancing the article and striving to present it attractively, provided that this did not distort or deform the information published and was not such as to mislead the reader.

Moreover, while there was no doubt in the present case that these photographs fell within the realm of the Prince's private life and that he had not consented to their publication, their link with the impugned article had not been tenuous, artificial or arbitrary. Their publication could be justified by the fact that they added credibility to the account of events. Ms C. had had at her disposal no other evidence which would have enabled her to substantiate her account. In consequence, although publication of these photographs had had the effect of exposing the Prince's private life to the public, they had supported the account given in the article.

Lastly, with regard to the consequences of the disputed article, shortly after the article was published, the Prince had publicly acknowledged his paternity. Those consequences had to be put into perspective, in the light of the articles which had previously appeared in the foreign press. Yet, in the present case the domestic courts did not appear to have evaluated the consequences in the wider context of the international media coverage already given to the events described in the article. Thus, they had attached no weight to the fact that the secrecy surrounding the Prince's paternity had already been undermined by the previous articles in other media.

f. The severity of the sanction: The penalties imposed on the applicant company – EUR 50,000 in damages and an order to publish a statement detailing the judgment – could not be considered insignificant.

In the light of all of these considerations, the arguments advanced with regard to the protection of the Prince's private life and of his right to his own image, although relevant, could not be regarded as sufficient to justify the interference in issue.

The Court therefore found a violation of Article 10 ECHR.

Cross-references:

European Court of Human Rights:

- *Alkaya v. Turkey*, no. 42811/06, 09.10.2012;
- *Axel Springer AG v. Germany* [GC], no. 39954/08, 07.02.2012;
- *Barthold v. Germany*, no. 8734/79, 25.03.1985, Series A, no. 90
- *Björk Eiðsdóttir v. Iceland*, no. 46443/09, 10.07.2012;
- *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, 20.05.1999, ECHR 1999-III;
- *Campmany and Lopez Galiacho Perona v. Spain* (dec.), no. 54224/00, 12.12.2000, ECHR 2000-XII;
- *Éditions Plon v. France*, no. 58148/00, 18.05.2004, ECHR 2004-IV;
- *Elsholz v. Germany* [GC], no. 25735/94, 13.07.2000, ECHR 2000-VIII;
- *Erla Hlynisdóttir v. Iceland*, no. 43380/10, 10.07.2012;
- *Fressoz and Roire v. France* [GC], no. 29183/95, 21.01.1999, ECHR 1999-I;
- *Gurgenidze v. Georgia*, no. 71678/01, 17.10.2006;
- *Hachette Filipacchi Associés (ICI PARIS) v. France*, no. 12268/03, 23.07.2009;

- *Hachette Filipacchi Associés v. France*, no. 71111/01, 14.06.2007;
- *Haldimann and Others v. Switzerland*, no. 21830/09, 24.05.2015, ECHR 2015;
- *Handyside v. the United Kingdom*, no. 5493/72, 07.12.1976, Series A, no. 24;
- *Jersild v. Denmark*, no. 15890/89, 23.09.1994, Series A, no. 298;
- *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, 16.02.2005, ECHR 2004-X;
- *Lillo-Stenberg and Sæther v. Norway*, no. 13258/09, 16.01.2014;
- *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22.10.2007, ECHR 2007-IV;
- *Lingens v. Austria*, no. 9815/82, 08.07.1986, Series A, no. 103;
- *Mater v. Turkey*, no. 54997/08, 16.07.2013;
- *MGN Limited v. United Kingdom*, no. 39401/04, 18.01.2011;
- *Minelli v. Switzerland* (dec.), no. 14991/02, 14.06.2005;
- *Mosley v. United Kingdom*, no. 48009/08, 15.09.2011;
- *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, 11.01.2000, ECHR 2000-I;
- *Ojala and Etukeno Oy v. Finland*, no. 69939/10, 14.01.2014;
- *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, 17.12.2004, ECHR 2004-XI;
- *Pinto Coelho v. Portugal*, no. 28439/08, 28.06.2011;
- *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, 21.09.2010;
- *Reklos and Davourlis v. Greece*, no. 1234/05, 15.01.2009;
- *Roseiro Bento v. Portugal*, no. 29288/02, 18.04.2006;
- *Ruusunen v. Finland*, no. 73579/10, 14.01.2014;
- *Smirnova v. Russia*, nos. 46133/99 and 48183/99, 24.07.2003, ECHR 2003-IX (extracts);
- *Société Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 01.07.2003;
- *Standard Verlags GmbH v. Austria* (no. 2), no. 21277/05, 04.06.2009;
- *Standard Verlags GmbH and Krawagna-Pfeifer v. Austria*, no. 19710/02, 02.11.2006;
- *Stoll v. Switzerland* [GC], no. 69698/01, 10.12.2007, ECHR 2007-V;
- *Sunday Times v. United Kingdom* (no. 1), no. 6538/74, 26.04.1979, Series A, no. 30;
- *Tănăsioaica v. Romania*, no. 3490/03, 19.06.2012;
- *Tønssbergs Blad A.S. and Haukom v. Norway*, no. 510/04, 01.03.2007;
- *Verlagsgruppe News GmbH v. Austria* (no. 2), no. 10520/02, 14.12.2006;
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- *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, 07.02.2012, ECHR 2012;
- *Von Hannover v. Germany* (no. 3), no. 8772/10, 19.09.2013;
- *Wingrove v. Royaume-Uni*, no. 17419/90, 25.11.1996, *Reports of Judgments and Decisions* 1996-V.

Languages:

English, French.



Identification: ECH-2015-3-017

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 04.12.2015 / **e)** 47143/06 / **f)** Roman Zakharov v. Russia / **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.**

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

Keywords of the alphabetical index:

Secret surveillance, measure.

Headnotes:

Shortcomings in legal framework governing secret surveillance of mobile telephone communications.

Where the domestic system does not afford an effective remedy to a person affected by legislation permitting secret surveillance measures who suspects that he or she was subjected to secret surveillance, the person concerned does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him or her. By contrast, if the national system provides for effective remedies, the person concerned may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he or she is able to show that, due

to his or her personal situation, he or she is potentially at risk of being subjected to such measures.

Summary:

I. The applicant, who was the editor-in-chief of a publishing company, brought judicial proceedings against three mobile network operators, complaining of interference with his right to privacy of his telephone communications. He claimed that pursuant to the relevant domestic law, the mobile network operators had installed equipment which permitted the Federal Security Service (FSB) to intercept all telephone communications without prior judicial authorisation. He sought an injunction ordering the removal of the equipment and ensuring that access to telecommunications was given to authorised persons only.

The domestic courts rejected the applicant's claim, finding that he had failed to prove that his telephone conversations had been intercepted or that the mobile operators had transmitted protected information to unauthorised persons. Installation of the equipment to which he referred did not in itself infringe the privacy of his communications.

The applicant complained that the system of covert interception of mobile telephone communications in Russia did not comply with the requirements of Article 8 ECHR. On 11 March 2014 a Chamber of the Court relinquished jurisdiction to the Grand Chamber.

II.a. Victim status – The Court's approach in *Kennedy v. the United Kingdom* was best tailored to the need to ensure that the secrecy of surveillance measures does not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court. Accordingly, an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures or of legislation permitting such measures, if the following conditions are satisfied:

i. Scope of the legislation – The Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted.

ii. Availability of remedies at national level – The Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies. Where the domestic system does not afford an effective remedy, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such circumstances the menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8 ECHR. There is therefore a greater need for scrutiny by the Court and an exception to the rule which denies individuals the right to challenge a law *in abstracto* is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By contrast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.

In the instant case, the contested legislation directly affected all users of the mobile telephone services, since it instituted a system of secret surveillance under which any person using the mobile telephone services of national providers could have their mobile telephone communications intercepted, without ever being notified of the surveillance. Furthermore, the domestic law did not provide for effective remedies for persons suspecting they had been subjected to secret surveillance. An examination of the relevant legislation *in abstracto* was therefore justified. The applicant did not need to demonstrate that due to his personal situation he had been at risk of being subjected to secret surveillance. He was thus entitled to claim to be the victim of a violation of the European Convention on Human Rights.

The Court dismissed the preliminary objection.

b. Merits – The mere existence of the contested legislation amounted in itself to an interference with the exercise of the applicant's rights under Article 8 ECHR. The interception of mobile telephone communications had a basis in the domestic law and pursued the legitimate aims of the protection of national security and public safety, the prevention of crime and the protection of the economic well-being of the country. It remained to be ascertained whether the domestic law was accessible and contained

adequate and effective safeguards and guarantees to meet the requirements of “foreseeability” and “necessity in a democratic society”.

i. Accessibility – It was common ground that almost all the domestic legal provisions governing secret surveillance had been officially published and were accessible to the public. Although there was some dispute over the accessibility of further provisions, the Court noted that they had been published in an official ministerial magazine and could be accessed through an internet legal database, and so did not find it necessary to pursue the issue further.

ii. Scope of application of secret surveillance measures – The nature of the offences which could give rise to an interception order was sufficiently clear. However, it was a matter of concern that the domestic law allowed secret interception of communications in respect of a very wide range of offences. Furthermore, interception could be ordered not only in respect of a suspect or an accused, but also in respect of persons who might have information about an offence. While the Court had earlier found that interception measures in respect of a person possessing information about an offence might be justified under Article 8 ECHR, it noted in the instant case that the domestic law did not clarify who might fall into that category in practice. Nor did the law give any indication of the circumstances under which communications could be intercepted on account of events or activities endangering Russia’s national, military, economic or ecological security. Instead, it left the authorities an almost unlimited discretion in determining which events or acts constituted such a threat and whether the threat was serious enough to justify secret surveillance. This created possibilities for abuse.

iii. Duration of secret surveillance measures – While the domestic law contained clear rules on the duration and renewal of interceptions providing adequate safeguards against abuse, the relevant provisions on discontinuation of the surveillance measures did not provide sufficient guarantees against arbitrary interference.

iv. Procedures for, *inter alia*, storing and destroying intercepted data – Domestic law contained clear rules governing the storage, use and communication of intercepted data, making it possible to minimise the risk of unauthorised access or disclosure. However, although the Court considered reasonable the six-month time-limit applicable to the storage of intercept material if the person concerned was not charged with a criminal offence, it deplored the lack of a requirement to destroy immediately any data that were not relevant to the purpose for which they were

obtained. The automatic storage for six months of clearly irrelevant data could not be considered justified under Article 8 ECHR.

Further, in cases where the person under surveillance was charged with a criminal offence the trial judge had unlimited discretion under the domestic law to decide whether to order the further storage or destruction of intercept material used in evidence. Ordinary citizens thus had no indication as to the circumstances in which intercept material could be stored. The domestic law was, therefore, not sufficiently clear on this point.

v. Authorisation of interceptions – As regards the authorisation procedures, any interception of telephone or other communications had to be authorised by a court. However, judicial scrutiny was limited in scope. In particular, materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures could not be submitted to the judge and were therefore excluded from the court’s scope of review. Thus the failure to disclose the relevant information to the courts deprived them of the power to assess whether there was a sufficient factual basis for suspecting persons in respect of whom operational-search measures were requested of a criminal offence or of activities endangering national, military, economic or ecological security. Indeed, Russian judges were not instructed to verify the existence of “reasonable suspicion” against the person concerned or to apply the “necessity” and “proportionality” tests.

In addition, the relevant domestic law did not contain any requirements with regard to the content of interception requests or authorisations. As a result, courts sometimes authorised the interception of all telephone communications in an area where a criminal offence had been committed, without mentioning a specific person or telephone number. Some authorisations did not mention the duration for which interception was authorised. Such authorisations granted a very wide discretion to the law-enforcement authorities as to which communications to intercept and for how long.

Furthermore, in cases of urgency it was possible to intercept communications without prior judicial authorisation for up to 48 hours. However, the urgent procedure did not provide sufficient safeguards to ensure that it was used sparingly and only in duly justified cases. The domestic law did not limit the use of the urgent procedure to cases involving immediate serious danger and so gave the authorities unlimited discretion to determine the situations in which it was used, thus creating possibilities for abuse.

Furthermore, although under domestic law a judge had to be immediately informed of each instance of urgent interception, the judge's power was limited to authorising the extension of the interception measure beyond 48 hours. Russian law thus did not provide for an effective judicial review of the urgent procedure.

In sum, the authorisation procedures provided for by Russian law were not capable of ensuring that secret surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration.

An added difficulty was that law-enforcement authorities generally had no obligation under the domestic law to show judicial authorisation to the communications service provider before obtaining access to communications, while for their part the service providers were required to install equipment giving the authorities direct access to all users' mobile telephone communications. The system was therefore particularly prone to abuse.

vi. Supervision – The prohibition set out in domestic law on logging or recording interceptions made it impossible for the supervising authority to discover interceptions carried out without proper judicial authorisation. Combined with the authorities' technical ability to intercept communications directly, this provision rendered any supervisory arrangements incapable of detecting unlawful interceptions and was therefore ineffective.

Where interceptions were carried out on the basis of proper judicial authorisation, judicial supervision was limited to the initial authorisation stage. Subsequent supervision was entrusted to the President, Parliament, the Government, the Prosecutor General and competent lower-level prosecutors. The domestic law did not set out the manner in which the President, Parliament and the Government were to supervise interceptions. There were no publicly available regulations or instructions describing the scope of their review, the conditions under which it could be carried out, or the procedures for reviewing the surveillance measures or remedying breaches.

While a legal framework provided, at least in theory, for some supervision by prosecutors, it was not capable in practice of providing adequate and effective guarantees against abuse. In particular:

- there were doubts about the prosecutors' independence as they were appointed and dismissed by the Prosecutor General after consultation with the regional executive authorities and had overlapping functions as they both approved requests for interception and then supervised their implementation;

- there were limits on the scope of their supervision (prosecutors had no information about the work of undercover agents and surveillance measures related to counter-intelligence escaped their supervision as the persons concerned would be unaware they were subject to surveillance and were thus unable to lodge a complaint);
- there were limits on their powers, for example, even though they could take measures to stop or remedy breaches and to bring those responsible to account, there was no specific provision requiring destruction of unlawfully obtained intercept material;
- their supervision was not open to public scrutiny and knowledge as their reports were not published or otherwise accessible to the public;
- the Government had not submitted any inspection reports or decisions by prosecutors ordering the taking of measures to stop or remedy a detected breach of law.

vii. Notification of interception and available remedies – Persons whose communications were intercepted were not notified. Unless criminal proceedings were opened against the interception subject and the intercepted data was used in evidence, the person concerned was unlikely ever to find out if his or her communications had been intercepted.

Persons who did somehow find out could request information about the data concerned. However, in order to lodge such a request they had to be in possession of the facts of the operational-search measures to which they were subjected. Access to information was thus conditional on a person's ability to prove that his or her communications had been intercepted. Furthermore, interception subjects were not entitled to obtain access to documents relating to the interception of their communications; they were at best entitled to receive "information" about the collected data. Such information was provided only in very limited circumstances, namely if the person's guilt had not been proved in accordance with law and the information did not contain State secrets. Since, under Russian law, information about the facilities used in operational-search activities, the methods employed, the officials involved and the data collected constituted a State secret, the possibility of obtaining information about interceptions appeared ineffective.

The judicial remedies referred to by the Government were available only to persons in possession of information about the interception of their communications. Their effectiveness was therefore undermined by the absence of a requirement to notify the interception subject or of an adequate possibility to request and obtain information about interceptions from

the authorities. Accordingly, Russian law did not provide an effective judicial remedy against secret surveillance measures in cases where no criminal proceedings were brought against the interception subject.

In sum, the domestic legal provisions governing the interception of communications did not provide adequate and effective guarantees against arbitrariness and the risk of abuse. The domestic law did not meet the “quality of law” requirement and was incapable of keeping the “interference” to what was “necessary in a democratic society”.

The Court therefore found a violation of Article 8 ECHR.

Cross-references:

European Court of Human Rights:

- *Amann v. Switzerland* [GC], no. 27798/95, 01.11.1998, *ECHR* 2000-II;
- *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10.01.2012;
- *Association for European Integration and Human Rights and Ekimdzhiiev v. Bulgaria*, no. 62540/00, 28.06.2007;
- *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, 17.07.2014, *ECHR* 2014;
- *Chahal v. the United Kingdom*, no. 70/1995/576/662, 15.11.1996, *Reports of Judgments and Decisions* 1996-V;
- *Christie v. the United Kingdom*, no. 21482/93, Commission decision, 27.06.1994;
- *Dumitru Popescu v. Romania* (no. 2), no. 71525/01, 26.04.2007;
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- *Halford v. the United Kingdom*, no. 20605/92, 25.06.1997, *Reports* 1997-III;
- *Huvig v. France*, no. 11105/84, 24.04.1990, Series A, no. 176 B;
- *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22.05.2008;
- *Iordachi and Others v. Moldova*, no. 25198/02, 10.02.2009;
- *Kennedy v. the United Kingdom*, no. 26839/05, 18.05.2010;
- *Khan v. the United Kingdom*, no. 35394/97, 04.10.2000, *ECHR* 2000-V;
- *Klass and Others v. Germany*, no. 5029/71, 06.09.1978, Series A, no. 28;
- *Krone Verlag GmbH & Co. KG v. Austria* (no. 4), no. 72331/01, 09.11.2006;
- *L. v. Norway*, no. 13564/88, Commission decision, 08.06.1990;
- *Leander v. Sweden*, no. 9248/81, 26.03.1987, Series A, no. 116;
- *Liberty and Others v. the United Kingdom*, no. 58243/00, 01.07.2008;
- *Liu v. Russia*, no. 42086/05, 06.12.2007;
- *Malone v. the United Kingdom*, no. 8691/79, 02.08.1984, Series A, no. 82;
- *Matthews v. the United Kingdom*, no. 28576/95, Commission decision, 16.10.1996;
- *Menchinskaya v. Russia*, no. 42454/02, 15.01.2009;
- *N.C. v. Italy* [GC], no. 24952/94, 18.12.2002, *ECHR* 2002-X;
- *Prado Bugallo v. Spain*, no. 58496/00, 18.02.2003;
- *Redgrave v. the United Kingdom*, no. 20271/92, Commission decision, 01.09.1993;
- *Rotaru v. Romania* [GC], no. 28341/95, 04.05.2000, *ECHR* 2000-V;
- *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 04.12.2008, *ECHR* 2008;
- *Valenzuela Contreras v. Spain*, no. 27671/95, 30.07.1998, *Reports* 1998-V;
- *Weber and Saravia v. Germany* (dec.), no. 54934/00, 29.06.2006, *ECHR* 2006-XI.

Languages:

English, French.



Identification: ECH-2015-3-018

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.12.2015 / **e)** 9154/10 / **f)** *Schatschaschwili v. Germany* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Criminal proceedings, guarantees / Fair trial / Witness, defendant's right to cross-examination / Witness, examination, right of defence / Witness, right of defence to examine / Witness, unavailability, search, reasonable effort.

Headnotes:

Inability to examine absent witnesses, whose testimonies carried considerable weight in applicant's conviction.

The judgment clarifies the *Al-Khawaja* test for determining the compatibility with Article 6.1 and 6.3.d ECHR of the admission of the testimony of absent witnesses:

- a. The absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a criminal trial, but is a very important factor to consider when assessing its overall fairness;
- b. The existence of sufficient counterbalancing factors must also be reviewed when it is unclear whether the evidence given by an absent witness was the sole or decisive basis for conviction if such evidence carries significant weight and its admission may have handicapped the defence;
- c. Although, as a rule, it will be pertinent to examine the three steps of the *Al-Khawaja* test in the order defined in that judgment, it may be appropriate to examine them in a different order, in particular, if one of the steps proves to be particularly conclusive as to the fairness or unfairness of the proceedings.

Summary:

I. The applicant was convicted of aggravated robbery in conjunction with aggravated extortion and sentenced to nine and a half years' imprisonment. As regards one of the offences, the trial court relied in particular on witness statements made by the two victims of the crime to the police at the pre-trial stage. The statements were read out at the trial as the two witnesses had gone back to Latvia and refused to testify as they continued to be traumatised by the crime.

II. In order to assess whether the overall fairness of the applicant's trial had been impaired by the use of the statements previously made by witnesses who did not attend the trial, the Court applied and further clarified the test laid down in its Grand Chamber judgment in *Al-Khawaja and Tahery v. the United*

Kingdom. In particular, while it was clear that each of the three steps of the test had to be examined if the questions in steps one (whether there was a good reason for the non-attendance of the witness) and two (whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction) were answered in the affirmative, it remained uncertain whether all three steps of the test had to be examined in cases in which either the question in step one or that in step two was answered in the negative, as well as in what order the steps were to be examined. The Court considered that:

i. The absence of good reason for the non-attendance of a witness, while it could not of itself be conclusive of the unfairness of a trial, was nevertheless a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which could tip the balance in favour of finding a breach of Article 6.1 and 6.3.d ECHR.

ii. The existence of sufficient counterbalancing factors had to be reviewed not only in cases in which the evidence given by an absent witness had been the sole or the decisive basis for the conviction, but also in those cases where it had carried significant weight and its admission could have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness.

iii. It would, as a rule, be pertinent to examine the three steps of the *Al-Khawaja* test in the order defined in that judgment. However, all three steps were interrelated and, taken together, served to establish whether the criminal proceedings at issue had, as a whole, been fair. It could therefore be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proved to be particularly conclusive as to either the fairness or the unfairness of the proceedings.

The Court went on to apply the *Al-Khawaja* test to the facts of the applicant's case:

a. Whether there was good reason for the non-attendance of the witnesses at the trial: The Court noted at the outset that the trial court had considered that the witnesses had not sufficiently substantiated their refusal to testify and had not accepted their state of health or fear as justification for their absence at the trial. After contacting the witnesses individually and proposing different solutions, the trial court had also repeatedly asked the Latvian courts to either have the witnesses' state of health and ability to testify examined by a public medical officer or to compel them to attend the hearing in Latvia. Since these efforts proved futile the trial court had admitted

the records of the witnesses' examination at the investigation stage as evidence in the proceedings. Thus, the witnesses' absence was not imputable to the trial court. Accordingly, there had been good reason, from the trial court's perspective, for the non-attendance of the witnesses at the trial and for admitting the statements they had made at the pre-trial stage in evidence.

b. Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction: The domestic courts did not clearly indicate whether they considered the witness statements in question as "decisive" evidence, that is, as being of such significance as to be likely to be determinative of the outcome of the case. After assessing all the whole evidence that had been before the domestic courts, the Court noted that the two victims of the crime were the only eyewitnesses to the offence in question. The only other available evidence was either hearsay or merely circumstantial technical and other evidence that was not conclusive. In these circumstances, the evidence of the absent witnesses had been "decisive", that is, determinative of the applicant's conviction.

c. Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured: In its reasoning, the trial court had made it clear that it was aware of the reduced evidentiary value of the untested witness statements. It had compared the content of the statements made by the victims at the investigation stage and found that they had given detailed and coherent descriptions of the circumstances of the offence. It had further observed that the witnesses' inability to identify the applicant showed that they had not testified with a view to incriminating him. Moreover, in assessing the witnesses' credibility the trial court had also addressed different aspects of their conduct in relation to their statements. The trial court had therefore examined the credibility of the absent witnesses and the reliability of their statements in a careful manner.

Furthermore, it had had before it additional incriminating hearsay and circumstantial evidence supporting the witness statements. In addition, during the trial the applicant had had the opportunity to give his own version of the events and to cast doubt on the credibility of the witnesses also by cross-examining the witnesses who had given hearsay evidence. However, he had not had the possibility to question the two victims indirectly or at the investigation stage.

In fact, even though the prosecution authorities could have appointed a lawyer to attend the witness

hearing before the investigating judge, these procedural safeguards were not used in the applicant's case. In this connection, the Court agreed with the applicant that the witnesses were heard by the investigating judge because, in view of their imminent return to Latvia, the prosecution authorities considered that there was a danger of their evidence being lost. In this context, and bearing in mind that under domestic law the written records of a witness's previous examination by an investigating judge could be read out at the trial under less strict conditions than the records of a witness examination by the police, the authorities had taken the foreseeable risk, which subsequently materialised, that neither the accused nor his counsel would be able to question them at any stage of the proceedings.

In view of the importance of the statements of the only eyewitnesses to the offence of which the applicant was convicted, the counterbalancing measures taken by the domestic court had been insufficient to permit a fair and proper assessment of the reliability of the untested evidence. Therefore, the absence of an opportunity for the applicant to examine or have examined the two witnesses at any stage of the proceedings had rendered the trial as a whole unfair.

The Court therefore found a violation of Article 6.1 and 6.3.d ECHR.

Cross-references:

European Court of Human Rights:

- *A.G. v. Sweden* (dec.), no. 315/09, 10.01.2012;
- *Aigner v. Austria*, no. 28328/03, 10.05.2012;
- *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, 15.12.2011, ECHR 2011;
- *Asadbeyli and Others v. Azerbaijan*, nos. 3653/05, 14729/05, 16519/06, 20908/05, 26242/05, 36083/05, 11.12.2012;
- *Beggs v. the United Kingdom*, no. 25133/06, 06.11.2012;
- *Bobeş v. Romania*, no. 29752/05, 09.07.2013;
- *Brzuszczyński v. Poland*, no. 23789/09, 17.09.2013;
- *Cevat Soysal v. Turkey*, no. 17362/03, 23.09.2014;
- *Chmura v. Poland*, no. 18475/05, 03.04.2012;
- *D.T. v. the Netherlands* (dec.), no. 25307/10, 02.04.2013;
- *Damir Sibgatullin v. Russia*, no. 1413/05, 24.04.2012;
- *Fąfrowicz v. Poland*, no. 43609/07, 17.04.2012;
- *Gabrielyan v. Armenia*, no. 8088/05, 10.04.2012;

- *Gäfgen v. Germany* [GC], no. 22978/05, 01.06.2010, ECHR 2010;
- *Gani v. Spain*, no. 61800/08, 19.02.2013;
- *Garofolo v. Switzerland* (dec.), no. 4380/09, 02.04.2013;
- *González Nájera v. Spain* (dec.), no. 61047/13, 11.02.2014;
- *Heglas v. the Czech Republic*, no. 5935/02, 01.03.2007;
- *Horncastle and Others v. the United Kingdom*, no. 4184/10, 16.12.2014;
- *Hümmer v. Germany*, no. 26171/07, 19.07.2012;
- *Imbrioscia v. Switzerland*, no. 13972/88, 24.11.1993, Series A, no. 275;
- *Jalloh v. Germany* [GC], no. 54810/00, 11.07.2006, ECHR 2006-IX;
- *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, 25.07.2013;
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- *Matytsina v. Russia*, no. 58428/10, 27.03.2014;
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- *Salikhov v. Russia*, no. 23880/05, 03.05.2012;
- *Şandru v. Romania*, no. 33882/05, 15.10.2013;
- *Sarkizov and Others v. Bulgaria*, nos. 37981/06, 38022/06, 39122/06, 44278/06, 17.04.2012;
- *Schenk v. Switzerland*, no. 10862/84, 12.07.1988, Series A, no. 140;
- *Scholer v. Germany*, no. 14212/10, 18.12.2014;
- *Sellick and Sellick v. the United Kingdom* (dec.), no. 18743/06, 16.10.2012;
- *Sică v. Romania*, no. 12036/05, 09.07.2013;
- *Štefančič v. Slovenia*, no. 18027/05, 25.10.2012;
- *Sulđin v. Russia*, no. 20077/04, 16.10.2014;
- *Taxquet v. Belgium* [GC], no. 926/05, 16.11.2010, ECHR 2010;
- *Trampevski v. "The former Yugoslav Republic of Macedonia"*, no. 4570/07, 10.07.2012;
- *Tseber v. the Czech Republic*, no. 46203/08, 22.11.2012;
- *Vronchenko v. Estonia*, no. 59632/09, 18.07.2013;
- *Windisch v. Austria*, no. 12489/86, 27.09.1990, Series A, no. 186;

- *Yevgeniy Ivanov v. Russia*, no. 27100/03, 25.04.2013.

Languages:

English, French.



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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

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³⁸ Including its Protocols.

³⁹ Presumption of constitutionality, double construction rule.

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⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

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⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.

⁵² Including the body responsible for revising or amending the Constitution.

⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

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⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

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⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

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⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

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⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹¹ For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

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⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

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¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Including all questions of non-discrimination.

¹⁰⁹ Taxes and other duties towards the state.

¹¹⁰ "One person, one vote".

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¹¹¹ According to the European Convention on Nationality of 1997, ETS no. 166, “‘nationality’ means the legal bond between a person and a state and does not indicate the person’s ethnic origin” (Article 2) and “... with regard to the effects of the Convention, the terms ‘nationality’ and ‘citizenship’ are synonymous” (paragraph 23, Explanatory Memorandum).

¹¹² For example, discrimination between married and single persons.

¹¹³ This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

¹¹⁴ Detention by police.

¹¹⁵ Including questions related to the granting of passports or other travel documents.

¹¹⁶ May include questions of expulsion and extradition.

¹¹⁷ Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

¹¹⁸ In the meaning of Article 6.1 of the European Convention on Human Rights.

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¹¹⁹ This keyword covers the right of appeal to a court.

¹²⁰ Including the right to be present at hearing.

¹²¹ Including challenging of a judge.

¹²² Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²³ This keyword also includes the right to freely communicate information.

¹²⁴ Militia, conscientious objection, etc.

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¹²⁵ Aspects of the use of names are included either here or under "Right to private life".

¹²⁶ Including compensation issues.

¹²⁷ This keyword also covers "Freedom of work".

¹²⁸ This should also cover the term freedom of enterprise.

¹²⁹ Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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