

THE BULLETIN

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

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

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

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

The decisions are presented in the following way:

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

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Director, Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

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

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Republic of Korea	S. Kim / K. Lim		

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, April 2017

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There was no relevant constitutional case-law during the reference period 1 May 2016 – 31 August 2016 for the following countries:

Austria, Estonia, Kazakhstan, Luxembourg, Norway, Slovenia.

Précis of important decisions of the reference period 1 May 2016 – 31 August 2016 will be published in the next edition, *Bulletin 2016/3*, for the following countries:

Ireland, Sweden.

Armenia Constitutional Court

Statistical data

1 May 2016 – 31 August 2016

- 52 applications have been filed, including:
 - 25 applications filed by the President
 - 26 applications as individual complaints
 - 1 application by domestic courts
- 37 cases have been admitted for review, including:
 - 25 applications on the compliance of obligations stipulated in international treaties with the Constitution
 - 12 cases concerning the constitutionality of certain provisions of laws, including:
 - 1 case on the basis of the application of a domestic court
 - 11 cases on the basis of individual complaints concerning the constitutionality of certain provisions of laws
- 25 cases heard and 18 decisions delivered, including:
 - 16 decisions on the compliance of obligations stipulated in international treaties with the Constitution
 - 9 decisions on the constitutionality of certain provisions of laws, all on the basis of individual complaints.



Belarus Constitutional Court

Important decisions

Identification: BLR-2016-2-003

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 21.06.2016 / **e)** D-1039/2016 / **f)** On the constitutional conformity of the Law on Making Addenda and Alterations to Certain Laws on Combating Terrorism / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 3/2016; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**
 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

Keywords of the alphabetical index:

Terrorism, fight / Terrorism, concept.

Headnotes:

Certain legislation which strengthens the powers of authorities combating terrorism and extends the scope of application of counter-terrorist operations entails a degree of interference with the privacy of individuals and places certain restrictions on the rights to private life and the inviolability of the home. This legislation is a necessary means of achieving the socially justified goal of the fight against terrorism; it is up to the law-enforcement bodies to strike a proportionate balance between permissible and justified restrictions of human rights and freedoms and the goals of safeguarding the constitutional foundations of the security of society and the state.

Summary:

I. In the exercise of obligatory preliminary review, the Constitutional Court was considering, in open court session, a case on the constitutionality of the Law on the Making of Addenda and Alterations to Certain Laws of the Republic of Belarus on Combating Terrorism (hereinafter, the "Law"). Obligatory preliminary review is required for any law adopted by Parliament before it is signed by the President.

The rationale behind the Law is the creation of an appropriate legal basis to respond to modern threats of terrorism so as to protect the rights, freedoms and legitimate interests of individuals, the constitutional order, independence and territorial integrity of Belarus and the security of society and the state.

Changes introduced by the Law to the existing Law on the Fight against Terrorism extend the competence of certain state bodies directly engaged in combating terrorism; develop the concept of counter-terrorism operations and enshrine a new term, namely "state response".

These updates have been made in order to improve the effectiveness of measures to counter terrorism, which, in accordance with the addendum made by Article 2.2 of the Law, is defined as a socio-political criminal phenomenon representing the ideology and practice of the use of violence or threat of violence in order to influence the decision-making of bodies of power, to impede political or other public activity, to provoke international tension or war, to frighten the population and to destabilise the public order (Article 3.9 of the Law on the Fight against Terrorism).

II. The Constitutional Court noted that terrorism is one of the most dangerous and destructive phenomena of modern times. It is becoming increasingly diverse in form and threatening in scope. Terrorism undermines the stability of society and the state, results in mass casualties, provokes international armed conflicts and causes irreparable damage to the sustainable development of human civilisation and the global world order.

The Court also observed that the provisions in question are aimed at strengthening the powers of the authorities in their fight against terrorism, creating conditions for more active and effective participation by state bodies and other organisations in the state response to terrorism and other anti-social, harmful phenomena, as well as extending the scope of application of counter-terrorist operations. This legislative approach is based on the constitutional

provisions stipulating that the Republic of Belarus shall defend its independence and territorial integrity, its constitutional system, and safeguard lawfulness and law and order (Article 1.3 of the Constitution); the State shall take all measures at its disposal to establish the domestic and international order necessary for the full exercise of the rights and freedoms specified by the Constitution (Article 59.1 of the Constitution).

A provision was added to Article 13 of the Law on the Fight against Terrorism, whereby persons conducting a counter-terrorist operation are entitled to enter freely at any time (with damage to locking devices and other items if necessary) the homes or other lawful possessions of individuals and to search them when pursuing persons suspected of an act of terrorism, creation of a terrorist organisation or illegal armed group, provided there is subsequent notification of the prosecutor within 24 hours (Article 7.2 of the Law).

The Constitutional Court acknowledged the interference these measures entail with the privacy of individuals and the limits they impose on the rights to protection against unlawful interference with private life (Article 28 of the Constitution), inviolability of the home and other legitimate possessions (Article 29 of the Constitution). However, in the Court's view, such restrictions are needed in order to achieve the socially justified goal of the fight against terrorism. In accordance with Article 23 of the Constitution, such restrictions are to be permitted only in the interests of national security, public order, protection of the morals and health of the population and the rights and freedoms of others.

Analysis of the restrictions of the human rights and freedoms established in Article 13 of the Law on the Fight against Terrorism shows that they are not excessive; they are consistent with the provisions of international legal instruments, including Article 29.2 of the Universal Declaration of Human Rights.

The Court nonetheless drew the attention of the law enforcement bodies to the need to strike a balance between the permissible and justified restrictions on human rights and freedoms and the goals of protection of the constitutional foundations of the security of society and the state.

Article 18 of the Law on the Fight against Terrorism, providing for the social rehabilitation of persons who have suffered as a result of an act of terrorism, is set out in new wording (Article 2.9 of the Law). These amendments provide that social rehabilitation (legal assistance granted at the expense of the national budget, psychological, medical and professional

rehabilitation, employment assistance and housing) will apply not only to the victims of an act of terrorism, but also to persons who have suffered from the activities of terrorist organisations, illegal armed groups or in the course of their suppression.

The Constitutional Court noted that social rehabilitation which is aimed at the social adaptation and integration into society of those affected, is a manifestation of the principle of humanism resulting from the constitutional provisions that the individual, his or her rights, freedoms and guarantees to secure them are the supreme value and goal of society and the State.

It accordingly recognised the Law on Making Addenda and Alterations to Certain Laws of the Republic of Belarus on Combating Terrorism as being in line with the Constitution.

Languages:

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



Identification: BLR-2016-2-004

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 11.07.2016 / **e)** D-1063/2016 / **f)** On the Constitutional Compliance of the Law on Making Alterations and Addenda to Certain Laws on Forced Migration / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 3/2016; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
 3.9 General Principles – **Rule of law**.
 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:

Immigration, law.

Headnotes:

The principle of the priority of the act with a larger scope of rights and legitimate interests in respect of refugees and others with similar status, as set out in the Law, is in line with the Constitution. Law enforcement bodies should, in their decision-making on the loss or revocation of refugee status or complementary protection, and the loss or deprivation of asylum relating to foreigners with children, be guided by the principle of the best interests of the child.

Summary:

I. In the exercise of obligatory preliminary review, the Constitutional Court considered, in open court session, a case on the constitutionality of the Law on Making Alterations and Addenda to Certain Laws of the Republic of Belarus on Forced Migration (hereinafter, the “Law”). Obligatory preliminary review is required for any law adopted by Parliament before it is signed by the President.

The present Law sets out in a new edition the Law on Granting Refugee Status, Complementary and Temporary Protection to Foreign Citizens and Stateless Persons in the Republic of Belarus (hereinafter, the “Law on the Protection of Refugees”), and makes changes and addenda to certain other laws. The Law is aimed at improving the effectiveness of law enforcement in the fight against illegal migration and creating an appropriate legal framework to provide assistance to forced migrants in accordance with international standards.

Article 1 of the Law on the Protection of Refugees provides for the priority of international treaties over other legislative acts, except in cases when the acts of national legislation provide for a greater scope of legal, economic and social guarantees for the protection of the rights and legitimate interests of foreigners seeking protection, as well as foreigners who have been granted refugee status, complementary protection, asylum or temporary protection in the Republic of Belarus.

The Constitutional Court noted that these provisions of the Law are consistent with the Constitution, which establishes that the Republic of Belarus shall recognise the supremacy of the generally recognised principles of international law and ensure the compliance of laws therewith (Article 8.1), as well as with the principle of *pacta sunt servanda* set out in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969 (every treaty in force is binding upon the parties to it and must be performed by them in good faith).

The principle of the priority of the act with a larger scope of rights and legitimate interests in respect of refugees and other persons with similar status, enshrined in the Law, meets with the constitutional provisions stipulating that the individual, his or her rights, freedoms and guarantees to secure them are the supreme value and goal of the society and the State (Article 2.1 of the Constitution). They are also in line with the approach laid down in paragraph 23 of the outcome document of the UN summit "Transforming our world: the 2030 Agenda for Sustainable Development", adopted by Resolution 70/1 of the UN General Assembly on 25 September 2015, which provides for the need to empower those who are vulnerable, especially refugees and internally displaced persons and migrants.

The provision in question is also consistent with Article 5.2 of the International Covenant on Civil and Political Rights of 1966, which stipulates that there are to be no restrictions on or derogations from any of the fundamental rights recognised or existing in any State Party to the Covenant on the pretext that the Covenant does not recognise the rights at all or recognises them to a lesser extent. In the Constitutional Court's view, it follows from Article 5.2 that the state is entitled to enshrine in domestic law a greater scope of human rights and freedoms than in international instruments.

In Article 5 of the Law on the Protection of Refugees, the legislator put in place a rule whereby foreigners applying for protection who have been granted refugee status, complementary protection, asylum or temporary protection; whose applications for protection were dismissed; who have been refused refugee status and complementary protection; whose request to renew a term of complementary protection have been denied; who have lost their refugee status, complementary protection or asylum; whose refugee status or complementary protection have been revoked or who have been deprived of asylum cannot be deported from the Republic of Belarus to a foreign country where their lives or freedom would be threatened on account of race, religion, citizenship, nationality, membership of a particular social group or political opinion, or to a foreign country where they would be threatened by the death penalty or their lives would be in jeopardy due to violence in situations of international or non-international armed conflict.

This provision will not apply to foreigners posing a threat to national security or convicted of a crime rated by the Criminal Code as being within the category of "particularly serious".

The Constitutional Court considered the above-mentioned provisions of Article 5 of the Law on the Protection of Refugees to be in line with Articles 2.1 and 23 of the Constitution (restrictions of personal rights and freedoms are only permitted in the instances specified by law, in the interests of national security, public order, protection of public health and morals and the rights and freedoms of others). They are consistent too with Article 3 of the Declaration of Territorial Asylum, which stipulates that nobody seeking asylum is to be subjected to measures such as rejection at the frontier or, if they have already entered the territory where they seek asylum, expulsion or compulsory return to any state where they may be subjected to persecution.

Under Article 20 of the Law on the Protection of Refugees, a foreigner who has been granted refugee status is entitled to medical care and education on an equal footing with citizen, unless the relevant legislation and international treaties provide otherwise. Similar rights in accordance with Article 26 of this Law will be given to foreigners who have been granted asylum (Article 4 of the Law).

The Constitutional Court noted that this approach of the legislator was based on the rule of Article 11 of the Constitution providing that foreign nationals and stateless persons in the territory of Belarus shall enjoy rights and freedoms on equal terms with citizens; this approach develops the constitutional provisions guaranteeing the right to health care (Article 45.1 of the Constitution), the right to education (Article 49.1 of the Constitution), and also implements the generally recognised principle of humanism.

In accordance with Article 4 of the Law, grounds for loss of refugee status, complementary protection or asylum are defined in the Law on the Protection of Refugees; the provision providing for the grounds for revocation of refugee status or complementary protection and asylum is also enshrined therein (Articles 65-67).

The Constitutional Court noted that in accordance with the UNHCR Executive Conclusion on the return of persons found not to be in need of international protection (no. 96 of 2003), any expulsion should be carried out humanely, with respect for human rights and the best interests of children must be a major consideration.

The Constitutional Court emphasised that law-enforcement bodies must, when making decisions on the loss or revocation of refugee status or complementary protection, and the loss or deprivation

of asylum relating to foreigners with children, be guided by the principle of the best interests of the child.

It recognised the Law on Making Alterations and Addenda to Certain Laws of the Republic of Belarus on Forced Migration to be in conformity with the Constitution.

Languages:

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



Belgium Constitutional Court

Important decisions

Identification: BEL-2016-2-007

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 25.05.2016 / **e)** 72/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 15.07.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**

1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties.**

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**

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

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

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

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

5.2 Fundamental Rights – **Equality.**

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

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

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

Keywords of the alphabetical index:

Gender equality, fundamental value, democracy / Gender equality, combating sexism / Constitutional Court, jurisdiction, limit, choice of the authors of the Constitution / Human dignity, attack, sexism / Appeal, interest, *habeas corpus*, custodial sentence / Appeal, claimant, *de facto* association, political party.

Headnotes:

The principle of legality in criminal cases requires the legislature to state, in terms which are sufficiently precise and clear and provide legal certainty, which acts are penalised so that, on the one hand, a person who adopts a certain behaviour can satisfactorily assess in advance what the criminal consequence of this behaviour will be, and, on the other, so that the Court will not be given excessive discretion.

However, the law does grant courts a certain margin of discretion.

Equality between women and men is a fundamental value of democratic society which is protected by Article 11bis of the Constitution, by Article 14 ECHR and by various international instruments. More specifically, efforts to combat gender-based violence are a matter of current interest to both the European Union and the Council of Europe.

Summary:

I. The “Libertarian Party” and two individuals submitted an application to the Constitutional Court to set aside Sections 2 and 3 of the Law of 22 May 2014 “combating sexism in public places and amending, the Law of 10 May 2007 combating discrimination between women and men in order to punish discrimination”.

The impugned provisions provided for a sentence of imprisonment of between one month and one year and/or a fine for the act of behaving in a sexist manner, namely any gesture or behaviour which, in the circumstances referred to in Article 444 of the Criminal Code, is manifestly intended to express contempt towards a person on the ground of his or her sex, or to regard him or her, for the same reason, as inferior or essentially reduced to his or her sexual dimension and which constitutes a serious affront to his or her dignity.

Article 444 of the Criminal Code punishes allegations which have been made either at meetings or in public places; either in the presence of several individuals, in a place which is not public but open to a number of persons who have the right to gather there or visit it; or in any location, in the presence of the injured party and in front of witnesses; or in documents, whether printed or not, or images or emblems which are displayed, distributed or sold, put on sale or exposed to public view; or, finally, in documents which are not published but which are sent or communicated to several persons.

II. The Court was first required to express an opinion on the admissibility of the applications to set aside. It declared the request made by the “Libertarian Party” inadmissible as this was a *de facto* association which was not acting in a matter for which it was legally recognised as forming a distinct entity. However, it did accept that private individuals had a legal interest in taking action. This was not an *actio popularis* given that provisions which laid down a custodial sentence related to an aspect of civil liberty which was so crucial that they did not solely concern the persons who were or had been subject to criminal proceedings.

The claimants firstly argued that there had been a breach of the principle of legality in criminal matters (Articles 12 and 14 of the Constitution and Article 7.1 ECHR).

The Court reiterated its case-law concerning the principle of legality in criminal matters. It held that the requirement for an offence to be clearly defined by the law was satisfied where a person subject to the jurisdiction of the courts could ascertain, from the wording of the relevant provision and, if necessary, with the aid of its interpretation by the courts, which acts and omissions incurred his or her criminal responsibility.

It was only by examining a specific legal provision that it was possible, having regard to the constituent elements of the offences that it was intended to punish, to ascertain whether the general terms used by the legislature were so vague as to infringe the principle of legality in criminal matters.

The Court also relied on the judgment issued by the European Court of Human Rights in *Rio del Prada v. Spain* [GC], 21.10.2013.

The claimants firstly stated that the law lacked clarity due to editorial differences between the French and Dutch versions of the law. The Court agreed with them in relation to one aspect: the French version of the law used the words “regard a person as ‘essentially’ reduced to his or her sexual dimension”. The word “essentially” did not appear in the Dutch version. The Court therefore decided to remove it from the French version since this discrepancy could have given rise to a difficulty of interpretation which would have been contrary to the principle of legality in criminal matters.

The Court then observed that the impugned provision clearly stated that an offence had been committed only if the act or behaviour constituted a serious affront to the dignity of the person concerned. This concept had already been used by the authors of the

Constitution (Article 23) and by the legislature, and the Court found that it could not be given different substance on the basis of the personal and subjective views of the victim of the behaviour. The lack of consent from a victim was not a constituent element of the offence that was created by the impugned provisions. It was for the court to ascertain, having regard to the specific circumstances in which the act or behaviour occurred, whether the constituent elements of the offence, including the consequences in terms of serious affront to the dignity of the person concerned, were present.

The claimants then argued that there had been a breach of freedom of expression. In order to respond to this argument, the Court had regard to Article 19 of the Constitution, Articles 9 and 10 ECHR and Articles 18 and 19 of the International Covenant on Civil and Political Rights, since the guarantees provided by these convention provisions formed a single whole. The Court also had regard to the case-law of the European Court of Human Rights with regard to freedom of expression. Since the impugned provisions constituted interference with this right, the Court verified whether this interference was provided for by a law which was sufficiently accessible and precise, was necessary in a democratic society, addressed an imperative social need, and was proportionate to the legitimate aims pursued by the legislature.

The Court held that the aims pursued by the impugned provisions, which were a reflection of the legislature's desire to guarantee equality between women and men – a fundamental value of democratic society – were legitimate and among the aims that could justify interference, as they related to the protection of the rights of others, the protection of order, and the affirmation of one of the fundamental values of democracy all at the same time.

The Court acknowledged the necessity of the impugned provisions and responded to the claimants – who felt that the measures were not effective in fulfilling the aforementioned aims – that the effectiveness of a criminal law, when gauged in terms of its application by the courts and the sentences handed down, was not, in itself, a condition of its compatibility with the constitutional and convention provisions cited in the argument. The statement that a behaviour constituted an offence because it was deemed by the legislature to be incompatible with the fundamental values of democracy could also have an educational and preventive effect. The desire to have this effect, which was by definition not objectively measurable, could, in principle, justify the imposition of criminal penalties.

The Court also had to consider whether the impugned provisions had effects which were disproportionate to the aims pursued. In this regard, it held that both the terms of the impugned provision and the associated preparatory documents showed that it concerned an intentional offence and that the legislature wanted to limit punitive measures to the most serious cases. The combination of the terms of the impugned provision indicated that it required an intention to express contempt towards a person or to regard him or her as inferior in the knowledge that the act or behaviour could constitute an affront to this person's dignity. Furthermore, to be punishable, the act or behaviour must actually have constituted such a serious affront.

The offence could not, therefore, be one whose existence would be presumed where its material constituent elements were present. It was for the prosecutor to prove the existence of the required special malicious intent.

The Court dismissed the second argument subject to this interpretation. This interpretative reservation was included in the operative part of the decision.

The Court dismissed the other arguments concerning the violation of equality and non-discrimination (Articles 10 and 11 of the Constitution) and freedom of the press (Article 25 of the Constitution). With regard to the freedom of the press, it held that the differences in the treatment of offenders according to whether their offences were committed through the press or by another means resulted from a choice made by the authors of the Constitution. The Court did not have jurisdiction to rule on this matter.

Cross-references:

European Court of Human Rights:

- *Rio del Prada v. Spain* [GC], no. 42750/09, 21.10.2013, *Reports of Judgments and Decisions* 2013.

Languages:

French, Dutch, German.



Identification: BEL-2016-2-008

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 25.05.2016 / **e)** 76/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 08.09.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**

5.2 Fundamental Rights – **Equality.**

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:

Procedural law, rules of procedure, discrimination / Procedural law, jurisdiction, court / Court, jurisdiction, trader / Court, jurisdiction, lease.

Headnotes:

A difference in treatment between certain categories of persons which results from the application of different procedural rules in different circumstances is not in itself discriminatory.

The legislature has discretion to decide which court is best placed to decide on a given type of dispute.

Summary:

I. The District Court of Antwerp, which had to rule on disputes concerning the respective jurisdictions of courts, had to deal with the question of whether a court of first instance had jurisdiction to rule on an appeal concerning a tenancy dispute between traders.

Prior to the Law of 26 March 2014, district courts had jurisdiction over actions concerning tenancy disputes involving amounts of no more than €2,500, even where they were tenancy disputes between traders. Appeals against the decisions of a district judge in relation to tenancy disputes had to be lodged at the court of first instance (Article 577.1 of the Judicial Code), except where they concerned tenancy disputes between traders, in which case appeals had to be lodged at the commercial court (Article 577.2 of the Judicial Code).

Since the enactment of the Law of 26 March 2014, district courts have had jurisdiction to hear all tenancy disputes, regardless of the amount at stake in the action – even where they are tenancy disputes between traders – and appeals concerning such disputes must be lodged at the court of first instance.

The district court held that removing disputes between businesses from a commercial court did not fulfil the aim of the legislature, which was to ensure that disputes were dealt with by the most appropriate court. The expertise of commercial courts in disputes between businesses and their special composition provided a guarantee to the litigants concerned. It therefore put a preliminary question to the Court with regard to the compatibility of Article 577 of the Judicial Code with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

II. The Court firstly reiterated its established case-law, according to which a difference in treatment between certain categories of persons which arises out of the application of different procedural rules in different circumstances is not discriminatory in and of itself. Discrimination can only occur if the difference in treatment arising out of the application of these rules of procedure leads to a disproportionate restriction on the rights of the persons concerned.

The Court pointed out that the provision in question did not deprive the trader involved in the tenancy dispute of the right of access to a court. This right did not include the right of a trader to have access to a court of his or her choosing.

The Court observed that the legislature has discretion to decide which court was best placed to deal with a given type of dispute. The mere fact that the legislature had entrusted tenancy disputes, including tenancy disputes between traders, to a court other than the commercial court did not interfere disproportionately with the rights of the traders concerned.

The Court concluded that the preliminary question called for a negative response.

Languages:

French, Dutch, German.



Identification: BEL-2016-2-009

a) Belgium / b) Constitutional Court / c) / d) 02.06.2016 / e) 83/2016 / f) / g) *Moniteur belge* (Official Gazette), 01.07.2016 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.

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

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

Keywords of the alphabetical index:

Criminal law, plea bargaining / State Prosecutor's Office, power, plea bargaining / Plea bargaining, conditions, judicial review / Plea bargaining, conditions, grounds / Plea bargaining, right to, absence.

Headnotes:

The State Prosecutor's Office has discretionary power to offer, or not to offer, a plea bargain or to accept, or not to accept, a proposal of this kind which is made by an indicted individual. Indicted individuals do not have the right to demand a plea bargain.

A plea bargain which leads to the termination of criminal proceedings can take place only where the main proceedings in the case are conducted before an investigating judge or a criminal judge provided that the investigating courts or the criminal court can exercise sufficient judicial review as to the merits, with regard to both the proportionality and the legality of the envisaged plea bargain, and provided that reasons for the decision to enter into a plea bargain are given so that this review can be undertaken.

Summary:

I. Since Article 216bis of the Code of Criminal Procedure was amended by the laws of 14 April 2011 and 11 July 2011, the State Prosecutor's Office has been able, subject to certain conditions, to offer an indicted individual a plea bargain even after criminal proceedings have begun.

A person who had been charged with carrying out several financial transactions and who had hoped to obtain a plea bargain which was refused by the State Prosecutor's Office criticised the fact that the State Prosecutor's Office could decide to enter into, or not enter into, a plea bargain after the criminal proceedings had been initiated and without the slightest judicial review of the grounds of this decision.

At the indicted individual's request, the Indictments Chamber, which was required to rule on whether the indicted individual would be referred back to the criminal court, put to the Court a number of preliminary questions concerning the compatibility of Article 216bis of the Code of Criminal Procedure with various general principles of law and various constitutional provisions (including the separation of powers, the independence of judges, fair trials, equality and non-discrimination (Articles 10 and 11 of the Constitution) and the principle of legality in criminal matters (Article 12 of the Constitution)).

II. In the view of the Court, the mere fact that the legislature empowered the State Prosecutor's Office to decide – within the limits that it itself set in Article 216bis of the Code of Criminal Procedure – on which individual cases it could offer or accept a plea bargain did not necessarily make it possible to deduce that the legislature had infringed the principle of equality and non-discrimination or had empowered the prosecutor's office to enter into plea bargains arbitrarily.

However, the Court had to consider whether the manner in which the State Prosecutor's Office wished to exercise this power interfered disproportionately with the right to a fair trial, either where the case was already being investigated by an investigating judge, or where the main proceedings on the merits of the case had already been conducted before a criminal court (Article 216bis.2 of the Code of Criminal Procedure).

The Court held that, for the reasons cited in the preparatory documents in relation to the swiftness of proceedings and the reduction of the caseload of courts, the legislature could, in principle, allow for the possibility of entering into plea bargains even where a case had been referred to an investigating judge. At this stage, the State Prosecutor's Office could, in the light of the findings of the investigation, have more information enabling it to better gauge how expedient it would be to offer a plea bargain.

However, the right to a fair trial and the independence of investigating judges, which was inherent in this right, dictated that criminal proceedings could only be

brought to an end by a plea bargain provided that, when the proceedings were settled, either the court sitting in chambers or the Indictments Chamber could exercise judicial review of the envisaged plea bargain. This review could be regarded as effective judicial oversight only if the grounds of the decision concerning the plea bargain were given.

The Court concluded that insofar as Article 216bis.2 of the Code of Criminal Procedure empowered the State Prosecutor's Office to bring an end to criminal proceedings by way of a plea bargain even where the case had been referred to an investigating judge and without any effective judicial review of this proposed plea bargain, it was not compatible with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), combined with the right to a fair trial, or the principle of the independence of judges which was guaranteed by Article 151 of the Constitution, Article 6.1 ECHR and Article 14.1 of the International Covenant on Civil and Political Rights.

The Court also had to examine Article 216bis.2 of the Code of Criminal Procedure insofar as it provided that "extended" plea bargains could also be entered into during the proceedings on the merits, provided that "no final judgment or order has been issued in criminal proceedings", even though provision was made for a court to verify that the "formal" conditions for a plea bargain had been met.

The Court pointed out that with regard to the right to a fair trial, the European Court of Human Rights accepted that with a view to the reduction of a sentence in exchange for an admission of guilt, which was sufficiently comparable to a plea bargain agreement where criminal proceedings had begun, an indicted individual could negotiate with the State Prosecutor's Office during the criminal proceedings on the merits, provided that the indicted individual voluntarily agreed to the plea bargain in full knowledge of the facts of the case and the legal consequences attached to this type of arrangement, and also provided that the court could exercise sufficient judicial review as to the substance of the agreement and the fairness of the manner in which it had been reached (ECHR, 29 April 2014, *Natsvlishvili and Togonidze v. Georgia*, § 92).

Once the facts had been put to the criminal court, the effect of a plea bargain on the independence of this court, which must, in principle, express an opinion as to whether the proceedings that were under way were well-founded, could, in the Court's view, be compatible with the right to a fair trial and the independence of the judge that was inherent in this right only if the indicted individual acted voluntarily and in full knowledge of the substance and

consequences of an agreement with the prosecutor's office and if the competent court could exercise sufficient judicial review as to both the proportionality and legality of the envisaged plea bargain, particularly whether the legal conditions for the agreement to take place had been met. This judicial review was effective only if reasons for the decision regarding the plea bargain were given.

The Court further stated that in accordance with the State Prosecutor's Office's policy on investigation and prosecution, it had discretionary power to offer, or not to offer, a plea bargain or to accept, or not to accept, an offer of this kind made by the indicted individual, and that indicted individuals did not have the right to demand a plea bargain. The fact that, where the State Prosecutor's Office refused to accept a proposal of this kind, it was not obliged to give reasons for its refusal or submit it for the assessment of a court did not diminish the right of access to a court which was guaranteed by Article 13 of the Constitution, combined with Article 6 ECHR.

If no plea bargain was entered into, the criminal proceedings would continue and the case would be dealt with by the competent court in accordance with the law.

Cross-references:

European Court of Human Rights:

- *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29.04.2014, *Reports of Judgments and Decisions* 2014 (extracts).

Languages:

French, Dutch, German.



Identification: BEL-2016-2-010

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 30.06.2016 / **e)** 103/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 16.09.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Environment, protection, environmental threat / Environment, polluted site, clean-up, costs / Property rights, restrictions / Expropriation, compensation, clean-up, costs / Expropriation, polluted site, clean-up, costs / Property rights, polluted site.

Headnotes:

If a person whose property is being expropriated has himself polluted the plot concerned, the Court which has to determine the provisional compensation for expropriation may take account of the costs of cleaning up the site.

However, if the person whose property is expropriated did not cause the pollution and is not under an obligation to clean up the site, under Article 16 of the Constitution, the Court may not deduct the costs for cleaning up the site when determining the provisional compensation for expropriation.

Summary:

I. In application of Article 58 of the Brussels-Capital Region order of 5 March 2009 on managing and cleaning up polluted soil, the said region sought the expropriation, for the purpose of public works, of a polluted site which had to be cleaned up. The Court charged with determining the compensation for expropriation calculated that the clean-up costs would be higher than the value of the expropriated property and awarded provisional expropriation compensation of one euro. The owner of the plot applied for a review of the amount and maintained, in accordance with the case-law of the Court of Cassation, that the estimated clean-up costs must not be taken into account when calculating the compensation for expropriation, given that any obligation to clean up the site lay with the expropriating authority.

The Court had concerns that this interpretation might result in unjust enrichment of the expropriated owner of a polluted site and therefore submitted a request for a preliminary ruling concerning the compatibility of Article 58 of the aforementioned order of Brussels-

Capital Region of 5 March 2009 with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and the provision in the Constitution that no one may be expropriated without fair compensation paid beforehand (Article 16 of the Constitution).

II. The Court first set out the stages and responsibilities in the case of disposal of a polluted property. Before disposal, a property listed as “potentially polluted” must be subjected to an exploratory soil survey and, if applicable, other tests. If necessary, risk management measures or clean-up work must be performed on the polluted property at the expense of the holder of a right in rem over the property or the person who caused the pollution.

The provision in question determines who is under these obligations when the polluted sites are the subject of expropriation. The drafters of the order sought to take account of the specific nature of expropriation, i.e. its involuntary nature. The expropriating authority accordingly fulfils the obligations of the holder of the rights in rem, while having the option of initiating recourse proceedings against the person responsible for the pollution (Article 24 of the order of 5 March 2009).

The Court held that the provision in question placed an obligation on the expropriating authority to conduct an exploratory soil survey and perform any subsequent steps in dealing with any pollution found on the expropriated site.

It therefore introduced a difference in treatment between the owners of polluted sites whose properties are expropriated and the owners of polluted sites whose properties are not expropriated, as the latter were required, at their expense, in certain circumstances – in particular, if they wished to sell the site – to have an exploratory soil survey conducted and, if necessary, perform the subsequent steps in dealing with the pollution found. The provision in question also established a difference in treatment between the owners of polluted sites and the owners of sites vitiated in some other way.

The Court held that these differences in treatment were relevant for achieving the goal pursued by the provision in question. In connection with the analysis and treatment of polluted sites, the drafters of the order had sought to take account of the specific nature of expropriation, i.e. its involuntary nature.

The compensation for expropriation corresponds, in principle, to the market value of the property. That value is influenced by the clean-up obligation encumbering the property. To determine the

monetary value of a property, account must be taken of all the aspects which affect that value, both favourably and unfavourably.

According to the preparatory documents for the provision in question, if the person whose property is expropriated caused the pollution, the courts may take account of the costs of cleaning up that pollution when determining the provisional compensation for expropriation. If that were not the case, persons whose properties were expropriated would be unduly enriched.

If, however, the person whose property was expropriated did not cause the pollution and is not under an obligation to clean up the site, the Court held that, under Article 16 of the Constitution, courts may not deduct the pollution clean-up costs when determining the provisional compensation for expropriation. Such a deduction would mean that persons whose properties were expropriated would have to bear the clean-up costs definitively and would possibly receive inadequate compensation for expropriation, as they did not have the right to recourse proceedings as set out in Article 24 of the order of 5 March 2009.

The Court concluded that Article 58 of the order of Brussels-Capital Region of 5 March 2009 on managing and cleaning up polluted soil violated Articles 10, 11 and 16 of the Constitution insofar as estimated clean-up costs were deducted from the compensation for expropriation when the person whose property was expropriated had not caused the pollution and was not under an obligation to clean up the site.

Languages:

French, Dutch, German.



Identification: BEL-2016-2-011

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 14.07.2016 / **e)** 108/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.10.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

3.13 General Principles – **Legality.**

3.16 General Principles – **Proportionality.**

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

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

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

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

Keywords of the alphabetical index:

Personal data, police / Personal data, storage / Personal data, access / Personal data, deletion / Personal data, processing / Police data / Police data, Supervisory board / Minor, protection / Minor, youth court judge.

Headnotes:

Interference with the exercise of the right to respect for privacy through the processing of personal data must be reasonably justified and proportionate to the aims pursued by the legislation. In determining whether it is proportionate, account must be taken of whether or not the relevant regulations include safeguards designed to prevent abuses in the processing of personal data. The provision on the composition of the supervisory board was accordingly partially set aside insofar as the majority of its members were appointed in their capacity as members of the local and federal police.

Moreover, if the principle of proportionality is to be respected, the opinion of the supervisory board must be considered binding, the deletion of personal data and related information must be the rule and archiving the exception.

Lastly, unless otherwise expressly provided for, the police are required to remove from databases any data which no longer satisfies the criteria of adequacy, relevance and non-excessiveness. There is an obligation to delete data and there are maximum deadlines for unlimited access. The authorisation by the “competent member of the legal service” which is required for processing specific personal data may not be interpreted as meaning that authorisation by a member of the public prosecutor’s department suffices.

Summary:

I. The non-profit associations “*Liga voor Mensenrechten*” and “*Ligue des Droits de l’Homme*” lodged an application with the Court to set aside the law of 18 March 2014 on police information management, amending the law of 5 August 1992 on police duties, the law of 8 December 1992 on the protection of privacy in respect of personal data processing and the Code of Criminal Investigation.

The arguments were mainly based on violation of the right to respect for private life, as enshrined in Article 22 of the Constitution, Article 8 ECHR, Article 17 of the International Covenant on Civil and Political Rights and Articles 7 and 8 of the EU Charter of Fundamental Rights.

The case resulted in a judgment of around one hundred pages involving the setting aside of a few words, combined with the continuation in force of the provision partially set aside pending the entry into force of new provisions to be adopted by parliament by 31 December 2017 at the latest and, for the remainder, the dismissal of the application subject to several interpretations. This summary will be confined to the general principles outlined by the Court concerning respect for the right to privacy, as well as the provision set aside and the interpretative reservations.

II. The Court held firstly that the right to respect for privacy was extensive in scope and included, in particular, the protection of personal data and personal information. It noted that the case-law of the European Court of Human Rights indicated that the protection of the right involved the following personal data and information: name, address, occupational activities, personal relations, fingerprints, filmed images, photographs, communications, DNA data, judicial data (convictions or charges), financial data and information concerning assets.

The Court went on to explain that the rights enshrined in Article 22 of the Constitution and Article 8 ECHR were not, however, absolute. It reiterated the conditions which any interference by a public authority with the exercise of the rights must satisfy, as well as the positive obligation on such authority to take steps to ensure effective respect for private life, including in the sphere of relations between individuals.

The first condition concerned respect for the principle of legality, which required the involvement of a democratically elected deliberative assembly, even if delegation to another authority could be allowed, provided that the relevant powers were defined with

sufficient clarity and concerned the execution of measures, of which the essential features had been previously defined by law. The requirement of procedural legality was combined with a requirement of foreseeability, as provided for both by Article 22 of the Constitution and by Article 8 ECHR. In this connection, the Court cited several judgments by the European Court of Human Rights, which has ruled, more particularly, that when the action by the authority is covert, the law must provide adequate safeguards against arbitrary interference with the exercise of the right to respect for private life, firstly, by defining the margin of discretion of the authorities concerned with sufficient clarity and, secondly, by providing for procedures for effective judicial review. Accordingly, the circumstances in which the processing of personal data is allowed must be laid down with sufficient clarity.

The interference by the public authorities must further answer a pressing social need in a democratic society and be proportionate to the aim pursued. While lawmakers had a margin of discretion here, this margin was not unlimited, as they had to strike a fair balance between all the rights and interests at issue. In determining that balance, the European Court of Human Rights took account, in particular, of the provisions of the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data and Recommendation no. R (87) 15 of the Committee of Ministers to member states Regulating the Use of Personal Data in the Police Sector.

The Court also noted that, with regard to whether the interference with private life was proportionate, the European Court of Human Rights took account of whether or not the relevant regulations included safeguards designed to prevent abuses in the processing of personal data. Account therefore had to be taken of the relevance of the data processed and whether or not it was excessive, whether or not there were measures limiting the length of storage of the data, whether or not there was an independent supervisory system for determining whether the storage of the data was still necessary, whether or not there were safeguards to prevent the persons whose data were processed being stigmatised and whether or not there were safeguards to prevent inappropriate use by the police of the personal data processed.

The Court went on to note that Articles 7 and 8 of the EU Charter of Fundamental Rights were similar in scope to Article 8 ECHR as far as the processing of personal data was concerned. The same applied to Article 17 of the International Covenant on Civil and Political Rights.

The Court also stated that the compatibility of legislative provisions with Articles 7 and 8 of the EU Charter of Fundamental Rights, taken together with equivalent constitutional provisions or with Articles 10 and 11 of the Constitution, could only be examined by the Court insofar as the impugned provisions implemented EU law. In the instant case, account had to be taken of Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. It followed from that framework decision that exchanges of personal data between EU member states came under EU law. Insofar as the impugned provisions concerned such exchanges, the Court assessed the said provisions with regard to Articles 7 and 8 of the EU Charter of Fundamental Rights, taken together with the provisions of the Constitution.

The complaints raised by the applicants concerned the following: violation of the “prescription by law” condition, violation of the principle of procedural legality, violation of the principle of proportionality, violation of equality of arms and the rights of the defence and violations of the rights of minors.

The only provision partially set aside concerned the composition of the supervisory board for police data. The Court held that having regard to the aim of supervising compliance by the police with the provisions of the law at issue, in the absence of provisions concerning the number of members who were police personnel and the total number of members of the supervisory board, there was no reasonable justification for the majority of the members of the supervisory board to be appointed in their capacity as members of the local or federal police (B.120.4).

Interpretative reservations were made regarding several provisions.

It was only insofar as the opinion of the supervisory board was considered binding on the authorities responsible for communicating personal data from police databases to relevant authorities, organs and bodies that the effect of this article was not disproportionate in relation to the purpose of the legislation (B.99.3.4).

The Court also indicated the limits applicable to the consultation of personal data after archiving (B.113.2).

It further stated that, given the case-law of the European Court of Human Rights, one of the provisions of the law must be interpreted as meaning

that the deletion of personal data and related information was the rule and that it was only in exceptional circumstances – relating to the purpose of the law on archives – that data from the General National Database (B.N.G.) could be transmitted to the State Archives (B.113.3).

Moreover, when the data concerning an individual was no longer accurate, the police were under a real obligation to take all the steps needed to update the relevant data (B.114.2). The rules on data storage and archiving could not therefore be interpreted as meaning that personal data processed in the General National Database or in the archives did not have to be deleted when they were not consistent at all with the categories set out in Article 44/5, §§1 and 3 of the law on police duties (B.114.4). Unless otherwise expressly provided for, the police were under an obligation to remove from the databases data which no longer satisfied the criteria of adequacy, relevance and non-excessiveness (B.115.3). In addition, an obligation to delete data and maximum deadlines for unlimited access followed from the previous reservations (B.115.4, B.115.5 and B.115.8).

With regard to minors, the provision under which authorisation by the “competent member of the legal service” was required for processing specific personal data could not be interpreted as meaning that authorisation by a member of the public prosecutor’s department sufficed. “Competent member of the legal service” had to be interpreted as “competent youth court judge” (B.150). Moreover, in determining that personal data concerning minors, including those aged 14 and over, was not excessive, particular attention had to be paid to the young age of the individuals concerned and to the impact of the processing of their personal data on their reintegration into society, due regard being had to the aims pursued by the processing of personal data (B.154.2).

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2016-2-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Grand Chamber / **d)** 12.01.2010 / **e)** AP 2843/07 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 23/10 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

3.18 General Principles – **General interest.**

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

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

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

Keywords of the alphabetical index:

Pension, payment, condition / War.

Headnotes:

The realisation of a legitimate aim – the provision of legal certainty and the preservation of the pension fund liquidity – cannot justify the total loss of the individual's acquired right in a given period.

The right to property is violated when the law failed to strike "a fair balance" between the requirement of a general or public interest and the requirement to protect the individual's right to property.

Summary:

I. The applicant requested from the administrative organs the retroactive payment of back pensions from 1992 to June 2005. During the period, he was a refugee and due to the wartime developments, his pensions had not been paid.

The Second-Instance Ruling Department in Banja Luka recognised the applicant's right to a proportionate portion of a disability pension starting from 22 July 1986 and the pension had been paid to the address in Bileća. It further noted that the payment had been suspended in 1992 because the applicant was not staying at the registered address and failed to register any change of address. Further, it was established that, after the applicant reported again to the *Republika Srpska* Pension and Disability Insurance Fund and submitted the new address and the life certificate, conditions were met to resume the payment of pension, thus the challenged ruling of the Pension and Disability Insurance Fund – Trebinje Branch Office reestablished the payment starting from 16 June 2005. In addition, the ruling reads that Articles 148.2 and 151 of the Law on Pension and Disability Insurance (hereinafter, the "Law") stipulates that "the due income referred to in paragraph 1 of this Article, which could not have been paid due to the circumstances caused by the income beneficiary, cannot be paid subsequently", that is to say that "the beneficiary of the right arising from the pension and disability insurance was obliged to register within eight days any fact affecting the use and scope of the right". Because the applicant failed to meet the request before the administrative organs, the applicant instituted an administrative dispute by filing a lawsuit before the County Court, which dismissed the lawsuit as ill-founded. It stated that the administrative bodies had correctly applied the substantive law to the completely and correctly established facts of the case, as the provisions of the Law prescribe that the income from the Pension and Disability Insurance would not be paid to the beneficiaries who themselves cause the circumstances preventing the continuation of the payment: failure to register within eight days the changes affecting the use and scope of rights arising from the Pension and Disability Insurance. Hence, the unpaid pension due to such circumstances cannot be paid retroactively.

The applicant refers to Article 1 Protocol 1 ECHR and states that after his right to pension had been recognised, the implementation of the Law made it impossible for him to receive the unpaid amounts of pension for the given period. The applicant holds that the peaceful enjoyment of property, to which he had already acquired the right, was brought into question. In its reply to the appeal, the National Assembly and the Government held that the pension beneficiaries are obliged to observe time limits prescribed by law and, if that is not the case, they cannot exercise their right over the failure to fulfill obligations prescribed by law. The National Assembly stated that the Law entered into force in 2000 and the provisions thereof do not have retroactive effect. Therefore, the war

acted as a *force majeure* so that the appellant cannot refer to the period of the applicability of that law. The Government stated that it is indisputable that the state of war is an objective circumstance, but that the threat of war in the territory of *Republika Srpska* had been lifted on 19 June 1996 and that the applicant was obliged then to report henceforth for the purpose of protecting his pension right, which is not too excessive of a burden in terms of “a fair balance”, which the applicant had failed to do.

II. The Constitutional Court observed that the relevant law restricts the applicant’s right to pension under certain conditions. The Constitutional Court recalled that the war circumstances in Bosnia and Herzegovina were the cause for “geographical” shifts of its citizens, both within Bosnia and Herzegovina and outside its borders. The situation in which Bosnia and Herzegovina’s citizens had found themselves in had brought about a series of unresolved issues, in particular the economic and social rights problems, the exercise and enjoyment of which had been, as a rule, always linked directly to their permanent or temporary residence. One of those issues was the exercise as well as the continuation to use the rights already acquired under the pension and disability insurance. The Constitutional Court observes that the Law, unlike the Law on Voluntary Pension Insurance, does not contain provisions regulating the issue of what happens with the pecuniary amounts that beneficiaries were undoubtedly entitled to, but which were left unpaid because of the unknown temporary or permanent residence of a beneficiary. Following the provisions of the Law on Voluntary Pension Insurance, the Constitutional Court claimed that an individual has acquired the right to pension on the basis of a private/voluntary contract of insurance, contributions for this type of insurance never go to waste, not even in cases where a contact address of a beneficiary is unknown for years. The reason is that a special account is opened for each beneficiary into which funds are paid, which a beneficiary can dispose of on the basis of the contract on voluntary insurance.

In view of the aforementioned, the Constitutional Court holds that the solution under the Law is imprecise and unspecified since it leaves room for arbitrary management of unpaid pecuniary funds. Also, the Constitutional Court established that the realisation of a legitimate aim – the provision of legal certainty and the preservation of liquidity of the pension fund – cannot be a justification for the total loss of the already acquired right of an individual in a given period. Therefore, such a legal solution cannot strike a fair balance between a requirement of a general or public interest and a

requirement to protect the right of an individual to property. Instead, it constitutes an excessive burden for a beneficiary, which is the reason why the principle of proportionality under Article 1 Protocol 1 ECHR has not been met.

In that respect, the Constitutional Court recalled its case-law, where it determined that it has jurisdiction in a procedure from within the appellate jurisdiction to examine the quality of the law to the extent to which it affects the issue of the exercise of the rights of individuals under the European Convention on Human Rights. In the case at hand, the Constitutional Court accepted that the principle of “legality” was satisfied, because the measure was provided for by law. However, the Constitutional Court concludes that the principle of “a fair balance” had not been satisfied, and that the violation of the right to property exists. Bearing in mind that such a measure, which is prescribed by the Law, is applied to all the pension beneficiaries and not to the applicant only, and in all circumstances and not only in those that may be considered special for whatever reason, the Constitutional Court held that it was necessary to examine the quality of this legal solution in the case at hand.

The Constitutional Court accepted by all means that public authorities enjoy a wide margin of appreciation in selecting measures to secure the enjoyment of economic and social rights, as well as in determining conditions under which to exercise those rights that significantly impact the country as a whole. The selection of such measures may involve decisions restricting economic and social rights, and the striking of a fair balance between rights is an extremely hard task. This margin of appreciation, no matter how important, is not unlimited nevertheless, and the modification thereof, even to the context of the most complex reform, cannot entail consequences that run counter to the standards of the European Court of Human Rights (see, *James et al. v. The United Kingdom*, 21 February 1986). However, the Constitutional Court observed that in the area of pension insurance, no fundamental and radical reform had occurred that could have justified such a restrictive measure. Legal solutions concerning conditions under which the right to pension is exercised and the same time limit of eight days for the registration of all changes with the pension beneficiary had been established in the Law of 1993, and were retained in the Law of 2000, that is to say even after the entry into force of the European Convention on Human Rights in Bosnia and Herzegovina, regarding which the public authorities, in the opinion of the Constitutional Court, failed to provide satisfactory reasons.

In view of all the aforementioned, the Constitutional Court held that the respective legal provisions did not meet the necessary legal quality to the extent required for the observance of standards referred to in Article 1 Protocol 1 ECHR, which is contrary to the principle of the rule of law referred to in Article I.2 of the Constitution.

Cross-references:

European Court of Human Rights:

- *James et al. v. The United Kingdom*, 21.02.1986, Series A, no. 98, paragraph 37.

Languages:

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



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2016-2-010

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 16.04.2015 / **e)** Direct Action of Unconstitutionality 1923 / **f)** New legal framework of Social Organisations / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 254, 17.12.2015 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Public administration, privatisation, conditions, services.

Headnotes:

A law that establishes the possibility of social organisations under private law to provide public services of social interest with public resources, public property and civil servants, is constitutional.

However, all acts related to the entity's qualification, to the signing of management contracts, to bidding waivers for contractors and to staff selection shall be public, objective and impersonal.

Summary:

I. The Workers Party and the Democratic Labour Party filed a direct action of unconstitutionality, questioning the legitimacy of the Federal Government's transfer of public property and money to private entities – social organisations – so that they provide services of a public and social nature: education, scientific research, technology development, protection and preservation of the environment, culture, and health.

In this case, the applicants argued that the legal regime of social organisations, by transferring government responsibilities to the private sector, violated the constitutional system of public services and the principle of private initiative actions (Articles 170 and 175 of the Federal Constitution). They argued that the changes introduced by Law 9.637/1998 do not encourage citizen's participation in state management, but allow the public sector to benefit from advantages inherent to the private sector, for example, exemption regarding: bidding for contracts; hiring (no competitive examination); and establishing laws to set wages, among others.

II. The Supreme Court, by majority, upheld the action in part. It confirmed the constitutionality of the National Publicisation Programme, which transfers to social organisations the execution of activities related to culture, sports, leisure, science, technology and environment. It stressed that such activities are a duty of the State and also of society, because they are of "social interest".

The Court considered that its role could not translate a form of inflexibility and crystallisation of a certain pre-conceived model of the State, in a way that would preclude the prevailing political majorities in the pluralistic democratic process, within ensured constitutional limits, from implementing their projects of government, in order to shape the profile and the instruments of government as a collective will.

However, as the organisations concerned receive public resources, public property and civil servants, their legal status should be informed by the principles of public administration. In this sense, the Court provided an interpretation of Law 9637/1998 in light of the Constitution, establishing that the following acts must be performed publicly, objectively and impersonally:

1. the qualification of social organisations;
2. the conclusion of the management contract;
3. the bid waiver opportunities for contracting and permission granting of public good use; and
4. the selection of personnel.

As to the means of control on the public budget application, the Full Court ruled unconstitutional the provision that limited the performance of internal control by the Administrative Council and the external control by the Prosecution Office and Federal Accounting Court.

Finally, the Court considered that, as the social organisations are not part of the constitutional concept of public service, since they are part of the so called third sector, they are not obliged to bid.

III. In other opinions which granted the request on broader scope, the Justices stressed that there are public services that may be performed by non-state entities. If the service is provided directly by the public sector or under concessions, permissions or authorisations, it will have public nature. If it is provided by the private sector, the service has public status nature. The Justices concluded that the changes introduced by Law 9.637/1998 are a mean to privatise public social services, allowing the public administrator, with no prior bid, to allocate public budget, public property and civil servants to social organisations.

Supplementary information:

- Law no. 9637/98;
- Article 24.XXIV of the Law no 8666/93;
- Articles 170 and 175 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-2-011

a) Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 27.08.2015 / **e)** Request for a writ of *habeas corpus* 127483 / **f)** Ratification of a plea bargain agreement / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 21, 04.02.2015 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Plea bargaining, validity / Organised crime.

Headnotes:

The plea bargain agreement is a valid juridical act, even when the collaborator is arrested and regardless of his or her personality.

The accused does not have standing to challenge a plea bargain because he or she is not directly affected, since it is only a means of obtaining evidence.

The benefits of the agreement, such as assets release, are legitimate because all the necessary measures to encourage the collaboration can be admitted in the process.

Summary:

I. An accused, remanded in custody because of a denunciation due to a plea bargain agreement, filed a *habeas corpus* action against the approval of this agreement by a Justice of the Supreme Court. The defendant argued that the informant was not trustworthy, since he had breached another plea bargain agreement. Moreover, the accused alleged that the pact provided an asset release clause to the collaborator's former spouse and daughters, which would be unlawful because the goods were purchased with funds obtained from the offence.

II. The Supreme Court, unanimously, denied the order. The Court declared that the plea bargain agreement is a valid juridical act, even when the informer is arrested and regardless of his or her personality. People who are accused, in turn, would not have standing to challenge it because they are not directly affected, since it is only a means of obtaining evidence. Furthermore, the benefits of the agreement, such as assets release, would be legitimate because all the necessary measures to encourage the collaboration can be admitted, according to international conventions on the subject.

Plea bargaining is a procedural juristic act and it is valid even when the informant is arrested, since he or she is not under duress. The validity results from the informant's psychological freedom. Nonetheless, preventive detention is unconstitutional when the only objective is to obtain a plea bargain agreement. The detention of someone who exercises the right to silence is also unconstitutional.

The informant's personality is not a requirement for the validity of a plea bargain agreement, as the law stipulates that this factor will be considered only for the benefits of the settlement. The possible beneficiaries of such agreement will always be people involved in organised crime, since only participants in crime could denounce the co-authors of the offence. Thereby, the reliability of the information provided by the informer is verified by other evidence, which might confirm it and may be helpful for the investigation. In the case at hand, the

fact that the informer had breached a previous plea bargain agreement would not invalidate the current one.

The plea bargain agreement is a way to acquire evidence and is distinct from the informant's testimony, which may be used as evidence since it is corroborated by other circumstantial evidence. Therefore, people who are accused in a testimony arising from a plea bargain agreement have no standing to challenge it, since they are not directly affected by it and cannot be convicted solely on the basis of the informant's reports. By contrast, those who are accused may prepare their defence when they are eventually prosecuted due to the information obtained through the plea bargain agreement. On that occasion, they can confront the version of the informer, including subjecting him or her to inquiry.

In the plea bargain agreement, the softening of the material effects of the conviction is allowed because, according to the United Nations Convention against Transnational Organised Crime (Palermo Convention) and the United Nations Convention against Corruption (Mérida Convention), all necessary measures to encourage forms of plea bargaining, as mitigation of sentence, can be admitted. Although the loss of assets in the Brazilian penal system is not the punishment itself, but only a reflex effect of the conviction, it is possible to teleologically interpret the conventions to settle that the mitigation of sentence, as a form of incentive, also covers the condemnation effects.

Supplementary information:

- Article 4.1 and 4.16 of Law no 12850/2013;
- United Nations Convention against Transnational Organised Crime (Palermo Convention);
- United Nations Convention against Corruption (Merida Convention).

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-2-012

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 30.09.2015 / **e)** Direct Action of Unconstitutionality with request for preliminary injunction 5311 (ADI 5311 MC) / **f)** Limits on the freedom to create or merge political parties / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 21, 04.02.2016 / **h)**.

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

Keywords of the alphabetical index:

Election, party, merger of parties / Election, political party, dissolution / Election, political party, freedom to create.

Headnotes:

The Constitution ensures the free foundation, merger and dissolution of political parties, if and only if constitutional principles are safeguarded, among them, pluralism, democracy and the national character of the party.

It is constitutional to require only unaffiliated voters to support the creation of a new party and determine a five-year minimum period as a condition for them to merge once created. Such measures comply with the constitutional principles that limit the freedom to establish and alter political parties.

Summary:

I. The Republican Party of Social Order (PROS) filed a direct action of unconstitutionality, with a request for preliminary injunction, questioning changes introduced in the Act of Political Parties (Law 9.095/1995). In the case, the law started requiring, as a condition for new parties to register with the Electoral Superior Court, that only unaffiliated voters could support their foundation. It also demanded a five-year minimum period for them to merge.

The applicant argued that the rules hinder the foundation of new parties, which violates strengthening of the rule of law. Moreover, the Law would have established two kinds of citizens, those who are affiliated and those who are not. This offends the free exercise of citizenship and the freedom of expression

and political conviction. Similarly, it would have established two kinds of political parties, according to the period of their foundation – those with five years or more and those with less than five years. This violates party autonomy as it hinders newly created parties to decide freely on *interna corporis* matter.

II. The Supreme Court, by majority, denied the claims. The Court found that the new requirements are consistent with the democratic principle of representation and the multiparty system. That is, the Constitution ensures freedom in the formation of political parties and on their internal autonomy, if and only if those principles are safeguarded.

The Court interpreted the national legislation, which has historically set qualitative and quantitative controls on the formation of parties, in accordance with the institutional and political goals of each period. The requirement of the national character of the party, now constitutionally provided, is the result of this historical process, which aimed to inhibit the state parties founded on political oligarchies and regionalisms that controlled the federal government.

Thus, the new rules must be seen as measures that strengthen such controls, both quantitative (national character of the party) and qualitative (pluralism and respect for the ideological character to their formation). The previous rule had already set, as a requirement, to create a political party on the support from citizens, expressed by a minimum amount of signatures collected nationwide. The new condition is that only those who have no affiliation can express that support. This rule is consistent with the principle of party loyalty, which radiates its effects to affiliates, and with the ban on dual-party membership.

At the same time, the five-year period of establishment to allow parties to merge does not offend their autonomy, as there is no interference in their internal operation. The rule intends to inhibit the so-called “rental parties” proliferation, which are created with the aim of gaining access to the constitutional right to the party fund and to radio and television time. Thus, the new requirements ensure that political parties reflect the social identity of the voters they represent and, as a result, strengthen the democratic regime.

III. In a dissenting opinion, a Justice granted the requests. Although the Justice stressed the need for greater rigour to create new parties – as multiple associations in the legislative houses embarrass the country’s governability – the new requirements prevent that all citizens participate in this process. Support for the creation of a party does not imply that citizens share its ideology. They can express support by signing

the founding motion and, once it hits the minimum number of signatures and the party is registered, they may choose to disaffiliate and support the newly created party. Thus, the rule requires the voter's commitment to a party not even yet registered with the Superior Electoral Court, which may compromise the constitutional freedom to create parties.

Moreover, the Justice considered that party loyalty does not provide a basis for the five-year rule for parties to merge, as the principle has exceptions called good causes, which allow parliamentarians to change between parties without losing their mandate. Among these causes are the foundation and merger of political parties.

Supplementary information:

- Article 17 of the Federal Constitution of 1988.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-2-013

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 01.10.2015 / **e)** Extraordinary Appeal 592581 / **f)** Jurisdiction of the Judiciary to determine the execution of construction works in prisons by the Executive / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 49, 16.03.2016 / **h)**.

Keywords of the systematic thesaurus:

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**
 3.3 General Principles – **Democracy.**
 5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

Keywords of the alphabetical index:

Decision, legislative, reviewability / Eternity clause / Member of parliament, privilege, breach / Party, merger of parties / Political party, dissolution / Political party, freedom to create.

Headnotes:

The National Congress may react to Supreme Court jurisprudence by legislating in a different direction to the one decided by the Court. However, the law is born with the presumption of unconstitutionality, which requires legislators to present new arguments or demonstrate change in the factual and axiological context from that on which the decision of the Supreme Court is based. The legislative reaction by means of constitutional amendment shall only be held unconstitutional if it violates an indelible clause ('eternity clause'), since the constitutional parameter itself has changed.

New political parties, created after the elections to the Chamber of Deputies, have the right to take, in order to participate in the party fund and free electoral propaganda, the representativeness of deputies who have migrated to them without being removed from office.

Summary:

I. The Solidarity Party filed a direct action of unconstitutionality against provisions introduced in the Political Parties Act and the Elections Act. The provisions changed the distribution criteria to participate in the party fund and free electoral advertising. According to the applicant, the rules prevent new political parties, created after the Chamber of Deputies elections, from participating in free electoral advertising (broadcasting right) and having access to the party fund. It stated that such rules violate the decision of the Supreme Court in Direct Actions (ADIs, in the Portuguese acronym) 4430 and 4795. At the time, the Court secured these parties the right to proportional access to the 2/3 of the time for the electoral propaganda on radio and television, considering the representation of congressmen who migrate directly from the parties for which they were elected to the new party created. It claimed violation, especially, of Article 17.*caput* of the Federal Constitution, which guarantees freedom to found, to merge and to incorporate political parties.

II. The Supreme Court, by majority, granted the request in order to declare unconstitutional the articles which provided the changes (Articles 1 and 2 of Law 12875/2013). Initially, the Court assessed that the new legislation is, indeed, a legislative response to its decision in ADIs 4430 and 4795. Therefore, the Court pointed out that the case should be examined in the light of the theoretical framework of constitutional dialogues. According to this modern theory, constitutional interpretation shall not be exclusive to the single organ of the Judiciary, but the result of a coordinated effort among the other

branches and segments of civil society. In this sense, the Supreme Court has the “last word provisionally” and, therefore, in theory, a legislative response to the Court’s case-law is legitimate. Additionally, according to constitutional provision, the binding effect inherent in direct actions of unconstitutionality does not reach the Legislature.

However, it is mandatory to set some boundaries that do allow institutional dialogue, since the decisions of the Supreme Court cannot be subject to Legislative Branch scrutiny. The legislative reaction may occur by the enactment of constitutional amendments or by ordinary law. On the one hand, the amendments change the constitutional parameter itself and will only be unconstitutional if they violate an indelible clause (supraconstitutional provisions, or ‘eternity clauses’). On the other hand, ordinary law that alters the understanding of the Supreme Court is born with the presumption of unconstitutionality. Therefore, it is required that the lawmaker demonstrate, in a reasoned manner, the need to seek correction of the case, or show that the factual and axiological assumptions that grounded the decision no longer exist (constitutional mutation by law).

The Court held that, in this case, those requirements were not fulfilled. The motive of the bill generally provided that the exclusion of new parties from the proportional right to broadcast and access to the party fund aims to strengthen political parties, as it would discourage elected members, with representation in the Chamber of Deputies, to leave his or her party and join the newly established one. The Court found that, on the contrary, the law inhibits the strengthening and development of new political parties, as it provides, for the purpose of access to the party fund and to radio and television time, the right to take members’ representativeness in case of merger of political parties, but prevents it in case of creation of new parties. The Supreme Court decided, in the direct actions mentioned, that it is not legitimate to establish differences between the creation of political parties and their merger and incorporation, and it is not feasible to apply the criterion of electoral performance in case of the creation of new parties. Moreover, the creation of new parties is a just cause that enables parliamentarians to affiliate in another party without incurring in party infidelity. Accordingly, the prerogatives inherent to the congressmen representation cannot be withdrawn from them in this situation.

III. In a concurring opinion, a Justice added that, during the legislative process of the questioned law, legislators filed a writ of *mandamus* arguing illegitimacy of the legislative reaction to the decision handed in the ADIs 4430 and 4795 (MS 32033). At

the time, the Court upheld its jurisprudence and dismissed the case on grounds that there is no prior control of constitutionality. Thus, the Court assured the Congress the right to act as an interpreter of the Constitution. The Justice also highlighted that the change of electoral rules is one of the most common ways that majorities use to perpetuate themselves in power.

In dissenting opinions, the request was denied *in totum*. Dissenting Justices stated that, indeed, the contested Law on the trial of ADIs 4430 and 4795 suppressed the right of the parties to share broadcasting time. However, the new legislation ensures a portion in the 5% of the party fund, resulting from the equal division among all the parties registered in the Supreme Electoral Tribunal and the equal distribution of 1/3 of the reserved free electoral propaganda in each election. It was also stressed that the Court’s understanding of this issue was wavering and that the provisions of the Law met the case-law on party loyalty until shortly before its enactment. Up to that time, the Court considered that, besides exceptional cases, the withdrawal act of the party for which the deputy was elected entailed the statement of the chair for the original party, due to party infidelity. Thus, if the Constitution assigns to the law the duty to regulate the airtime division and the access to resources from the party fund (Article 17.3 of the Constitution) and, if there are two possible arguments from the legal point of view, it would not be appropriate for the Judiciary Branch to overlap valid choices of the Legislature.

Supplementary information:

- Article 17.caput and Article 17.3 of the Federal Constitution of 1988;
- Direct Actions of Unconstitutionality 4.430 and 4.795 (ADI 4430 and ADI 4795);
- Request for a *Writ of mandamus* 32033 (MS 32033).

Languages:

Portuguese, English (translation by the Court).



Canada

Supreme Court

Important decisions

Identification: CAN-2016-2-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 23.06.2016 / **e)** 36328 / **f)** R. v. Saeed / **g)** *Canada Supreme Court Reports* (Official Digest), 2016 SCC 24, [2016] 1 S.C.R. 518 / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; 29 *Criminal Reports* (7th) 1; 336 *Canadian Criminal Cases* (3d) 171; 399 *Dominion Law Reports* (4th) 391; [2016] S.C.J. no. 24 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

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

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

Keywords of the alphabetical index:

Charter of rights, search and seizure, search incident to arrest.

Headnotes:

Under Section 8 of the Canadian Charter of Rights and Freedoms, “[e]veryone has the right to be secure against unreasonable search or seizure”. The common law power to search incident to a lawful arrest permits reasonable searches when the police have neither a warrant nor reasonable and probable grounds. This includes penile swabs, although some modification of the existing common law framework is necessary in order to make that power compliant with Section 8.

Summary:

I. The complainant was viciously attacked and sexually assaulted. Shortly thereafter, the accused was arrested. The supervising police officer felt that there were reasonable grounds to believe the complainant’s DNA would still be found on the accused’s penis and a penile swab should be taken. The supervising officer did not seek a warrant for the swab, because in his view, it was a valid search incident to arrest. The swab took place before two male officers, who permitted the accused to conduct the swab himself. The swab was tested and revealed the complainant’s DNA. At trial, the accused challenged the admissibility of the DNA evidence. The trial judge ruled that the swab violated the accused’s Section 8 right. However, she admitted the evidence under Section 24.2 of the Charter and relied on it to convict the accused. A majority of the Court of Appeal dismissed the accused’s appeal.

II. A majority of seven judges of the Supreme Court of Canada dismissed the appeal. The majority held that the accused’s Section 8 right was not breached and the DNA evidence obtained from the penile swab was properly admitted. Determining whether the common law power of search incident to arrest may reasonably authorise a penile swab involves striking a proper balance between an accused’s privacy interests and valid law enforcement objectives. While the accused’s privacy interests are significant, they will not be so significant as to preclude the power of search incident to arrest. In these cases, the existing common law framework must instead be tailored to ensure the search will be Charter-compliant. The common law must provide a means of preventing unjustified searches before they occur and a means of ensuring that when these searches do occur, they are conducted in a reasonable manner. The reasonable grounds standard and guidelines regarding the manner of taking the swab provide these two protections.

First, the police may take a penile swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested. Whether reasonable grounds have been established will vary with the facts of each case. Relevant factors include the timing of the arrest in relation to the alleged offence, the nature of the allegations, and whether there is evidence that the substance being sought has already been destroyed. The potential for destruction or degradation of the complainant’s DNA will always be a concern in this context.

Second, the swab must also be conducted in a reasonable manner. The following factors will guide police in conducting penile swabs incident to arrest reasonably. A swab should, as a general rule, be conducted at the police station. It should be conducted in a manner that ensures the health and safety of all involved. It should be authorised by a police officer acting in a supervisory capacity. The accused should be informed shortly before the swab of the nature of the procedure, its purpose and the authority of the police to require the swab. The accused should be given the option of removing his clothing and taking the swab himself or the swab should be taken or directed by a trained officer or medical professional, with the minimum of force necessary. The officers carrying out the swab should be of the same gender as the accused unless the circumstances compel otherwise. There should be no more police officers involved in the swab than are reasonably necessary in the circumstances. The swab should be carried out in a private area. It should be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time. A proper record should be kept of the reasons for and the manner in which the swabbing was conducted.

In light of these requirements, the penile swab in this case did not violate the accused's Section 8 right. The accused was validly arrested. The swab was performed to preserve evidence of the sexual assault. The police had reasonable grounds to believe that the complainant's DNA had transferred to the accused's penis during the assault and that it would still be found on his penis. The swab was performed in a reasonable manner. The police officers were sensitive to the need to preserve the accused's privacy and dignity. The accused was informed in advance of the procedure for taking the swab and its purpose. The swab itself was conducted quickly, smoothly, and privately. The swab took at most two minutes. The accused took the swab himself. There was no physical contact between the officers and the accused. The officers took detailed notes regarding the reasons for and the process of taking the swab. The swab did not fundamentally violate the accused's human dignity.

III. One judge agreed to dismiss the appeal, although she held that the common law power of search incident to arrest does not authorise the police to take genital swabs. However, in the exceptional circumstances of this case, the evidence was nonetheless admissible under Section 24.2. According to the judge, society's interest in the adjudication on the merits outweighs the seriousness of the Charter-infringing conduct and its impact on the accused's interests. On balance, therefore, the admission of the evidence would not bring the administration of justice in disrepute.

IV. The one dissenting judge, however, held that instead the seriousness of the Charter-infringing conduct and its impact on the accused's interests outweigh society's interest in the adjudication on the merits.

Languages:

English, French (translation by the Court).



Identification: CAN-2016-2-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 08.07.2016 / **e)** 36068 / **f)** R. v. Jordan / **g)** *Canada Supreme Court Reports* (Official Digest), 2016 SCC 27, [2016] 1 S.C.R. 631 / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; 29 *Criminal Reports* (7th) 235; 335 *Canadian Criminal Cases* (3d) 403; 398 *Dominion Law Reports* (4th) 381; [2016] S.C.J. no. 27 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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:

Charter of rights, right to be tried within reasonable time / Unreasonableness, presumption / Presumption, criteria.

Headnotes:

Under Section 11.b of the Canadian Charter of Rights and Freedoms, “[a]ny person charged with an offence has the right to be tried within a reasonable time”. The framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771, for applying Section 11.b is replaced by a new framework. The new framework includes a presumptive ceiling beyond which delay – from the charge to the actual or anticipated end of trial – is presumed to be unreasonable, unless exceptional circumstances justify it.

Summary:

I. The accused was charged in late 2008 for his role in a dial-a-dope operation. His trial ended in early 2013. The accused brought an application under Section 11.b of the Charter, seeking a stay of proceedings due to the delay. In dismissing the application, the trial judge applied the *Morin* framework. Ultimately, the accused was convicted. The Court of Appeal dismissed the appeal.

II. A majority of five judges of the Supreme Court of Canada allowed the appeal, set aside the convictions and entered a stay of proceedings. The majority held that the delay was unreasonable and that the accused's Section 11.b Charter right was infringed. The *Morin* framework has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it. A new framework is therefore required. At the heart of this new framework is a presumptive ceiling beyond which delay – from the charge to the actual or anticipated end of trial – is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay will follow.

Exceptional circumstances lie outside the Crown's control in that:

1. they are reasonably unforeseen or reasonably unavoidable; and
2. they cannot reasonably be remedied. In general, exceptional circumstances fall under two categories: discrete events (such as an illness or unexpected event at trial), and particularly complex cases.

Below the presumptive ceiling, however, the burden is on the defence to show that the delay is unreasonable.

To do so, the defence must establish that:

1. it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and

2. the case took markedly longer than it reasonably should have. Absent these two factors, the Section 11.b application must fail. Stays beneath the presumptive ceiling should only be granted in clear cases.

For cases currently in the system, the new framework must be applied contextually, to avoid charges being stayed because of the change in the law, and it must be sensitive to the parties' reliance on the previous state of the law.

In this case, the total delay between the charges and the end of trial was 49.5 months. As the trial judge found, four months of this delay were waived by the accused when he changed counsel shortly before the trial was set to begin, necessitating an adjournment. In addition, one and a half months of the delay were caused solely by the accused for the adjournment of the preliminary inquiry because his counsel was unavailable for closing submissions on the last day. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling of 30 months in the superior court. The Crown has failed to discharge its burden of demonstrating that the delay of 44 months (excluding defence delay) was reasonable. The case against the accused was not so exceptionally complex that it would justify such a delay. Nor does the transitional exceptional circumstance justify it. A total delay of 44 months in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating.

III. Four judges agreed to allow the appeal, although they held that a new framework is unnecessary and that a reasonable time for trial under Section 11.b cannot and should not be defined by numerical ceilings. According to them, the *Morin* framework ensures that the constitutional right of accused persons to be tried within a reasonable time is applied appropriately.

Supplementary information:

In the companion appeal, *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741, the accused was charged in early 2009 for historical sexual offences against a minor. His trial ended in late 2011. The accused applied for a stay of proceedings due to the delay. The trial judge dismissed the application and the accused was convicted. The Court of Appeal allowed the appeal and entered a stay. A majority of five judges of the Supreme Court of Canada dismissed the appeal. The majority held that applying the new framework established in *Jordan*, the accused's right to be tried within a reasonable time under Section 11.b was infringed. The delay between the

charges and the end of trial was approximately 35.5 months. The accused did not waive any of this delay, and solely caused only one and a half months of it. Subtracting this defence delay leaves 34 months. This is still above the 30-month presumptive ceiling for cases going to trial in the superior court and therefore, is presumptively unreasonable. Here, the Crown has failed to discharge its burden of showing that the delay is reasonable. The record does not disclose any delay caused by discrete, exceptional circumstances, and the case does not remotely qualify as exceptionally complex. Finally, the transitional exceptional circumstance does not apply.

One judge agreed to dismiss the appeal. In doing so, however, she applied the *Morin* framework, as did the three dissenting judges.

Languages:

English, French (translation by the Court).



Identification: CAN-2016-2-005

a) Canada / **b)** Supreme Court / **c)** / **d)** 21.07.2016 / **e)** 36200 / **f)** R. v. K.R.J. / **g)** *Canada Supreme Court Reports* (Official Digest), 2016 CSC 31, [2016] 1 R.C.S. 906 / **h)** <http://scc-csc.lexum.com/scc-csc/fr/nav.do>; [2016] A.C.S. no. 31 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

Keywords of the alphabetical index:

Sexual offender, conditions of release / Criminal law, amendment, retrospective application / Charter of rights, lesser punishment / Prohibition measures / Punishment, definition.

Headnotes:

Section 11.i of the Canadian Charter of Rights and Freedoms provides that, if the punishment for an offence is varied after a person commits the offence, but before sentencing, the person is entitled to “the benefit of the lesser punishment”. New prohibitions that can be imposed by sentencing judges when releasing sexual offenders in the community, stemming from amendments to the Criminal Code, qualify as punishment, such that their retrospective operation limits the right protected by Section 11.i of the Charter. The retrospective operation of Section 161.1.c, which empowers sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age, is not a reasonable limit on the Section 11.i Charter right and therefore cannot be justified under Section 1 of the Charter. The retrospective operation of Section 161.1.d, which provides for a prohibition from using the Internet or other digital network, is a reasonable limit and is justified under Section 1 of the Charter.

Summary:

I. When offenders are convicted of certain sexual offences against a person under the age of 16 years, Section 161.1 of the Criminal Code gives sentencing judges the discretion to prohibit them from engaging in a variety of conduct upon their release into the community. In 2012, Parliament expanded the scope of Section 161.1, empowering sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age (Section 161.1.c) or from using the Internet or other digital network (Section 161.1.d).

In 2013, the accused pleaded guilty to incest and the creation of child pornography. The offences were committed between 2008 and 2011. By virtue of the convictions and the age of the victim, the sentencing judge was required to consider whether to impose a prohibition under Section 161.1. The question arose as to whether the 2012 amendments could operate retrospectively such that they could be imposed on the accused. The sentencing judge concluded that an order under the new Section 161.1.c and 161.1.d constituted punishment within the meaning of Section 11.i of the Charter, such that the provisions could not be applied retrospectively. On appeal by the Crown, the majority of the Court of Appeal concluded that the 2012 amendments were enacted to protect the public, rather than to punish offenders, and therefore, that they did not qualify as punishment within the meaning of Section 11.i of the Charter. The majority allowed the appeal and imposed the conditions in Section 161.1.c and 161.1.d retrospectively on the accused.

II. A majority of seven judges of the Supreme Court of Canada allowed the appeal in part.

The Court reformulated as follows the test for determining whether a consequence amounts to punishment under Section 11.i of the Charter: a measure constitutes punishment if:

1. it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence; and either
2. it is imposed in furtherance of the purpose and principles of sentencing, or
3. it has a significant impact on an offender's liberty or security interests.

To satisfy the third branch of this test, a consequence of conviction must significantly constrain a person's ability to engage in otherwise lawful conduct or impose significant burdens not imposed on other members of the public. Applying this reformulated test, the 2012 amendments to Section 161.1 constitute punishment. As such, their retrospective operation limits the right protected by Section 11.i of the Charter.

To be justified under Section 1 of the Charter, a law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society. The legislative history, judicial interpretation, and design of Section 161 all confirm that the overarching goal of the provision is to protect children from sexual violence perpetrated by recidivists. It follows that the objective of the retrospective operation of the 2012 amendments is to better protect children from the risks posed by offenders like the accused who committed their offences before, but were sentenced after, the amendments came into force. There is clearly a rational connection between this objective and retrospectively giving sentencing judges the discretionary power to limit those offenders who pose a continuing risk to children in contacting children in person or online, and in engaging with online child pornography. The retrospective operation of Section 161.1.c and 161.1.d impairs the Section 11.i Charter rights as little as reasonably possible. However, the deleterious effects flowing from the retrospective operation of Section 161.1.c are substantial. The new Section 161.1.c prohibits any contact – including communicating by any means – with a person who is under the age of 16 years in a public or private space. The government failed to lead much, if any, evidence to establish the degree of enhanced protection Section 161.1.c provides in comparison to the previous version of the prohibition. The retrospective operation of Section 161.1.c

therefore cannot be justified under Section 1 of the Charter. The deleterious effects resulting from the retrospective operation of Section 161.1.d are also significant. A complete ban on using the Internet or other digital network is more intrusive than the previous ban on using a computer system for the purpose of communicating with young people. Section 161.1.d is directed at grave, emerging harms precipitated by a rapidly evolving social and technological context. The previous prohibition was insufficient to address the evolving risks. Parliament was justified in giving Section 161.1.d retrospective effect.

III. In a partially dissenting opinion, one of the judges concluded that the breach of the Charter resulting from the retrospective application of Section 161.1.d also cannot be justified. In this case, there was no evidence about how the retrospective application of Section 161.1.d was expected to, or would, reduce recidivism rates any more than those under the former restrictions.

In a second partially dissenting opinion, another judge concluded that the retrospective application of both provisions should be upheld under Section 1 of the Charter. All the reasons identified by the majority in support of the conclusion that the limit imposed on the Section 11.i Charter right by the retrospective application of Section 161.1.d is justified are equally applicable to the retrospective application of Section 161.1.c.

Languages:

English, French (translation by the Court).



Identification: CAN-2016-2-006

a) Canada / **b)** Supreme Court / **c)** / **d)** 22.07.2016 / **e)** 36466, 36844 / **f)** R. v. Cawthorne / **g)** *Canada Supreme Court Reports* (Official Digest), 2016 SCC 32, [2016] 1 S.C.R. 983 / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; [2016] S.C.J. no. 32 (*Quicklaw w*); CODICES (English, French).

Keywords of the systematic thesaurus:

4.7.11 Institutions – Judicial bodies – **Military courts**.
5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.

Keywords of the alphabetical index:

Armed forces, criminal offence, appeal / Right of appeal, Minister of National Defence, constitutionality / Right to an independent prosecutor / Independent prosecutor, presumption.

Headnotes:

Sections 230.1 and 245.2 of the National Defence Act (hereinafter, the “Act”), which give the Minister of National Defence (hereinafter, the “Minister”) the authority to appeal to the Court Martial Appeal Court and to the Supreme Court of Canada, are constitutional. Parliament’s conferral of authority over appeals in the military justice system on the Minister does not violate the right to liberty guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms, nor the right to an independent tribunal guaranteed by Section 11.d of the Charter.

Summary:

I. Three military accused charged with criminal offences contested, in the context of appeal proceedings in their respective matters, the authority of the Minister to appeal to the Court Martial Appeal Court, conferred on him by Section 230.1 of the Act, and the authority of the Minister to appeal to the Supreme Court, conferred on him by Section 245.2 of the Act. In the case of two of the accused, motions to quash the Minister’s appeals before the Court Martial Appeal Court were brought, on the basis that Section 230.1 of the Act violates Section 7 of the Charter. The Court Martial Appeal Court dismissed the motions to quash but agreed that Section 230.1 should be invalidated, as it violates the right to an independent prosecutor. In the case of the other accused, a motion to quash the Minister’s appeal before the Supreme Court was brought, on the basis that Section 245.2 violates Sections 7 and 11.d of the Charter.

II. In a unanimous decision, the Supreme Court dismissed the motion to quash and allowed the Minister’s appeals. Sections 230.1 and 245.2 of the Act are constitutional. The power that Sections 230.1 and 245.2 of the Act confer on the Minister – that is, to initiate an appeal – may effect a deprivation of liberty. Therefore, Section 7 of the Charter is

engaged. The law recognises as constitutional the principle that prosecutors must not act for improper purposes, such as purely partisan motives. This principle is a basic tenet of our legal system. It safeguards the rights of the individual and the integrity of the justice system, and it satisfies the criteria to be considered a principle of fundamental justice. A prosecutor – whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function – has a constitutional obligation to act independently of partisan concerns and other improper motives.

The Minister, like the Attorney General of Canada or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister’s membership in Cabinet does not displace that presumption. The law presumes that the Attorney General, also a member of Cabinet, can and does set aside partisan duties in exercising prosecutorial responsibilities, and there is no compelling reason to treat the Minister differently in this regard. Accordingly, Parliament’s conferral of authority over appeals in the military justice system on the Minister does not violate Section 7 of the Charter. As to the argument that the impugned provisions violate the right to an independent tribunal guaranteed by Section 11.d of the Charter, it cannot succeed.

Languages:

English, French (translation by the Court).



Costa Rica

Supreme Court of Justice

Important decisions

Identification: CRC-2016-2-002

a) Costa Rica / **b)** Supreme Court of Justice / **c)** Constitutional Chamber / **d)** 13.05.2015 / **e)** 06839/15 / **f)** / **g)** *Boletín Judicial* (Judicial Bulletin), no. 127, 01.07.2016 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 4.5.9 Institutions – Legislative bodies – **Liability**.
 4.6.10.1.1 Institutions – Executive bodies – Liability – Legal liability – **Immunity**.
 4.7.4.3.6 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Status**.

Keywords of the alphabetical index:

Immunity of office / Immunity, scope.

Headnotes:

Modern constitutionalism establishes immunities and other legal standards to protect and exempt certain public officials from criminal prosecution.

Article 121.9 of the Constitution furnishes the Legislative Assembly with the legal authority to lift such immunities for the persons exercising the Presidency of the Republic, the Vice Presidents, members of the Supreme Branches (Legislative Assembly, Supreme Court of Justice and Supreme Electoral Tribunal) and Diplomatic Ministers, by a vote of two-thirds of the entire Legislative Assembly.

In general, Supreme Branch members are shielded from frivolous or politically motivated prosecutions.

It is unconstitutional to extend exemptions in a law to extend immunities and privileges of the Supreme Branch members to other public officials.

Summary:

I. Articles 9 and 12 of the Organic Law of the Procurator General Office accord the same immunities and prerogatives to the Procurator General and the Deputy Procurator General as Supreme Branch members (i.e., members of the Legislative Assembly, Supreme Court and Supreme Electoral Tribunal).

The Third Chamber of the Supreme Court of Justice, pursuant to Article 102 of the Law of Constitutional Jurisdiction, requested an advisory opinion from the Constitutional Chamber of the Supreme Court while examining an indictment brought against the General Procurator for a criminal breach of duties. The Third Chamber sought an opinion determining if Articles 9 and 12 of the Organic Law were unconstitutional for extending immunities and prerogatives of the Supreme Branch members to the Procurators, being a privilege stipulated by the law and not by the Constitution.

The question before the Constitutional Chamber was whether the Procurator General of the Republic or corresponding Deputy Procurator was constitutionally eligible to such immunities and exemptions.

II. To answer the question, the Constitutional Chamber examined three relevant decisions: one of its own previous decisions, as well as two foreign decisions, from the Constitutional Tribunal of Spain and the Constitutional Court of Colombia.

In its previous decision, Decision no. 1991-000502 of 7 March 1991, the Constitutional Chamber had relied on its own previous opinion, concerning privileges created for the Ombudsman. At that time, it came to the conclusion that the legal creations of immunities were exceptions to the equal enforcement of the Rule of Law, and that therefore these gaps to the rule of law could only be authorised in the Constitution or by international law.

In Decision no. 22-1997 of 11 February 1997, the Spanish Constitutional Tribunal concluded that these prerogatives were associated to establish legal safeguards and were designed to satisfy an institutional and long-standing interest to uphold the legal order. As these prerogatives were *jus cogens*, they are not at the disposal of those entitled to them; they can only be interpreted in accordance within the constitutional framework. They are designed to provide independence and serenity to parliamentary and jurisdictional decisions, providing a shield against external pressures on those officials in the course of

carrying out their political or institutional functions. Finally, in Decision SU712-2013 the Colombian Constitutional Court held that these prerogatives are real institutional safeguards, designed to defend congressional members' independence. They are not there to satisfy a petty or particular individual; rather, they seek to preserve the parliamentary institution, the separation of powers and popular sovereignty.

After citing relevant parts of these decisions, the Constitutional Chamber held that these exemptions and privileges for Supreme Branch members were designed for a constitutional and democratic setting, that they provide protection to specific public officers against "political malice" or wrongful pressure seeking to undermine independence.

As a measure taken in the Constitution for specific persons, that differentiates them from all the rest, it is necessary for the constitutional forefathers (original or derived) to produce such privileges and exemptions only based on the importance and weight of each official's role.

As a result, it is unconstitutional to extend exemptions in a law to extend immunities and privileges of the Supreme Branch members to other public officials.

Cross-references:

Constitutional Chamber:

- no. 91-000275-0007-CO, 22.11.1994;
- no. 1991-000502, 07.03.1991.

Spanish Constitutional Tribunal:

- no. 22-1997, 11.02.1997, *Bulletin* 1997/1 [ESP-1997-1-004].

Colombian Constitutional Court:

- no. SU712-2013, 17.10.2013.

Languages:

Spanish.



Croatia Constitutional Court

Important decisions

Identification: CRO-2016-2-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.05.2016 / **e)** U-I-3541/2015, U-I-2780/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 52/16 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
- 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.**
- 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

Keywords of the alphabetical index:

Vacatio legis / Credit, contract, conversion / Credit institution, contract terms, modification, time-limit.

Headnotes:

The purpose of *vacatio legis* is for legal entities to familiarise themselves with and prepare themselves to assume the obligations prescribed by a new law. However, there is no possibility of imposing on legal entities the obligation to fulfil requirements prescribed by such a new law which would have to be met by the date of its coming into force (as early as the date of publication of the law in the official journal) with failure to meet the obligations on the date of its coming into force being deemed as a misdemeanour offence.

This is an incorrect understanding of the function of the publication of a law, an incorrect understanding of the meaning and purpose of *vacatio legis*, and an incorrect understanding of the manner in which obligations may be imposed on legal entities in a normative way and in the democratic spirit based on the rule of law and the protection of individual rights.

Summary:

I. Pursuant to a request of the High Misdemeanour Court and a proposal by Privredna Banka Zagreb d.d., the Constitutional Court instituted proceedings for a review of the constitutionality of Article 10.6 (in the part in which indent 28 was added to Article 26.1 of the Consumer Credit Act), Articles 13.2 and 15 of the Act on Amendments to the Consumer Credit Act (hereinafter, "AA to the Act"), and rendered a decision repealing Article 13.2 in the part that reads: "at the latest by 1 January 2014", while in the remaining part it rejected the claim and did not accept the proposal. On the basis of Article 31.5 of the Constitutional Act on the Constitutional Court, the Court established that within the period 1 January 2014 to 1 April 2014 nobody could be subject to misdemeanour liability for the misdemeanour offence referred to in Article 26.1.28 of the Consumer Credit Act (hereinafter, the "Act").

Article 13.2 of the AA to the Act is a transitional and final provision. It provides that for existing credit agreements concluded before the entry into force of the AA to the Act, where parameters and their causes and effects were not defined, creditors must harmonise the interest rate with the debtor by establishing a parameter and a fixed margin, as well as the periods of changes in interest rates, by 1 January 2014 at the latest.

The misdemeanour liability prescribed by Article 26.1.28 of the Act (a fine for creditors or credit mediators and the responsible person within the legal entity) is related to the meeting of the obligation prescribed by Article 3 AA to the Act which amended Article 11a of the Act. This Article, in order to control the increase of a variable interest rate, defines acceptable parameters based on the changes of which the change in interest rate will be implemented as a EURIBOR, LIBOR, NRS yield on the Treasury bills of the Ministry of Finance, or the average interest rate on citizens' deposits in the related currency. A variable interest rate is defined as a total of the contracted parameter and the fixed margin that must be contracted together with the parameter and which must not increase during the repayment period. Furthermore, this Article contains a provision whereby the obligation of defining the parameter, fixed margin and the period of changes in interest rates is also explicitly prescribed for previously concluded credit agreements in which the parameters for the change in interest rate was not previously defined. (Article 11a.5 of the Act). Similarly, in previously contracted housing loans with a variable interest rate which has increased by over 20% in comparison to the domestic currency since the time when the

contract was concluded, it is also prescribed that the future fixed margin must not be higher than the difference between the initial interest rate and the initial value of the variable parameter (reference interest rate). When the exceptional circumstances cease to exist, the bank must offer the client a conversion of the loan into domestic currency or EUR without a fee. If he or she refuses the conversion, the repayment of the loan will continue according to standard conditions.

Under Article 15 of the AA to the Act, the Act was to come into force on 1 January 2014.

The applicants challenged the constitutional compliance of the legal solution whereby creditors of consumer loans would have to fulfil the obligation referred to in Article 3 AA to the Act immediately after the publication of the Act and before its entry into force, and would incur misdemeanour liability if they failed to fulfil it within this period.

II. The Constitutional Court based its deliberations over the impugned provisions of the AA to the Act on the stance taken in decision no. U-I-659/1994 *et al.* of 15 March 2000 on the fact that under the principles of legal certainty and the rule of law referred to in Article 3 of the Constitution, legal norms must be predictable for their addressees, so that they can familiarise themselves with their real and specific rights and obligations and then comply with them.

Any legislation that provides for the sanctioning of persons must meet strict requirements of legal certainty and the rule of law referred to in Article 3 of the Constitution.

In the light of the above, the Constitutional Court considered the conformity with the Constitution of Article 13.2 of the AA to the Act separately and in conjunction with Article 26.1.28 of the Act.

The Constitutional Court recalled that in its Notification to the Croatian Parliament U-X-80/2005 of 1 June 2006, with regard to the coming into force and the beginning of implementation of a law or other regulation, it stated that the constitutional rule is for laws to come into force at the earliest on the eighth day following their publication in the Official Gazette. A period of time between the date the law is published and the date it comes into force (*vacatio legis*) is needed to allow the addressees of the law to familiarise themselves with its provisions and prepare for its implementation. During the *vacatio legis* period there is no obligation to implement the law, as it has yet to enter into legal force.

In this particular case, the *vacatio legis* period lasted 28 days. The obligation itself occurred on 1 January 2014. However, the misdemeanour liability for not meeting this obligation also occurred on 1 January 2014 (Article 26.1.28 of the Act). It was not therefore a question of the length of the *vacatio legis* period, but rather of the non-existence of a time period for the fulfilment of an obligation that came into effect on 1 January 2014, on the same day it became subject to a sanction due to non-compliance.

The Court concluded that the legislator should have determined an appropriate period for the creditor to fulfil the obligation pursuant to the amended Article 11a of the Act after its coming into force, i.e., after 1 January 2014, and provided for misdemeanour liability only once this period had expired. The legislator had failed to do so and the Constitutional Court accordingly found that the part of Article 13.2 of the AA to the Act which reads: "at the latest by 1 January 2014" was not in conformity with the Constitution.

Based on the stance that creditors and credit mediators had the right to an appropriate period for the fulfilment of the obligation referred to in Article 11.5 of the Act, counting from the date when the AA to the Act came into force (from 1 January 2014), the Constitutional Court found that none of the creditors or credit mediators should have been sanctioned for a misdemeanour pursuant to Article 26.1.28 of the Act if, on the date when the AA to the Act came into force, they had not fulfilled the obligation referred to in Article 11a.5 of the Act.

However, by repealing part of Article 13.2 of the AA to the Act, the question of an appropriate period for fulfilling the obligation of the creditor referred to in Article 11a.5 of the Act has remained open. Therefore, the Constitutional Court established that no one should have been subject to misdemeanour liability for the misdemeanour offence referred to in Article 26.1.28 within the period from 1 January 2014 to 1 April 2014.

On the other hand, the Constitutional Court found that the substantive content of Article 26.1.28 of the Act, apart from the part lacking the prescription of an adequate period for its implementation, met the requirements of clarity and precision of the legal norm referred to in Article 3 of the Constitution.

Cross-references:

Constitutional Court:

- no. U-I-659/1994 *et al.*, 23.12.2014, *Bulletin* 2000/1 [CRO-2000-1-010];
- Notification no. U-X-80/2005, 01.06.2006.

Languages:

Croatian, English.



Identification: CRO-2016-2-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 01.06.2016 / **e)** U-I-2881/2014 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 55/16 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
 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.**
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

Keywords of the alphabetical index:

Proceedings, enforcement / Motion, correction.

Headnotes:

The provisions of the law regulating enforcement and insurance, as the basic act providing for the realisation and protection of civil rights within the legal order, must be clear, precise, predictable, certain and in line with legitimate expectations.

The requirement for the legal norm to be clear and precise must be considered as an integral part of the principle of the rule of law in all fields of law; neglecting this requirement would put into question the other components of the principle of legal certainty as part of the principle of the rule of

law, especially the requirements for the uniform application of the law and for respecting the effect of final judgments and other decisions of government and public authorities.

It is impermissible for a party to be able to, but not to have to, file something, depending on whether this is “necessary”, and for the assessment of whether this is “necessary” to be delegated to the competent body that has authority *a priori* to dismiss the motion if the party omits to file everything that this body deemed was necessary to be submitted.

Summary:

I. Upon the proposal of a natural person and the Croatian Bar Association, the Constitutional Court instituted proceedings for the review of the constitutional compliance of Article 39.3 of the Enforcement Act (hereinafter, “EA”) and rendered a decision repealing it.

Article 39 EA prescribes the content of a motion for enforcement (paragraph 1) and a motion for enforcement based on an authentic document (paragraph 2), and stipulates that a motion for enforcement not containing all the data referred to in paragraphs 1 and 2 of this Article would be dismissed by a ruling (paragraph 3).

The applicants considered that Article 39.3 EA was not in conformity with Articles 3, 14.2, 16.2, 26 and 29.1 of the Constitution. They also raised objections regarding the vagueness and unpredictability of the impugned legal norm, excessive formalism and the unequal treatment of enforcement creditors.

II. The Constitutional Court established as relevant to the matter the following Articles of the Constitution: Article 3 (equality and rule of law), Article 14 (prohibition of discrimination and equality of all before the law) and Article 29.1 (right to a fair trial).

The Court noted that Article 39.3 EA indirectly precludes the application of Article 109 of the Civil Procedure Act (hereinafter, “CPA”) in enforcement proceedings. Namely, the provisions of the CPA are appropriately applied in enforcement proceedings, unless otherwise prescribed by the EA or another act. Under Article 109 CPA, the Court must order a proponent to correct or supplement within eight days a submission that is incomprehensible or which does not contain all it needs to contain (paragraphs 1 and 2), and a submission corrected or supplemented within this time period would be deemed to have been filed with the court on the date when it was filed for the first time (paragraph 3). If a submission is not returned to the court within a fixed time limit, it shall

be deemed to have been withdrawn. If it is returned without having been amended or supplemented, it shall be dismissed (paragraph 4).

In terms of compliance with the requirements of predictability, precision and clarity, the Court found that the impugned Article 39.3 EA prescribes a ban on the mechanism of correcting a motion for enforcement in a situation when the required data is not listed in the impugned norm itself (paragraph 3 in conjunction with paragraph 1), but the legislator mentions “other prescribed data required to execute enforcement”, and those that may be delivered only “if necessary”.

In this case, the requirement for clarity and precision of the legal norm has not been met. The formulation of Article 39.3 EA (in conjunction with other provisions of the EA regulating the motion for enforcement) does not allow citizens to know their realistic and specific obligations when filing a motion for enforcement.

Specifically, Article 39.1 EA prescribes that a motion for enforcement must also state “if necessary, the object with respect to which it is to be executed”. Such necessity is assessed by a competent body (authorised to dismiss the motion). Furthermore, it prescribes that in the motion for enforcement the enforcement creditor must also state “other prescribed data required to execute enforcement”, opening up an additional possibility for arbitrariness by the body conducting the enforcement procedure. The formulation “other prescribed data” is unclear. It is also difficult for the enforcement creditor to discern with certainty which provisions of the EA (or another act) prescribe such data.

The powers of the body conducting the procedure to decide whether such “other prescribed data required to execute enforcement” are provided in the motion for enforcement implies a certain discretion on the part of such a body in assessing the completeness of the motion for enforcement in each case.

The requirement of legal certainty does not preclude those making the decisions from being granted discretionary powers or a degree of freedom to proceed, provided that there are legal remedies and legal procedures in place to prevent their abuse. Laws must always set boundaries for discretionary powers and regulate the manner of exercising these powers with sufficient clarity to ensure that individuals have adequate protection against arbitrariness. The arbitrary implementation of powers, in a substantive sense, may lead to unfair, unjustified or unreasonable decisions running counter to the principle of the rule of law.

Therefore, the Constitutional Court found that Article 39.3 EA does not meet the requirements of legal certainty of the objective legal order and it is contrary to the requirements arising from the rule of law (Article 3 of the Constitution).

The proponent of the EA stated as a legitimate goal of the impugned legal measure “the strengthening of the parties’ procedural discipline”, along with the “economy, acceleration and effectiveness of the enforcement procedure”. However, focusing on the principles of economy and procedural discipline at the very beginning of the enforcement procedure can have serious and grave consequences for enforcement creditors, making it impossible for creditors to collect the claims awarded to them by final court judgments.

Therefore, although economy in itself may be a legitimate goal for a legislative measure, it must not be set so exclusively that it makes it impossible for citizens to exercise their recognised subjective rights.

The Constitutional Court accordingly found that the legal measure according to which in enforcement proceedings (especially for enforcement based on an authentic document) the mechanism of requesting a correction referred to in Article 109 CPA is not applied is not in conformity with the requirement of the rule of law referred to in Article 3 of the Constitution in the part regulating access to justice.

Namely, if an incomplete motion for enforcement is filed and it is dismissed, the collection of the claim related to which the previous civil court proceedings were conducted (sometimes even lasting some ten years) may be caught by the statute of limitations. Such a consequence (which arises from the application of Article 39.3 EA) would, in this context, be clearly unreasonable and excessively formalistic.

Article 20.1 of the Act on Amendments to the EA of 2014 excluded from the general regime prescribed by Article 39.3 EA, according to which the enforcement creditor is not asked to correct the filed motion for enforcement, employees in enforcement proceedings for readmitting employees to their jobs or duties. Article 109 CPA applies to such motions, and the proponents will be asked to correct the filed motions for enforcement.

The Constitutional Court established that the reasons the Government stated when amending the legal regime in Article 39.3 EA may not be assessed as legitimate. They introduce a clear inequality between particular enforcement creditors, as initiators of enforcement proceedings. This led to an impermissible favouring of one group of

enforcement creditors over all others, which violates the principle of equality of treatment of comparable groups of enforcement creditors referred to in Article 14.2 in conjunction with Article 3 of the Constitution.

The Constitutional Court stated that after the repeal of Article 39.3, Article 109 CPA will apply to all motions for enforcement, unless and until the legislator regulates the conditions for filing motions for enforcement differently and in a constitutionally compliant fashion.

Languages:

Croatian, English.



Identification: CRO-2016-2-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 06.06.2016 / **e)** U-III-3360/2014 / **f)** / **g)** *Narodne novine* (Official Gazette), 64/16 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.
 5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms**.
 5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle**.

Keywords of the alphabetical index:

Complaint, constitutional, admissibility / Complaint, constitutional, review, limits / Proceedings, criminal, remedy, extraordinary.

Headnotes:

A constitutional complaint is admissible if filed within 30 days from the day of the receipt of a final criminal judgment or decision from the Supreme Court, by which it was decided on the merits upon a request for extraordinary review of a final judgment (hereinafter, "RERFJ").

If the constitutional complaint has been filed after receiving the Supreme Court decision on the merits regarding a RERFJ, the Constitutional Court, in proceedings initiated by such a constitutional complaint, must also respond to the applicant's objections relating to the first and second instance criminal proceedings. In cases concerning the protection of constitutional rights, court proceedings are viewed as an integral whole. By contrast to the Supreme Court, the Constitutional Court, in cases regarding the protection of human rights and fundamental freedoms initiated by constitutional complaint, is not limited to legal reasons for declaring the filing of a RERFJ admissible.

Summary:

I. The applicant filed a constitutional complaint against a Supreme Court judgment rejecting his request for extraordinary review of a final judgment by which he had been found guilty of committing three criminal offences against the security of payment transactions and business operations by abuse of official authority in economic operations.

The applicant was sentenced to a single prison sentence for the duration of one year and six months and was ordered by the court to pay the injured person, Croatia Banka d.d., in accordance with a claim for indemnification, the amount of HRK 2,933,496.70 with due default interest specified in the operative part of the second-instance judgment.

The applicant filed a RERFJ claiming that one of the offences of which he had been found guilty was no longer a criminal offence, in breach of a provision of the Criminal Procedure Act (hereinafter, "CrPA"), which prescribed the obligation of the court to review all allegations stated in the appeal.

The State Attorney's Office of the Republic of Croatia (hereinafter, "SAORC") delivered an opinion on the applicant's RERFJ.

The Supreme Court rejected the applicant's RERFJ, finding that the offence referred to in the first-instance judgment was indeed a criminal offence, that the

reasons given in the statement of reasons of the judgment were not omitted to an extent that would preclude a review of the judgment, and that the contestation of the facts established in the final judgment was not one of the reasons listed in the CrPA on which grounds a RERFJ may be filed.

In his constitutional complaint, the applicant entered an objection concerning a violation of the right to equality of arms caused by the failure of the court to forward to him the opinion of the competent state attorney concerning his RERFJ. He also entered a number of objections regarding the first and second instance criminal proceedings, and to the final court judgment. These focused primarily on the violation of the right to a fair trial guaranteed by Article 29 of the Constitution.

II. Noting the case-law of the European Court of Human Rights, the Constitutional Court has changed its jurisprudence concerning RERFJ, an extraordinary remedy to which a person has recourse if they have been convicted by a final judgment to a prison sentence for infringing the law, in cases provided for in the CrPA, or if they have been convicted by a final judgment in a manner that represents a violation of fundamental human rights and freedoms guaranteed by the Constitution, international law or a law. A RERFJ may not be filed against a judgment of the Supreme Court. A RERFJ must be filed within a period of one month from the receipt of the final judgment. The Supreme Court decides on such requests.

Acknowledging the positions of the European Court of Human Rights expressed in the judgments *Maresti v. Croatia* (paragraphs 26-29), *Dolenec v. Croatia* (§§199-201) and *Šebalj v. Croatia* (paragraph 242), according to which a RERFJ is considered a domestic remedy which must be exhausted if the applicant's objections concern violations on which this remedy may have an effect, including violations of the right to a fair trial, the Constitutional Court held that a constitutional complaint is admissible provided that it is filed within 30 days of the date of receipt of the final criminal judgment or Supreme Court decision by which it was decided on the merits regarding a RERFJ.

It was clear from the case file of the Supreme Court that the State Attorney's submission had not been forwarded to the applicant and that he was not afforded the opportunity to acquaint himself with the content of the opinion on his RERFJ, and to respond to it.

The State Attorney's Office stated in its opinion that the applicant's allegations were ill-founded and explained to the Supreme Court why it considered that, in the applicant's case, no breach had occurred of criminal law or of the provisions of criminal procedure either at first or second instance.

The Constitutional Court recalled that the European Court of Human Rights, in the judgment of *Zahirović v. Croatia* (paragraphs 42-43 and 46-50), had established a breach of the principle of equality of arms and of the right to an adversarial procedure because the Supreme Court had not forwarded to the convicted person the opinion of the State Attorney's Office for analysis and comment. The European Court of Human Rights reiterated the same position in the judgment of *Lonić v. Croatia* (paragraph 83).

Guided by the legal standards established by European Court of Human Rights' case-law, the Constitutional Court concluded that failure to forward to the applicant the SAORC opinion, which was taken into account when deliberating on the applicant's request, had resulted in a breach of the principle of equality of arms in criminal proceedings and the applicant's right to an adversarial trial (Article 29.1 of the Constitution and Article 6.1 ECHR).

As the judgment the Supreme Court handed down on the applicant's RERFJ was overturned by the Constitutional Court in its entirety, the Constitutional Court, in the continuation of these Constitutional Court proceedings, investigated in full the applicant's objections as to the violation of his constitutional rights by the final judgment rendered in proceedings before the first and second instance court.

The Court recalled that the right to a fair trial guaranteed by the Constitution and by the European Convention on Human Rights primarily guarantees protection from the arbitrariness of decisions by courts and other state authorities. Article 29.1 of the Constitution and Article 6.1 ECHR oblige courts to state the reasons for their decisions.

Since no relevant reasons for relating each of the three offences to the relevant article of the Criminal Code (which presumes a proven direct intention by the perpetrator to acquire illicit pecuniary gain for himself or for another's legal entity), the Constitutional Court found a violation had occurred of the applicant's constitutional right to a reasoned decision guaranteed by Article 29.1 of the Constitution, with further consequences related to this omission.

To remove doubt over any arbitrary procedure or decision in this case, the Constitutional Court upheld the constitutional complaint, quashed the first-instance judgment in the impugned part, along with the second-instance judgment, and remanded the case to the first-instance court in the part where the applicant had been found guilty of the criminal offences with which he had been charged, including the decision on the claim for indemnification as it had been amended in the operative part of the second-instance judgment.

Cross-references:

European Court of Human Rights:

- *Maresti v. Croatia*, no. 55759/07, 25.06.2009;
- *Dolenec v. Croatia*, no. 25282/06, 26.11.2009;
- *Šebalj v. Croatia*, no. 4429/09, 28.06.2011;
- *Zahirović v. Croatia*, no. 58590/11, 25.04.2013;
- *Lonić v. Croatia*, no. 8067/12, 04.12.2014.

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Statistical data

1 May 2016 – 31 August 2016

- Judgments of the Plenary Court: 9
- Judgments of panels: 64
- Other decisions of the Plenary Court: 3
- Other decisions of panels: 1 266
- Other procedural decisions: 50
- Total: 1 392

Important decisions

Identification: CZE-2016-2-004

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 24.05.2016 / **e)** II. ÚS 1042/15 / **f)** On the right to effective investigation under Article 3 ECHR / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

5.3.13.14 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:

Procedure, criminal, file, access / Expert, member of police force, independence / Investigation, effective / Police, report, suppression / Recording, audio, video / Witness, ill-treatment.

Headnotes:

Every force, or coercible means, can be used by the police only to the extent necessary to achieve the legitimate aim pursued by police intervention. In a situation where a person does not act at all aggressively, and is not suspected of committing a crime, the use of coercive means cannot be considered appropriate. Coercive means may not, under any circumstances, serve as revenge or punishment for failure to follow a police officer's instructions. In the case of a non-violent blockade, only a police intervention that moved the blocking person physically, without force, outside the blocked area, can be considered appropriate and commensurate.

Summary:

I. During a protest against the felling of trees in the Šumava National Park in August 2011, the applicant chained himself to a tree designated to be cut down. He was subsequently removed from the site by the police and taken to a police station. At the station the applicant announced that he had been injured and asked to be examined by a doctor. An official protocol of explanation was recorded with him, in which he stated, among other things, that he had been choked by police officers. He subsequently filed an extensive crime report against the police officers involved with the then-existing Inspectorate of the Police of the Czech Republic (transformed as of 1 January 2012 into the General Inspectorate of Security Forces, the “*Inspectorate*” (hereinafter, the “GISF”). Investigation of the applicant's case was part of a more extensive review of police procedures during actions taken against persons protesting against mining in the Šumava National Park in July and August 2011. The Inspectorate concluded that the police actions were proportional and suspended the matter in December 2011.

In September 2014, the applicant filed a new crime report concerning the same police intervention against him as well as against other persons. He sent the crime report to the Supreme State Prosecutor's Office in Prague (hereinafter, the “SSPO”) and requested that the matter be assigned to a body other than the GISF, as that body had already handled the matter ineffectively, and was not independent and

impartial. However, the matter was again assigned to the GISF, which concluded that the applicant did not present any new facts that could change the original conclusions, and suspended the matter again. In response to the applicant's subsequent request to view the file, he was informed that the matter was not a preparatory proceeding under the Criminal Procedure Code, and therefore he was not entitled to view the file. The applicant reacted against this notification by filing a request for review with the SSPO.

II. The Constitutional Court, in accordance with its own methodology and that of the European Court of Human Rights, first considered the existence of a defensible claim that would establish the applicant's right to have an effective investigation duly conducted by law enforcement bodies. It concluded that if the greater part of the applicant's claims was supported to a certain degree (the applicant's version matched the police record concerning compression of pressure points in the neck region; the testimony of two witnesses concerning the applicant's skin being reddened immediately after the police intervention), then it is necessary to view the applicant's entire claim as defensible. If part of the claim is not completely untrustworthy, that also increases the trustworthiness of the other parts of the applicant's claim, which are not as yet supported by any evidence (having ants poured under his clothing at the neck, and being threatened with a chainsaw). If that part of the claim too, as in this case, is possible chronologically, is sufficiently specific, and does not change over time, it is the duty of law enforcement bodies to investigate and confirm these circumstances as well.

In connection with the case presented, the Constitutional Court recapitulated the requirements of a minimum standard applied to investigations by law enforcement bodies, in order for such investigation to be considered effective. They include the thoroughness, sufficiency and speed of the investigation, independence and impartiality, and, last but not least, also giving the injured party access to the file. In the Constitutional Court's view, the law enforcement bodies did not adequately meet even one of these requirements.

The requirement of thoroughness and sufficiency was not fulfilled even at first sight, as the Inspectorate did not question any witnesses in the matter, even though according to the applicant's description several police officers, Šumava National Park employees, and partly one forestry worker were present during the treatment of him. Moreover, it was not assessed at all whether it is correct and in accordance with regulations that the video recording

being made by the police officers was interrupted precisely at the moment when coercive means began to be used against the applicant. The manner in which the Inspectorate suspended the matter, not having in any way evaluated the gathered evidence, not having in any way dealt with the applicant's claims or refuted them in any manner, testify to the overall laxness and trivialising approach to the applicant's crime report. In this regard, the GISF did not subsequently correct the matter either. From the Constitutional Court's point of view, such termination of the investigation of the applicant's defensible claim does not at all meet the requirement that the conclusions of an investigation be based on a thorough, objective, and impartial analysis of all relevant facts.

The European Court of Human Rights has, in the past, expressed criticism of the Inspectorate's position in the question of independence and impartiality. In this regard the GISF is in a formally more appropriate position, but the composition of its personnel has remained virtually unchanged. If the GISF is predominantly composed of former officers of the forces that it is supposed to investigate, its independence may be purely illusory. In the Constitutional Court's opinion, the practical independence of the GISF would certainly be supported by a more significant inclusion of persons who have not previously been members of the bodies that the GISF investigates.

The applicant's right to access the file arises directly from his constitutional right to effective investigation. Therefore, in the Constitutional Court's view, the GISF's argument based on Section 158.1 of the Criminal Procedure Code is completely unfounded and there is no point in debating it. The applicant in this case had the right to effective investigation as he raised a defensible claim of ill-treatment. He can be denied access to the file only in exceptional situations, in particular in the early phases of investigation, when the purpose of the investigation could be threatened. However, the law enforcement bodies did not cite such circumstances.

Cross-references:

European Court of Human Rights:

- *Abuyeva and Others v. Russia*, no. 27065/05, 02.12.2010;
- *Cestaro v. Italy*, no. 6884/11, 07.04.2015;
- *Altay v. Turkey*, no. 22279/93, 22.05.2001;
- *Boris Kostadinov v. Bulgaria*, no. 61701/11, 21.01.2016;

- *Dedovskiy and Others v. Russia*, no. 7178/03, 15.05.2008, *Reports of Judgments and Decisions* 2008 (extracts);
- *Romanov v. Russia*, no. 41461/02, 24.07.2008;
- *Gäfgen v. Germany*, no. 22978/05, 01.06.2010, *Reports of Judgments and Decisions* 2010;
- *Boacă and Others v. Romania*, no. 40355/11, 12.01.2016;
- *Rehbock v. Slovenia*, no. 29462/95, 28.11.2000, *Reports of Judgments and Decisions* 2000-XII;
- *Serikov v. Ukraine*, no. 42164/09, 23.07.2015;
- *A. and Others v. United Kingdom*, no. 3455/05, 19.02.2009, *Reports of Judgments and Decisions* 2009;
- *Bureš v. Czech Republic*, no. 37679/08, 18.10.2012;
- *Archip v. Romania*, no. 49608/08, 27.09.2011;
- *Myummyun v. Bulgaria*, no. 67258/13, 03.11.2015.

Languages:

Czech.



Identification: CZE-2016-2-005

a) Czech Republic / b) Constitutional Court / c) Plenum / d) 14.06.2016 / e) I. ÚS 7/15 / f) Civil Partnership as Preclusion to Individual Adoption of a Child / g) <http://nalus.usoud.cz> / h) CODICES (Czech).

Keywords of the systematic thesaurus:

- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
- 5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Adoption, right, discrimination / Child, best interests / Homosexuality, couple / Homosexual, orientation / Homosexuality, family life / Homosexual, partnership / Parental rights, unequal treatment / Status, legal, inequality / Equality, anti-discrimination law, lack / Human dignity, violation / Personal, privacy, right.

Headnotes:

The simple fact that a person lives in a civil partnership should not be an obstacle to the adoption of a child.

Summary:

I. The plenum of the Constitutional Court has granted the motion of the Municipal Court of Prague for the annulment of Section 13.2 of the Act on Civil Partnership, which precluded the adoption of a child to persons living in a civil partnership.

The Constitutional Court emphasised the fact that there exists no fundamental right to adopt a child – neither on a constitutional basis nor on the basis of international obligations of the Czech Republic. At the same time, the Court recalled that there is not even a fundamental right to marry/to enter into civil partnership with respect to persons of the same sex. Therefore, the Court accepted that it is mainly for the lawmaker to decide whether or how to regulate the relations among same-sex partners.

According to Section 800.1 of the Civil Code, both or one of the spouses in a heterogenic relationship may become adoptive parents and in exceptional cases, a single person may become an adoptive parent. In this context, the Court finds the legal preference of marriage in accord with the Constitution, as it corresponds to the institution of marriage as the closest mode of cohabitation among persons of different sex involving not only a number of rights, but also many obligations. This fact clearly distinguishes marriage from other types of cohabitation and gives *a priori* a greater chance of fulfilling the chief purpose of adoption which is, and must be, primarily the best interest of the child.

II. However, in the present case, the heart of the problem lies in the fact that on the one hand, the Civil Code in exceptional circumstances allows adoption by a single person. On the other hand, the Act on Civil Partnership explicitly precludes that such a person lives in a civil partnership. As a consequence, a person in fact living with a same-sex partner may apply to become a suitable adoptive parent, but a

person living in a civil partnership may not. Neither the legal acts themselves nor their explanatory reports provide any reasonable explanation that may have led the lawmaker to the adoption of such a legal regulation, which the Court finds illogical, irrational and in its effect discriminatory.

In this light, the Constitutional Court has come to the conclusion that the contested legal provision breaches the right to human dignity. Provided that the provision excludes from the enjoyment of the right a specific group only based on the fact that the relevant persons decided to enter into a civil partnership, renders them *de facto* "second class citizens", stigmatises them and evokes an impression of their inferiority, essential otherness and apparently also even the inability to take care of children properly – unlike other persons.

The Court therefore concluded that the contested legal provision, which for absolutely no reason excludes one group of people (civil partners) from the opportunity of child adoption, in its effect interferes with their human dignity and breaches their right to private life.

However, the Court did not find a breach of the right to family life. The Court stated that as there is no fundamental right to adopt a child, a negative decision in the case of an application to adoption cannot breach the right to family life.

Cross-references:

European Court of Human Rights:

- *Fretté v. France*, no. 36515/97, 26.02.2002, *Reports of Judgments and Decisions 2002-I*;
- *E.B. v. France*, no. 43546/02, 22.01.2008;
- *X. and Others v. Austria*, 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*.

Languages:

Czech.



Identification: CZE-2016-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 23.08.2016 / **e)** I. ÚS 1015/14 / **f)** Legal Basis for Extradition to Russian Federation / **g)** *Sbírka nálezů a usnesení* (Court's Collection); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Extradition, proceedings / Extradition, evidence by receiving state / Offence, criminal, element, essential / Procedure, criminal, extradition / Extradition, possibility / Extradition, assurance by receiving state.

Headnotes:

In extradition proceedings, it is unacceptable to proceed when the description of the extradition offence is vague, rendering it difficult to clarify the elements of a crime under the national law with sufficient certainty. The extradition request must show that the criminal proceedings are based on a certain body of evidence which reasonably justifies the suspicion of a commission of a crime. If the ordinary court overlooks flagrant shortcomings in the actions based on which the criminal proceeding is being conducted in the requesting state, rights under Article 6 ECHR of the suspect are violated.

Summary:

I. The High Court ruled that it was permissible to extradite the applicant to Russia for criminal prosecution regarding his alleged fraud. The applicant contested this decision in a constitutional application in which he claimed that he would not receive a fair trial in Russia (or specifically, in Dagestan). He cited reports from non-governmental organisations and other materials documenting the bad conditions in Russian jails and individual cases of torture and inhuman treatment of persons serving sentences or being held in detention. The applicant objected that the High Court did not appropriately assess these materials and, on the contrary, demonstrated blind faith in the guarantees of the General Prosecutor's Office.

II. The Constitutional Court already granted the applicant's constitutional complaint against the extradition proceedings in 2013. The Court held that the extradition request did not contain sufficiently concrete description of the offence. It lacked the reasoning justifying the suspicion and evidence linking the offence with the applicant. On the basis of the supplementary documents provided by the Russian Federation, the High Court granted the extradition with the same diplomatic assurances.

As to the submission that the extradition to Russia *per se* appears unacceptable, the Constitutional Court reiterated that it does not share the applicant's blanket condemnations regarding the guarantees of a fair trial and corresponding treatment of imprisoned persons in Russia. It emphasised that Russia is a member state of the UN and the Council of Europe, and a signatory to conventions concerning the protection of human rights. Therefore, one can expect a certain standard of these rights, and Russia is subject to the proceedings and control mechanisms that international treaties provide, including proceedings before the European Court of Human Rights. For that reason, among others, the applicant's request, flatly rejecting extradition for criminal proceedings to Russia *per se* appears unacceptable.

The Constitutional Court held that, when examining the extradition requests, the ordinary courts do not decide whether the requested person committed the offence or not. At the same time, the extradition file must show that the criminal proceedings are based on a certain body of evidence which reasonably justifies the suspicion of a commission of a crime. The documents supplemented by the Russian Federation after the first Constitutional Court's decision removed formal shortcomings that would prevent the actual evaluation of the permissibility of the extradition. Under the Code of Criminal Procedure, the extradition is excluded in case of reasonable doubt that the criminal proceedings in the requesting state would not conform to the requirements of Articles 3 and 6 ECHR or the punishment would violate Article 3 ECHR.

The High Court evaluated the general conditions in Russia and Dagestan; however, it did not translate these findings into an individual assessment of the applicant's situation. The probability that justice will be denied in the Republic of Dagestan is so high that the ordinary courts should be diligent in every case to consider the reasonable basis of the criminal proceedings. The Constitutional Court concluded that the criminal prosecution is in fact based only on the testimony of a single injured company and indirectly on the testimony of the agent of one "shell company" which differs with the former testimony in part. Any

further data linking the applicant's business activities with the offences he is suspected of is missing. The extradition request is not expected to dispel every single doubt; however, it should provide sufficient information that would in a necessary manner remove concerns that the general risks related to the criminal prosecution may affect the applicant. Insofar as the High Court accepted the extradition request it did not guarantee applicant's fair trial under Article 36 of the Czech Charter of Fundamental Rights and Freedoms and Article 6 ECHR.

Cross-references:

Constitutional Court:

- no. III. US 1354/2013, 11.09.2013, *Bulletin* 2013/3 [CZE-2013-3-008].

European Court of Human Rights:

- *Soering v. United Kingdom*, no. 14038/88, 07.07.1989, Series A, no. 161;
- *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, 17.01.2012, *Reports of Judgments and Decisions* 2012;
- *Salah Sheekh v. Netherlands*, no. 1948/04, 11.01.2007;
- *Gasayev v. Spain*, no. 48514/06, 17.02.2009;
- *Myumyun v. Bulgaria*, no. 67258/13, 03.11.2015.

Languages:

Czech.



France

Constitutional Council

Important decisions

Identification: FRA-2016-2-004

a) France / **b)** Constitutional Council / **c)** / **d)** 24.05.2016 / **e)** 2016-543 QPC / **f)** French section of the International Prison Observatory [Visit permits and permission to make telephone calls during pre-trial detention] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.05.2016, text no. 42 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Pre-trial detention, visit permit / Pre-trial detention, telephone.

Headnotes:

Provisions which do not allow for any form of appeal against a decision to deny a permit to visit a person held in pre-trial detention where the request has been made by a person who is not a family member infringe the right to an effective legal remedy.

The same applies where a visit permit has been requested where no investigation has been initiated or after the investigation has ended. These provisions also do not allow for any remedies against decisions to deny access to a telephone to a person held in pre-trial detention.

Summary:

I. On 24 February 2016, the Constitutional Council was asked by the *Conseil d'État* to give a priority preliminary ruling on constitutionality regarding compliance with the rights and freedoms guaranteed by the Constitution of Sections 35 and 39 of the Prison Law of 24 November 2009 and Articles 145-4 and 715 of the Code of Criminal Procedure.

The disputed provisions do not allow for any form of appeal against a decision to deny a permit to visit a person held in pre-trial detention where the request has been made by a person who is not a family member. The same applies where the visit permit has been requested where no investigation has been initiated or after the investigation has ended. These provisions also do not allow for any remedies against decisions to deny access to a telephone to a person held in pre-trial detention.

II. The Constitutional Council held that the impossibility of challenging these refusal decisions was contrary to the right to an effective legal remedy.

The Constitutional Council further held that this same right was also breached where no specified deadline was stipulated for the investigating judge to rule on a request for a visit permit made by a family member of the person held in pre-trial detention.

The Constitutional Council therefore declared that the words "and, in relation to remand prisoners, in respect of the requirements of the investigation" in the second paragraph of Section 39 of the Law of 24 November 2009 and the third and fourth paragraphs of Article 145-4 of the Code of Criminal Procedure were contrary to the Constitution.

This declaration of unconstitutionality shall not apply until new legislative provisions enter into force or, at the latest, 31 December 2016.

Languages:

French.



Identification: FRA-2016-2-005

a) France / **b)** Constitutional Council / **c)** / **d)** 24.06.2016 / **e)** 2016-545 QPC and 2016-546 QPC / **f)** Mr Alec W. and other v. Mr Jérôme C. [Fiscal penalties for under-declaration and criminal penalties for tax evasion] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 30.06.2016, text no. 110 and text no. 111 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Tax evasion, seriousness / Penalty, need, principle / Tax, increase / Tax evasion, criminal penalties / Increase, penalties, combined application.

Headnotes:

In accordance with the principle of the need for penalties, a criminal penalty for tax evasion cannot be imposed on a taxpayer who, for a substantive reason, has been found in a final decision not liable to pay tax.

Tax collection and the objective of tackling tax evasion justify the initiation of additional proceedings in the most serious cases of fraud.

The principle of the need for defined offences and penalties requires that criminal penalties shall apply only to the most serious cases of fraudulent concealment of amounts which are liable to be taxed.

Summary:

I. On 30 March 2016, the Constitutional Council was asked by the Court of Cassation to give two priority preliminary rulings on constitutionality concerning the compliance of Articles 1729 and 1741 of the General Taxation Code with the rights and freedoms guaranteed by the Constitution.

The two cases, on which the Council gave a ruling in two decisions, raised identical questions. The only difference was the applicable version of the provisions of Article 1741 of the General Taxation Code.

The claimants disputed the combined application of the tax increases provided for by Article 1729 together with the criminal penalties laid down by Article 1741.

II. The Constitutional Council firstly held that the disputed provisions of each of these Articles, taken in isolation, complied with the Constitution. The penalties provided for therein were appropriate to the offences that they penalised. They were proportionate.

In relation to this point, however, the Constitutional Council expressed an interpretative reservation. In accordance with the principle of the need for penalties, it ruled that a criminal penalty for tax evasion cannot be imposed on a taxpayer who, for a substantive reason, has been found in a final decision not liable to pay tax.

The Constitutional Council then ruled on the combined application of the disputed provisions.

The Constitutional Council declared the combined application of the disputed provisions of Articles 1729 and 1741 to be in accordance with the Constitution, but expressed two interpretative reservations.

After reiterating the objective of the two Articles the provisions of which had been disputed, the Constitutional Council held that they made it possible to protect the state's financial interests and guarantee equality of taxation by pursuing common purposes which were both dissuasive and punitive. Tax collection and the objective of tackling tax evasion justified the initiation of additional proceedings in the most serious cases of evasion.

However, the Council expressed a reservation on this point by ruling that the principle of the need for defined offences and penalties required that criminal penalties must apply only to the most serious cases of fraudulent concealment of amounts which were liable to be taxed. It held that this seriousness could result from the amount of tax evaded, the nature of the person's misconduct or the circumstances in which such misconduct occurred.

The Constitutional Council consequently ruled that the combined application of the disputed provisions could not be regarded as leading to the initiation of different proceedings and so was not contrary to the principle of the need for penalties.

Finally, in line with well-established case law, the Constitutional Council expressed a final interpretative reservation guaranteeing respect for the principle of the proportionality of penalties through the combined application of the disputed provisions: in all cases, the

total amount of any penalties imposed could not exceed the highest of any one of the penalties incurred.

Subject to these reservations, the Constitutional Council declared that Article 1729 of the General Taxation Code and the words "or has intentionally concealed part of the amounts liable to be taxed" in the first sentence of the first paragraph of Article 1741 of the same Code were in accordance with the Constitution.

Languages:

French.



Identification: FRA-2016-2-006

a) France / **b)** Constitutional Council / **c)** / **d)** 04.08.2016 / **e)** 2016-737 DC / **f)** Law for the restoration of biodiversity, nature and landscapes / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.08.2016, text no. 5 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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:

Biodiversity / Environment, protection, constant improvement, principle / Marine deposit, extraction, licence fee / Pharmaceutical products, prohibition / Public property, plant species, transfer.

Headnotes:

The following are in accordance with the Constitution: the principle of "non-regression", which has legislative force and which requires constant improvement of environmental protection in the light of current scientific knowledge; the introduction of a licence fee on the extraction of marine deposits located on the continental shelf or in the exclusive economic zone; the prohibition of phyto-pharmaceutical products

containing active substances in the neonicotinoid family due to the risks that they may pose to the environment and public health; exemption from certain rules for free-of-charge transfers of plant species in the public domain to users who do not intend to exploit them commercially.

Summary:

In its Decision no. 2016-737 DC, the Constitutional Council ruled on the Law on the restoration of biodiversity, nature and landscapes, which comprised 174 Sections.

As to the merits, the Constitutional Council ruled only on the four Sections that had been referred to it by the claimant senators and members of the National Assembly. It ruled that these 4 Sections were essentially in accordance with the Constitution, while also pronouncing a partial censure.

The Constitutional Council held that the provisions of the last paragraph of Section 2, which set out a principle of constant improvement of environmental performance in the light of current scientific knowledge, were in accordance with the Constitution. This principle of "non-regression" has legislative force and applied to the regulatory authority pursuant to the legislative provisions concerning each subject. It was not contrary to any constitutional requirements.

The Constitutional Council also ruled that the provisions of paragraph II of Section 95, which introduced a licence fee on the extraction of marine deposits located on the continental shelf or in the exclusive economic zone, were in accordance with the Constitution.

Finally, it ruled that the provisions of paragraph I of Section 125, which prohibited the use of phyto-pharmaceutical products containing active substances in the neonicotinoid family on account of the risks they could pose to the environment and public health, were in accordance with the Constitution.

With regard to paragraph 1 of Section 11, which concerned transfers and exchanges of seeds and plant reproductive materials, the Constitutional Council declared that the provisions which provided exemption from certain rules for free-of-charge transfers of plant species in the public domain to users who did not intend to exploit them commercially were in accordance with the Constitution. However, it held that the provisions establishing the same exception for paid-for transfers carried out solely by associations governed by the Law of 1 July 1901 were contrary to the principle of equality. Without in any way questioning the legislature's desire to

promote exchanges in order to preserve biodiversity, the Constitutional Council held that the distinction based on the legal form of legal entities which entered into exchanges for a fee had no connection to the purpose of the law.

The Constitutional Council also examined of its own motion several provisions included in the law by means of a procedure contrary to the Constitution (articles unconnected with the initial text and amendments to articles already approved), which it censured in this regard.

The following were censured:

- Section 24, which made provision for the attachment to the French Agency for Biodiversity of the State Public Institution for the Management of the Water and Biodiversity of the Marais Poitevin;
- Paragraph II of Section 29 concerning the submission of a government report to Parliament with regard to the expediency of supplementing water agency licence fees;
- Sections 76 to 79, which amended the rules governing the protection of rural paths;
- Section 138, which altered the incompatibility between the duties of a private guard and those of a member of the board of directors of the association that appointed him.

The Constitutional Council did not express an opinion as to whether the other provisions of the law which were not referred to it were in accordance with the Constitution. Priority preliminary rulings on constitutionality could be requested if necessary.

In addition, in Decision no. 2016-735 DC, the Constitutional Council held that the institutional act on appointments to the chairmanship of the executive board of the French Agency for Biodiversity was in conformity with the Constitution. Given its importance for the economic and social life of the nation, this function fell under the scope of the fifth paragraph of Article 13 of the Constitution.

Languages:

French.



Georgia Constitutional Court

Important decisions

Identification: GEO-2016-2-005

a) Georgia / **b)** Constitutional Court / **c)** Second Board / **d)** 27.02.2014 / **e)** 2/2/558 / **f)** Georgia Iliia Chanturaia v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.

3.18 General Principles – **General interest**.

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

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

5.3.13.7 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:

Expulsion, courtroom / Imposition, penalty, fine / Deprivation, individual, oral hearing / Appeal, right / Fair, reasonable, judgment.

Headnotes:

The right to an oral hearing includes interrelated procedural guarantees. The disputed provision, however, precluded every component of procedural guarantees enshrined under the right to an oral hearing, including the right to orally present opinions on a person's punishment. Considering the circumstances that the case involves investigation of fact and imposing punishment after making a legal assessment, an individual should be equipped with at least a right to present his or her opinions.

Summary:

I. The applicant disputed that Article 212.9 of the Civil Procedure Code complies with Article 42.1 of the Constitution (right to a fair trial). The disputed provision provides that an order imposing a penalty and/or expulsion from a courtroom could be issued without an oral hearing and could not be appealed. Article 212 of the Civil Procedure Code defines the penalties for breaching courtroom order during civil proceedings. Where there is disorder at the hearing, disobedience to the presiding judge's order or contempt of court, the presiding judge may, following deliberation in the courtroom, issue an order to penalise a participant of the trial and/or a person attending the hearing and/or expel him or her from the courtroom. The disputed provision sets forth the adoption of the order without an oral hearing, and it could not be appealed.

II. The Constitutional Court considered whether the disputed regulation interferes with the fundamental right to a fair trial and if so, whether it was compatible with the requirements of the Constitution. The disputed regulation refers to different measures of compulsion (imposition of fine, expulsion from court hearing) and to different individuals (participants and attendants presented at the court hearing). Therefore, while deciding on the constitutionality of the disputed provision, the Constitutional Court took into account the character of the mentioned measure, different legal status and interests of the individuals.

The Court indicated that setting a fine by a lawmaker for improper conduct at the court hearing inflicts certain property (monetary) loss upon an individual, which is deemed to be a sufficient and adequate response to an offence committed. The purpose of a fine is instant elimination of the offense, preventing and punishing an individual for his or her action. Alternatively, the process of expulsion from the hearing supports protection of rights of the participants and proper proceeding of a hearing. Predominantly, it is a preventive measure, but it also has a punitive nature since it deprives an individual opportunity to be present at the court hearing.

In the given case, the Court noted that the right to a fair trial may be restricted to achieve important legitimate aims, such as unhindered administration of justice, protection of order, dignity of participants of the proceedings and established etiquette during court hearing. The oral hearing, on the one hand, enables the parties to substantiate their legal demands, while, on the other hand, allows the judge to deliver objective, fair and reasoned judgment as a result of a thorough investigation of a case. Imposition of a fine and expulsion from a hearing significantly influence the legal condition of

participants in a hearing. Adoption of a ruling without an oral hearing and without the possibility to appeal negatively affects the participants' right to attend the main hearing and defend their interests. At the same time, the participants of the court hearing might refrain from expressing an opinion in order to avoid possible penalties. Therefore, the disputed provision to some extent was found to hinder the parties' opinions, amounting to high intensity of the restriction at hand.

The Court further emphasised that the standard of protection of the right to an oral hearing sufficiently depends on the content of the proceedings. Where the proceedings related to the establishment of formal-legal issues, the legal interest in oral hearing is lower. In such cases, the principle *jura novit curia* is applicable and reference to legal circumstances by the parties only has auxiliary functions. In contrast, a different approach is exercised when the court has to decide not only formal-legal issues, but also needs to assess factual circumstances as well. Holding an oral hearing and listening to opinions of the parties have special importance in cases involving a need to investigate factual circumstances as well. The disputed provision restricted oral hearing in cases when sanction was imposed for contempt of court, which according to the Constitutional Court, is substantively related to an investigation of the concrete factual circumstances of the case. Thus, the interest of an individual to be able to present their opinion in the process of adopting such ruling should be overwhelmingly protected.

The Court concluded that the legislator could have adopted less restrictive measures, which, on the one hand, would enable an individual to fully enjoy the right to a fair trial guaranteed by the Constitution and on the other hand, prevent delay of the court proceedings. Consequently, the normative content of the disputed provision, which established the court's authority to adopt a ruling to impose a fine on a participant without holding an oral hearing, contradicted the right to a fair trial and thus declared unconstitutional.

Regarding the expulsion measure, the Court indicated that it restricted the right to a fair trial. However, in this case, the public interest to support proper administration of justice and to provide a fair hearing to the participant of proceedings must be given priority. A court warning before adopting a ruling on expulsion has sufficient effect and gives the opportunity to individuals to alter their behaviour and avoid expulsion. Accordingly, adoption of a ruling on expulsion of the attendant without holding an oral hearing was deemed to be a suitable and proportional measure for achieving the legitimate aim, avoiding interruption and delay of the main proceedings.

With respect to the restriction on the right to appeal, the Constitutional Court stated that the regulation excluding every mechanism to apply to the Court contradicts the essence of the right to a fair trial. The Court emphasised the significance of the right to appeal and defined that respect to the judiciary, unhindered administration of justice, protection of order, though representing legitimate aims, do not have to be implemented at the expense of the right to a fair trial. Therefore, the Constitutional Court considered that prohibiting the possibility to appeal the court ruling (on imposing fine and or expulsion) to the person, who is sanctioned based on the disputed provision, disproportionately restricted the constitutional right to a fair trial, and thereby declared unconstitutional.

Languages:

Georgian, English.



Identification: GEO-2016-2-006

a) Georgia / **b)** Constitutional Court / **c)** First Board / **d)** 22.01.2015 / **e)** 1/1/548 / **f)** Zurab Mikadze v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Criminal proceedings, testimony, indirect, acceptable, trustworthy, evidence / Doubt, reasonable / Prosecution, guilty, conviction.

Headnotes:

The Constitutional standard of incontrovertibility refers not only to inadmissibility of dubious evidences (doubt of forging evidences or losing their essential

characteristics should be excluded), but also includes the requirement that facts and circumstances important for the criminal case be confirmed by a reliable source and based on adequately verified information. The information received from evidence should incontrovertibly refer to the factual circumstance for proving that the evidence was presented. The purpose of presenting evidence is to confirm facts and circumstance relevant for the criminal case, which in sum indicates the guilt of an individual. The Constitution requires the relevant authority to use only such evidences he or she considers to be incontrovertible for proving the guilt of an individual.

Summary:

I. The applicant (Zurab Mikadze) disputed the part of the Criminal Procedure Code (hereinafter, the “CPC”) that establishes the admissibility of indirect testimony, if it is supported by additional evidences (Article 76.3 of the CPC), allowed to be used to issue a verdict of conviction (Article 13.2 of the CPC) and to indict a person (Article 169.1 of the CPC). The procedures were disputed with regards to Article 40.3 of the Constitution (judgment of conviction shall be based on the evidence beyond a reasonable doubt).

Before the Court considered the case, Article 76.3 of the CPC was changed. The new version of the norm specified that indirect testimony shall be considered as admissible evidence, if it can be proved by any other evidence that is not an indirect testimony. Therefore, since the disputed norm was abolished, this part of the claim was dropped from the constitutional proceedings.

II. The Constitutional Court interpreted Article 40.3 of the Constitution, requiring that a bill of indictment and a judgment of conviction be based only on evidence beyond a reasonable doubt. The principle intends to eliminate a threat of errors or of arbitrariness in the process of prosecution by banning dubious evidence that could be used against the defendant.

The Court explained the definition of indirect testimony as provided in Article 76 of the CPP. Article 169.1 of the CPC requires that the grounds for the indictment of a person shall be the body of evidence sufficient to establish probable cause that the person has committed a crime. Article 13.2 of the CPC, meanwhile, requires that a judgment of conviction be based only on a body of consistent, clear and convincing evidence that, beyond reasonable doubt, proves the culpability of a person “together it establishes procedural basis, that transforms indirect testimony into an evidence valid, not only for accusation, but also to pass a judgment

of conviction against the accused". If indirect evidence is proven by other evidence, nothing rules it out that a court will substantially base the conviction of judgment on the indirect testimony. Therefore, an indirect testimony, as a rule, is an acceptable, trustworthy and valid form of evidence, much like other evidence.

Against this reality, the Constitutional Court noted, in general, indirect testimony is a less trustworthy form of evidence and carries many risks. Since the source of information is a person who does not appear at court, the court is unable to evaluate his or her sentiments and attitudes towards events in question. It is true that the law ensures that the source of information is identified, but it fails to specify how the source can be properly verified. Besides, warning the witness about responsibilities due to perjury, which is an important safeguard to ensure trustworthiness of an eyewitness testimony, is ineffective in this case, since the person who has testified cannot confirm that the person who disseminated the information can be equally trusted.

This situation was further aggravated by the following: an indirect testimony could be used even when an eyewitness (on whose words an indirect testimony was based) appeared him or herself at the court and testified. There were several opportunities to apply various indirect testimonies to prove the same fact and the law even allowed a double-indirect testimony (when the source of information named by a witness did not witness the fact him or herself).

Given the characteristics of an indirect testimony, the Court determined that automatic admission of an indirect testimony was not justified. However, the Court also noted that an indirect testimony can be used in exceptional cases. One instance is, if an objective reason exists, which makes it impossible to interrogate the very person on whose words an indirect testimony is based and when this is required on behalf of justice (e.g. when there is a threat that a witness can be intimidated). The most important aspect is that in each case, the respective court should evaluate the case circumstances, which are named by the body in charge of criminal prosecution to justify submission of indirect testimonies.

However, unlike these aspects, the disputed norms determined a general rule for the admissibility of an indirect testimony and its application was admissible even when there were no judicial reasons. Neither the reasonable doubt standard required for the judgment of guilty nor the valid reliance standard required for issuing a decree on the indictment of a person could prevent the application of indirect testimony as one of the core evidences brought into the case. There was

a high probability that the effect of an indirect testimony on the courts and on the jury would be much higher than its limited trustworthy nature allowed.

The Court highlighted that the use of an indirect testimony carries with it the risk of creating a false impression on the culpability of a person and can only be admissible in exceptional cases and not on the basis of general norms, as determined by the currently enacted CPC. Therefore, the normative content of disputed norms, which afforded the possibility of passing a negative judgment, or an issuance of a decree of indictment based on an indirect testimony, was declared unconstitutional with regards to Article 40.3 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2016-2-007

a) Georgia / **b)** Constitutional Court / **c)** First Board / **d)** 28.05.2015 / **e)** 1/3/547 / **f)** UchaNanuashvili and MikheilSharashidze v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.1 General Principles – Democracy – **Representative democracy**.
 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system**.
 4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies**.
 5.2 Fundamental Rights – **Equality**.
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

Keywords of the alphabetical index:

Election, electoral district, voters, number, equality / Election, constituency, boundary / Election, law, electoral.

Headnotes:

In majoritarian elections, it is practically impossible to ensure absolute equality between the “weight” of votes, since there will always be comparatively smaller and bigger districts which will elect the same number of Member of Parliament. At the same time, the election system that gives more “weight” to votes of citizens registered in one district, compared to others registered in another district, does not create equal opportunities for voters to equally influence election results and causes significant deviation from the principle of equality of votes.

Summary:

I. The applicant disputed the norms of the Election Code, which stipulated that for the parliamentary elections, 73 single-mandate majoritarian electoral district was to be created, of which 10 districts in Tbilisi (Article 110.1 of the Election Code). For the parliamentary elections, the norm sets forth that each municipality, except Tbilisi, shall become a single-mandate majoritarian electoral district. These norms were disputed with regard to Article 14 of the Constitution (equality before law) and Article 28.1 of the Constitution (right to participate in elections).

II. The Constitutional Court noted that the right to participate in elections, enshrined in Article 28 of the Constitution, does not require any particular electoral model to be implemented, but the existing model must ensure free and equal reflection of the will of the people in forming a government. The lawmaker must ensure that citizens have equal access to elections and equal opportunity to influence final results of the elections. Active rights of election are significantly limited by minimising the power of votes.

The disputed norms had the following effect: in 2012 parliamentary elections, the number of single-mandates that were created varied greatly from the number of constituencies. For instance, in Kazbegi Electoral District, the registered voters were 17 times fewer, compared to the Vake District and 22 times as few as Saburtalo Electoral District. Despite these differences, the constituents of each electoral district could only elect one representative to Parliament. There was a total of 3.613.851 voters registered in all of Georgia, of which 1.025.455 was registered in Tbilisi. Therefore, Tbilisi had 28% of all voters, but only 14% (10 mandates) of all mandates. Hence, numerous inhabitants of Tbilisi had less impact on the results of the majoritarian elections, compared to those constituents who resided in other electoral districts (e.g. Kazbegi, Abasha and Krtsanisi) and were registered voters. Such distribution of mandates excluded the possibility to form proportional single-

mandate electoral districts and hence, such restriction violated the rights of the applicants.

According to the respondent’s argument, such deviation from the principle of voter proportionality was conditioned by the fact that majoritarian elections presuppose representation of administrative units, not the representation of the population. Applying the constitutional provisions (Articles 4, 5 and 52 of the Constitution), the Court concluded that local municipal units do not possess constitutional legitimacy to participate in forming the national bodies of government and elect their representatives to Parliament. The only subjects that participate in forming the Government and elect their representatives to Parliament are the people. The essence of majoritarian system is not to ensure territorial representation, but the personified representation when the people elect specific persons and thus establishes a more direct connection between the voters and the elected representative.

The Court acknowledged that it is virtually impossible to establish what constitutes equal “weight” when the borders between electoral districts are delineated. Such inequality will be acceptable if a legitimate argument exists and if a government strives to minimise inequality between the “weights” of voters’ voices. The Court did not rule out the possibility for administrative borders of territorial units to be considered when electoral districts are determined. On some occasions, specific characteristics of certain regions dictate moderate disproportional division between electoral districts. The deviation may be justified if certain constitutional-legal reasons are present (e.g. the Court considers that municipalities, as a rule, are firmly established territorial units and coupling electoral districts with municipal units may eliminate risks of election subjects manipulating with the idea of altering electoral borders). However, even after considering this argument, the difference between electoral districts should not be more significant than it absolutely mandates.

The Court discussed the proportionality principle of votes and based its judgment on the “Venice Commission” 2002 “Code of Good Practice in Electoral Matters”. It noted that allowable deviation from this principle may not go above 10% and in exceptional cases, 15% (e.g. to protect the rights of minorities).

In the case under review, the electoral districts were automatically linked to municipalities, without consideration of registered voters. As a result, an unusually high deviation from the principle of voter proportionality had taken place, resulting in disproportional representation in the representative

body of government. Therefore, the disputed norms were declared unconstitutional with regard to Article 28.1 of the Constitution.

The Court also determined that unequal treatment of voters registered in high-density electoral districts was evident in contrast with electoral districts that had very few registered voters. The collective weight of one segment of voters was unjustifiably increased at the expense of the other group of voters. Consequently, the Court found that the disputed norms did not respond to the constitutional principle of equality before the law and declared disputed norms as unconstitutional with regard to Article 14 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2016-2-008

a) Georgia / **b)** Constitutional Court / **c)** Plenary / **d)** 15.09.2015 / **e)** 3/2/646 / **f)** Giorgi Ugulava v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
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 on remand, duration, extension / Proceedings, criminal / Freedom, restriction.

Headnotes:

The maximum term of nine months for preliminary detention under Article 18.6 of the Constitution unequivocally indicates its purpose and aspiration not to allow the use of detention for an indefinite

period of time even when such necessity is derived from the interests of the administration of justice. Detention restricted in time might be justifiable for the achievement of the mentioned legitimate aim, but the same could not justify the detention for any period of time.

Summary:

I. The applicant (Giorgi Ugulava) challenged the constitutionality of Article 205.2 of the Criminal Procedure Code (hereinafter, the “CPC”), which allows a suspect to be detained for nine months for each criminal case (provided the case relate to criminal crimes committed prior to the detention). The applicant requested the aforementioned Article to be viewed against Article 18.1 of the Constitution (right to liberty) and Article 18.6 of the Constitution (term of detention on remand not to exceed nine months). Also disputed were:

- a. Norms, which allowed for detention based on the valid reliance standard (Articles 3.11 and 198.2 of the CPC) with regard to Article 18.1 of the Constitution;
- b. Norms, which allowed the use of detention with the goal of crime prevention (the following words of Article 198.2 of the CPC “or, will commit a new crime” and “C” Sub-Paragraph of Article 205 of the CPC) with regard to Article 18.1 of the Constitution; and
- c. Standard, which imposed the burden of proof on the defence to prove newly revealed circumstances before the Court, in order to revoke or revise preventive measure (third sentence of Article 206.8 of the CPC) with regard to Article 42.1 of the Constitution.

II. First, the Constitutional Court considered Article 18.6 of the Constitution, which stipulates that detention on remand of an accused shall not exceed nine months. Unlike the prior judgment of the Constitutional Court (no. 2/3/182, 185, 191, 29.01.2003), this Court believed that the nine months’ guarantee does not terminate the injunction when the defendant has submitted his or her case to court. The goals of applying detention (dispense law, prevention of a new crime) remain unaltered during the entire duration of criminal prosecution, until the defendant is acquitted or charged guilty. Article 18.6 of the Constitution protects the defendant from indeterminate application of preventive custody, which may be caused by arbitrary acts of prosecution, but also protraction of the case at the trial court, or by error. The Court interpreted that for the purposes of the Constitution, “any person, against whom criminal proceedings have been launched, shall be known as the defendant, until charged guilty; “detention on

remand” is a constitutional term (has meaning independent of sub-law), which includes a temporary restriction of freedom for up to maximum 9 months. Furthermore, the state is not allowed to trespass this constitutional limitation of time, even when the detention serves legitimate aims – if the Court fails to establish the defendant’s guilt, he or she must be dispensed from detention.

The aim of Article 18 of the Constitution is to force the state to render a judgment in a timely manner when the person is in custody and the term of nine months is satisfactory to reach this aim. When the person is indicted with several charges and detention is applied with regard to any of the charges presented, the aims of this measure ensure that aims of all charges are equally achieved. “On occasions, where several accusations are simultaneously indicted, to determine the maximum dates of detention on remand, the time the defendant spent in custody, after he or she was charged in other crimes, must be taken into the account.” Therefore, it is unconstitutional to apply detention on remand against a person from the moment he or she already was detained for nine months, after he or she was initially indicted (in any criminal case).

The Court noted that the constitutional claim does not preclude requesting detention for those criminal cases, which were committed by a person after he or she was placed in custody or were committed prior to detention, but appropriate evidences were only revealed after he or she was placed in custody. Additionally, constitutional aims preclude artificial break-up of cases with the goal of prolonging the duration of detention, when the new grounds (appropriate facts, information) for criminal prosecution had become known for the prosecutors, and they were sufficient to indict the person.

The Court believed that Article 205.2 of the CPC could not prevent the aforementioned manipulations when the goal was to prolong the nine-months limit on detention. Effectively, it allowed a person to remain in custody for one particular criminal case, even when enough evidence was revealed to indict the person, despite that fact that he or she had already spent nine months in custody. Therefore, norms under Article 205.2 of the CPC violated Article 18.1 and 18.6 of the Constitution.

The Court did not agree with the applicant’s challenge against the detention on the ground of valid reliance standard and placing a person in custody to prevent new crimes to be committed by the defendant. The disputed norms gave clear and simple instructions to the court to determine whether the grounds for the defendant’s detention were such a combination of evidences and information, which would persuade an

objective person to apply the detention. Therefore, the disputed norms precluded the unsubstantiated application of detention, and the burden of proof fell entirely on the prosecution.

The disputed procedure was substantially changed when the Constitutional Court was hearing the case (third sentence of Article 206.8 of the CPC), which prompted the Court to drop this part of the constitutional proceeding.

Languages:

Georgian, English.



Identification: GEO-2016-2-009

a) Georgia / **b)** Constitutional Court / **c)** First Board / **d)** 15.10.2015 / **e)** 1/4/592 / **f)** Beka Tsikarishvili v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Cannabis, possession, consumption, personal / Liability, criminal, threat / Imprisonment / Punishment, disproportional / Human freedoms, rights.

Headnotes:

To justify certain punishment in a democratic society, there should be an adequate means to achieve the aims of punishment itself. Any punishment prescribed by the state will become an aim itself if it is not connected to the aims of punishment. Punishment of an individual without necessarily achieving the aims

of punishment turns punishment into an aim and main function of the state, nullifying the essence of a state based on the Rule of Law.

Summary:

I. The applicant (Beka Tsikarishvili) disputed the constitutionality of Article 260.2 of the Criminal Code, which provided imprisonment from 7 to 14 years for purchasing and owning up to 70 grams of dried leaves of cannabis for personal use, with regard to Article 17.2 of the Constitution (torture, inhuman, cruel treatment and punishment or treatment and punishment infringing upon honour and dignity shall be impermissible).

II. The Constitutional Court noted that, in determining criminal procedure policies, the state has a broad margin of appreciation, i.e. when deciding what acts to criminalise and what the punishment for the act should be. However, state discretion is not unlimited: the state must select the level of amenability before the law, which is adequate and effective to neutralise risks coming from the action in question. Furthermore, "the state cannot interfere in human freedoms (and rights) more than is objectively required".

The Constitutional Court evaluates punishment with regard to Article 17.2 of the Constitution, determining the proportionality between the gravity of the crime and the punishment allotted for it. The punishment will either be declared as inhuman and cruel, or its duration as too long, which is grossly disproportionate with respect to the substance of the act committed and threats pertaining to it. Additionally, the law must ensure that the judge/prosecutor is allowed enough flexibility to consider each relevant factor in an individual case (the damage caused, the quality of a guilty acts, etc.), so that proportional punishment is imposed.

The Court also pointed out that the existence of punishment is only justified when it is an adequate means to achieve the aims of punishment. Otherwise, the punishment becomes an end in itself, which is not compatible with the idea of a lawful state. The Court discussed the aims of punishment: restoration of justice, resocialisation, private (of crime committed by the same person) and general prevention (of a crime committed by other person). It determined that the aims of the punishment must be reached in tandem. General prevention solely is not enough to impose punishment. Punishing a person only for the purpose of preventing others from the same crime turns a person into a tool to fight crime, which is not justifiable in itself and thus, renders punishment grossly disproportional.

In the given case, the subject of dispute was not testing the constitutionality of disallowing cannabis from lawful circulation (decriminalisation), but disputing the constitutionality of the proportionality of the punishment for purchasing and storing large quantities of cannabis (50-500 grams). To determine the proportionality of the punishment, the Court discussed the nature of the act itself and the risks associated with the action in question. The legitimate aim of criminalising the act of purchasing and storing cannabis was to prevent the distribution of cannabis and this way, to ensure public order, safety and the health of human beings. The Court determined that the "assessment of constitutionality of the disputed norm is determined in conjunction with the very legitimate aims the norm itself lists, and with taking into consideration the possibilities to achieve these aims with the norm in question".

Discussing the legitimate aim of protecting health, the Court differentiated damages that affected the health of the person committing the act from damages inflicted on the health of others. While it is true that the health of the person who consumes cannabis may become subjected to various levels of health risks, the Court found it unreasonable to imprison a person solely because he or she committed an act against his or her own health. "In this case, restricting liberty of a person only serves the general prevention purpose, so that others do not commit the same acts and do not harm their own health." Therefore, based on the legitimate aim of protecting the health of an individual, imposing punishment in the form of restricting liberty for the act of purchasing and storing the respective amount of cannabis (up to 70 grams) was declared disproportional in terms of achieving the stated legitimate aim.

Discussing threats of purchasing and storing cannabis, the Court did not side with the argument that there is a link between consuming cannabis and committing other crimes, since presented research and statistics did not prove that consumption of cannabis itself causes a person to commit other crimes. According to the expert, the nature of the element in question, the risk of committing other crimes is the same or less, as in the case of persons under the influence of alcohol. On the other hand, the Court saw the state's legitimate interest to control the distribution of cannabis, as it damages the health of an individual. In this regard, the Court found that if the quantity of cannabis is large, it poses a threat that it was not purchased and stored with personal consumption in mind, but for the purposes of reselling it and in this case, the state is entitled to impose respective level of punishment. However, the Court discussed the disputed norm within the limits of quantity, which the applicant had at the moment of his arrest (69 grams). It did not find that

dried cannabis up to 70 grams is a quantity that indicates insurmountably the intention of reselling it, given the fact that according to the expert explanation provided to the Court, the risk of over-dosage of cannabis is minimal, which allows a person to consume 50-70 grams of cannabis in a short amount of time. Another point to consider is that the disputed norms had imposed blanket punishment for purchasing/storing up to this quantity of cannabis, and the prosecutor was not required to find out the intention of the act, whether it was for personal consumption or for the purposes of reselling it.

The Court concluded with regards to the disputed amount of cannabis, when the threats of selling it and damaging the health of others are only hypothetical, restriction of liberty for an act that only damages the health of a person committing the act is disproportional and inadequate punishment, which violates Article 17.2 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2016-2-010

a) Georgia / **b)** Constitutional Court / **c)** First Board / **d)** 28.10.2015 / **e)** 2/5/560 / **f)** Georgia Nodar Mumlauri v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

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

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

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

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

Keywords of the alphabetical index:

Public office, capacity to hold / Communist regime, political belonging / Equality, distinction / Party ideology, political affiliation.

Headnotes:

The freedom of political belonging and political views and the right of citizens to actively participate in public governance are guaranteed in a democratic state. At the same time the principle of a democratic state implies restriction, in order to ensure that by using the democratic methods the idea of democratic state itself is not disregarded. Therefore, the law should envisage tools to protect fundamental principles of a democratic state from the threat created by formally democratic processes.

A democratic state is not only authorised, but frequently obliged to protect fundamental principles of democracy in the process of public governance. For this purpose, the State is authorised to adopt preconditions for holding certain offices and has enough legitimacy not to allow persons, whose participation in governance carry irreversible threats, to the public service.

Summary:

I. The applicant disputed the constitutionality of Article 9.1c and 9.1d of the Law of Georgia “Freedom Charter” (hereinafter, the “Law”) with respect to Article 14 of the Constitution (equality before the law), Article 17.1 of the Constitution (right to dignity) and Article 29.1 of the Constitution (right to hold any state position and public office). Pursuant to the provisions in question, persons who have held certain offices between 25 February 1921 and 9 April 1991 shall not be appointed or elected to any position referred to in Article 8 of the Law (a number of executive positions in public service). The right was restricted to the former members of Central Committees of the Communist Party of the former USSR and Georgian SSR, secretaries of Regional and City Committees and members of the bureaus of the Central Committees of the Leninist Young Communist League.

II. Regarding Article 17.1 of the Constitution, the Court indicated that the realisation of the right to dignity requires the recognition of a person as the subject of the right. In the present case, the Court assessed whether prohibiting the applicant from holding specific state offices for an indefinite time violates his right to dignity.

According to the respondent, the disputed norms attempted to overpower communist heritage, namely transforming the mentality, removing the fear of responsibility, eliminating disrespect towards the different, radical nationalism, intolerance, racism and xenophobia. The aim was to replace them with democratic values as tolerance, respect of differences and personal accountability.

The Constitutional Court noted that the disputed provisions were based on the assumption that holding a party post by definition meant having connection with communist totalitarian ideology. According to law, holding an office cannot be based on assessing a specific person's involvement with the Soviet totalitarian regime. The Court emphasised that every person who formally held a leading post in the Communist Party might not have directly taken part in the activities of the Soviet regime and might have opposed the communist ideology.

With the disputed provision, the Law created a special legal regime for the persons prescribed by the disputed Law without assessing the quality of their involvement in the Communist Party. The Court stated that for establishing the regulation to limit the right prescribed by Article 17.1 of the Constitution, the disputed regulation should have envisaged inquiry of the activities and functions of each individual and an obligatory prerequisite to evaluate how substantial and real the threats coming from these persons were today when appointing them to the offices prescribed by the law.

The Court indicated that, with the lapse of time, the threats and challenges, which were the reasons for adopting the disputed normative act, lose their relevance. The legislator is obliged to consider social results that may accompany certain regulation of social relationships, but should avoid regulation that carries the risks of stigmatising certain groups of society or specific individuals. The interest of protecting national security and fight against totalitarian ideologies cannot outweigh the negative results of the Law that is stigmatising and violates dignity. Accordingly, the Court found that the legislator did not consider the ability of a human being, as a free individual, to change attitudes after a lapse of time to fulfil certain conditions to hold a state office. According to the rule established by the disputed provision, persons were stripped of the right to hold state offices unconditionally and for an unlimited time, which amounted to a violation of their right to dignity.

With respect to Articles 29.1 and 14 of the Constitution, the Court found that the restriction set by the disputed provisions met the proportionality criteria and do not violate the Constitution, provided

they are applied in good faith and an individual approach towards each individual is employed in practice.

III. Two judges dissented. They opined that given the Court's case-law on the matter, contradiction of the disputed norms with the right to dignity simultaneously constitutes a violation of other rights guaranteed by the Constitution, including the right to hold public office and equality before the law.

Languages:

Georgian, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2016-2-008

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 23.03.2016 / **e)** 1 BvR 184/13 / **f)** / **g)** / **h)** *Europäische Grundrechte-Zeitschrift* 2016, 315-317; *Der Deutsche Rechtspfleger* 2016, 408-410; *Zeitschrift für das gesamte Familienrecht* 2016, 1041-1043; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Custodian, appointment / Legal protection / Legal protection, effective, guarantee / Personality, right / Right to be heard.

Headnotes:

Legal custodianship entails serious interferences with the general right of personality. Such interferences can only be justified if the competent court has duly investigated and established the facts of the case and can therefore assume that the requirements for establishing or extending legal custodianship are indeed met. As a rule, the court must hear the person concerned prior to its decision. Ordering legal custodianship without such a hearing, in addition to violating the right to be heard (*Recht auf rechtliches Gehör*), also violates the general right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law.

The right to an effective remedy under Article 19.4 of the Basic Law requires courts not to render ineffective legal remedies available under procedural law. It is

compatible with this requirement to make legal protection dependent on the existence of a recognised legal interest in bringing an action. However, the courts must recognise such an interest where, upon the relevant sovereign act ceasing to have legal effects, the person is no longer directly adversely affected by the sovereign act, but where the interferences with fundamental rights originating from that sovereign act had been serious and the person had not been able to obtain effective legal protection before.

Summary:

I. The applicant had been placed under provisional legal custodianship by way of a preliminary injunction in December 2010. In June 2011 the custodian applied for an extension of the provisional legal custodianship for six months. By order of that day, the Local Court (*Amtsgericht*) granted the application without prior hearing of the applicant. Upon a second application by the legal custodian in August 2011, the Local Court extended the provisional legal custodianship until 31 October 2011. Again it did not grant the applicant a prior hearing. By 31 October 2011 the provisional legal custodianship ended through effluxion of time.

Thereupon the applicant lodged a complaint with the Local Court, applying for a declaration that the August 2011 court order extending the legal custodianship had violated her rights. The Local Court did not grant the relief sought. After hearing the applicant face-to-face, the Regional Court (*Landgericht*), as court of appeal, rejected the complaint. The Regional Court held that, as the provisional legal custodianship had ended, the applicant lacked a continued recognised legal interest in obtaining a declaratory finding of a violation of her rights (*Fortsetzungsfeststellungsinteresse*). In her constitutional complaint, the applicant claims that the guarantee of effective legal protection (Article 19.4 in conjunction with Article 3.1 of the Basic Law) and her right to be heard (Article 103.1 of the Basic Law) have been violated.

II. The Federal Constitutional Court held that the applicant's general right of personality and her right to be heard had been violated.

The decision is based on the following considerations:

First, the challenged court order that extended the legal custodianship under which the applicant had been placed violates her general right of personality and her right to be heard.

The right to a free and self-determined development of one's personality guarantees everyone an autonomous area of private life in which one can develop and safeguard one's individuality. Placing someone under legal custodianship by court order interferes with this right to develop oneself freely by shaping one's future autonomously, because, with regard to decisions in the life of the person concerned, such an order assigns powers in legal and factual matters – powers that at the minimum amount to co-decision – (*rechtliche und tatsächliche Mitverfügungsgewalt*) to third parties.

Such interference can only be justified if the competent court has duly investigated and established the facts of the case and can therefore assume that the requirements for establishing or extending legal custodianship are indeed met. One of the pivotal requirements under constitutional law is to observe the right to be heard (Article 103.1 of the Basic Law). As a rule, a hearing in the form of a face-to-face hearing of the person concerned is indispensable if placing someone under legal custodianship, as the potential interferences with the general right of personality that custodianship entails are serious. A face-to-face hearing may only be dispensed with temporarily – in cases of both urgency and immediate danger; in such cases, the hearing must be held as soon as possible after the danger is over.

Due to the close relationship between the general right of personality and the right to be heard, which in the context of legal custodianship proceedings is designed as a right to be heard personally, ordering legal custodianship without hearing the person concerned does not only constitute a violation of the right under Article 103.1 of the Basic Law, but, at the same time, a violation of the general right of personality. Therefore, a subsequent hearing cannot retroactively remedy such a violation; such a result is only possible for the future.

The Local Court did not personally hear the applicant any time. On the contrary, as in the decision on the first extension of legal custodianship, the Local Court ordered the second extension, which is challenged in the present case, without even informing the applicant. There was no personal hearing afterwards, either. The applicant also did not waive her right to a hearing: Such a finding neither follows from the facts of the case, nor can it be based on statutory law.

It was not possible to remedy the violations of the right to be heard in the course of the complaint proceedings aimed at a declaratory finding of the violations. Failure to hear the person concerned in legal custodianship proceedings results in the ordering of legal custodianship being illegal. A subsequent hearing by the court cannot retroactively remedy the court's previous failure to hear the person concerned.

Second, the Regional Court's order violates the applicant's right to effective legal protection by denying the existence of a continued recognised legal interest in obtaining a declaratory finding that the Local Court had violated her right to be heard. Article 19.4 of the Basic Law requires of the appellate courts not to render ineffective the legal remedies provided by the different codes of procedure. Under this requirement, legal protection can be made dependent on the existence of a recognised legal interest in bringing an action. However, in cases of serious interferences with fundamental rights such a recognised legal interest in bringing an action must be found to exist where, while the challenged sovereign act no longer has legal effects and therefore the person concerned is no longer directly adversely affected by it, the person concerned was not able to obtain effective legal protection before. In its order of 3 May 2012, the Regional Court, by denying that the applicant had a recognised legal interest in a declaratory finding of a violation, failed to meet these requirements.

Cross-references:

Federal Constitutional Court:

- 1 BvR 396/55, 08.01.1959, Official Digest (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 9, 89 <95>;
- 2 BvR 143/61, 28.06.1967, *BVerfGE* 22, 114 <119>;
- 1 BvR 570/77, 27.09.1978, *BVerfGE* 49, 212 <215>;
- 1 BvR 16/72, 11.10.1978, *BVerfGE* 49, 286 <298>;
- 1 BvR 857/85, 18.06.1986, *BVerfGE* 72, 122 <137>, available in English in: Decisions of the Federal Constitutional Court, Vol. 5, pp. 231-244;
- 1 BvL 17/87, 31.01.1989, *BVerfGE* 79, 256 <268>;
- 2 BvR 1516/93, 14.05.1996, *BVerfGE* 94, 166 <207>, *Bulletin* 1996/2 [GER-1996-2-016];
- 2 BvR 817/90, 2 BvR 728/92, 2 BvR 802/95 and 2 BvR 1065/95, 30.04.1997, *BVerfGE* 96, 27<39 and 40>;
- 2 BvR 527/99, 2 BvR 1337/00, 2 BvR 1777/00, 05.12.2001, *BVerfGE* 104, 220 <232 and 233>;
- 1 BvR 461/03, 03.03.2004, *BVerfGE* 110, 77 <85>;
- 1 BvR 421/05, 13.02.2007, *BVerfGE* 117, 202 <225>, available in English on the Court's website, *Bulletin* 2007/1 [GER-2007-1-007];
- 1 BvR 538/06, 1 BvR 2045/06, 27.02.2007, *BVerfGE* 117, 244 <268 and 269>, *Bulletin* 2007/1 [GER-2007-1-008];

- 1 BvR 2539/10, 12.01.2011, Second Chamber of the First Panel;
- 1 BvR 2516/13, 13.07.2015, Third Chamber of the First Panel, *Bulletin* 2015/2 [GER-2015-2-015].

Languages:

German.



Identification: GER-2016-2-009

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 24.03.2016 / **e)** 2 BvR 175/16 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift-Spezial* 2016, 377; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Extradition / Extradition, detention / Extradition, guarantees / Extradition, preconditions / Extradition, principle of speciality / Freedom of action, general.

Headnotes:

An extradition may not be declared to be permissible if there is no certainty that the requesting state will observe the principle of speciality, unless it has been waived. This condition is not met if the courts and authorities of the requesting state as a rule only comply with the principle of speciality upon formal protest against non-compliance in the individual case by the requested state's government.

Summary:

I. US authorities requested the extradition of the applicant, a Swiss national, for the prosecution of tax offences. This was based on an arrest warrant issued by the US District Court, Southern District of New York, on 3 January 2012. In this arrest warrant, the applicant was charged with having conspired with

other persons between 2007 and 2010 in New York and in other places to defraud the US-American tax authorities and the Internal Revenue Service (IRS) by evading taxes. Under US law, this conduct was punishable as conspiracy to defraud US tax authorities, to evade income tax, and to submit false income tax returns. The applicant was arrested on 2 February 2015. The Frankfurt am Main Higher Regional Court (*Oberlandesgericht*) ordered provisional arrest pending extradition. The applicant did not agree to simplified extradition proceedings. After having received the formal extradition request, the Higher Regional Court ordered formal detention pending extradition on 1 April 2015. The Higher Regional Court was of the opinion that the only offences punishable under German law that had been sufficiently corroborated by facts so far were those to the benefit of customers P and Q and that the other offences mentioned would require additional evidence to be submitted. The US authorities submitted further evidence. Thereupon, the Higher Regional Court extended the formal detention pending extradition to the offences for the benefit of customers R, S, T and U, but asked the US authorities to submit additional specific evidence with regard to customers P, Q, R, S, T and U. The US authorities provided those by brief of 24 August 2015.

By order of 19 October 2015, the Higher Regional Court declared the applicant's extradition to be permissible with regard to the alleged offences for the benefit of customers P, Q, T and U, but impermissible with regard to customers R and S. To that extent, the court also voided the arrest warrant. This was based on the court's view that in that regard there were no extraditable offences, as the documents submitted did not show that R and S had committed tax evasion, and therefore, under German law it was not possible for the applicant to have aided with that offence. In addition, conspiracy was no criminal offence under German law and the facts submitted did not amount to "forming a criminal organisation" punishable under German law.

By *note verbale* of 5 November 2015, the German Foreign Office told the US embassy that the Government of the Federal Republic of Germany agreed to the applicant's extradition for the purpose of criminal prosecution in the US on the basis of the arrest warrant of the U.S. District Court, Southern District of New York, with regard to the offences for the benefit of customers P, Q, T and U. To the extent that the applicant was charged with further offences for the benefit of customers R and S, extradition was not granted. In addition, it informed the US that neither the German Federal Foreign Office nor the applicant had waived the US' obligation to comply with the principle of speciality.

By brief of 11 November 2015, the applicant's authorised representative applied for a new decision on the permissibility of the applicant's extradition and for a stay of the execution of the extradition. He explicitly pointed to the Suarez decision of the Court of Appeals for the Second Circuit New York. In his view, the Court of Appeals denied the person who was later convicted to invoke the principle of speciality. The Court of Appeals' decision was based on the following considerations: In its opinion, the principle of speciality as part of international law is a right of the requested state, but not an individual right of the accused; therefore, an individual can only validly invoke the principle of speciality if the requesting state's government had formally protested before.

In its order of 22 December 2015, the Higher Regional Court rejected the applications for a new decision on the permissibility of the extradition and for a stay of the execution of the warrant for detention pending extradition. It admitted that the procedural rights of the accused were restricted to some extent following the Suarez decision because the U.S. Court of Appeals refused to consider a claim of non-compliance with the principle of speciality if the requested state had not lodged a protest with the US government. However, it held that the applicant had the right to ask the German Federal Government to lodge a protest, which the court considered to be sufficient.

In the constitutional complaint, the applicant challenged the Higher Regional Court's orders of 19 October and 22 December 2015 as well as the Federal Government's *note verbale* of 5 November 2015. He asserted that his fundamental rights under Articles 19.4, 2.1 in conjunction with Articles 20.3 and 103.1 of the Basic Law had been violated.

II. The Federal Constitutional Court decided that the constitutional complaint was only admissible in part. This concerned the part of the Higher Regional Court's decision of 22 December 2015 in which the Court had rejected the application for a new decision on the permissibility of the extradition. To that extent, the constitutional complaint was also well-founded.

The decision is based on the following considerations:

When examining the permissibility of an extradition, the German Constitution requires the regular courts to review whether the extradition sought violates inalienable constitutional principles or the indispensable scope of fundamental rights protection. In particular, in the context of extraditions with states that are not Member States of the European Union, the regular courts must in addition review whether the

extradition and the acts on which it is based are in line with the minimum standards under public international law that have to be complied with pursuant to Article 25 of the Basic Law. The principle of speciality, which applies in the context of extraditions, is part of the general rules of international law. Therefore, pursuant to Article 25 of the Basic Law, German courts are required to verify whether the authorities and courts of the requesting state indeed observe that principle. If strict compliance with the principle of speciality is not ensured, the extradition would entail a serious violation of fundamental rights. If a fundamental rights violation can only be claimed under aggravated circumstances that are impermissible under German constitutional law, this fact must already be taken into account in the context of the decision on the permissibility of the extradition. § 73 of the German Act on International Cooperation in Criminal Matters (hereinafter, the "Act") takes up these principles and transfers them to ordinary law by prohibiting mutual assistance where this would contradict the indispensable principles of the German legal order.

In its decision of 22 December 2015, the Higher Regional Court, in interpreting and applying § 73 of the Act, failed to recognise the significance of the second sentence of Article 2.2 of the Basic Law, or at the very least of Article 2.1 of the Basic Law in conjunction with Article 25 of the Basic Law. When reviewing whether the principle of speciality would be complied with, it did not take into account that the objective of § 73 of the Act is to protect the general rules under international law that are indispensable for the German legal order. This applies irrespective of whether these general rules also aim at protecting the person sought.

The Higher Regional Court failed to recognise the possible impact of the Suarez decision, namely that where it was not certain whether the principle of speciality would be complied with in the requesting state, the violations of the fundamental rights of the person sought would be serious in case of an extradition. In particular, the applicant would not be able to effectively defend himself against these violations. Referring him to the possibility of applying to the German Federal Government for help if the US did not comply with the principle of speciality, constitutes a denial of legal protection, which is incompatible with Article 19.4 of the Basic Law, against an illegal extradition that would violate fundamental rights.

Cross-references:

Court of Appeals for the Second Circuit New York:

- *Suarez*, no. 14-2378-cr, 30.06.2015.

Languages:

German.

*Identification:* GER-2016-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 03.05.2016 / **e)** 2 BvE 4/14 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2016, 922-929; CODICES (German).

Keywords of the systematic thesaurus:

4.5.4.5 Institutions – Legislative bodies – Organisation – **Parliamentary groups**.
4.5.6.2 Institutions – Legislative bodies – Law-making procedure – **Quorum**.

Keywords of the alphabetical index:

Member of Parliament, equality / Parliament, group, rights / Parliament, member, independence / Parliament, member, mandate, free / Parliament, opposition, status / Parliament, principle, effective opposition / Parliamentary democracy, principle.

Headnotes:

The Basic Law contains a general constitutional principle of an effective opposition (*verfassungsrechtlicher Grundsatz effektiver Opposition*), which has been further defined by the case-law of the Federal Constitutional Court. The Basic Law, however, does not expressly create specific rights for parliamentary opposition (groups), nor can one derive from it an obligation to create such rights.

The creation of specific rights for parliamentary opposition groups is also not compatible with the second sentence of Article 38.1 of the Basic Law. The

lowering of the specifically envisaged quorums of one third (third sentence of Article 39.3 of the Basic Law) or of one fourth (second sentence of Article 23.1a, first sentence of Article 44.1, second sentence of Article 45a.2 and Article 93.1 no. 2 of the Basic Law) of the members of the *Bundestag* for the exercise of parliamentary minority rights is impossible due to the constitutional legislator's deliberate decision for the existing quorums.

Summary:

I. The *Organstreit* proceedings concern applications by the parliamentary group of *DIE LINKE* in the German Parliament (*Bundestag*) with regard to the constitutionally required scope of parliamentary minority and opposition rights in Parliament.

Under the Basic Law, to exercise certain parliamentary minority rights, certain quorums (one third or one quarter of the members of Parliament) must be reached. Due to the majority situation in Parliament, the parliamentary groups that do not support the Federal Government – that is *DIE LINKE* and *BÜNDNIS 90/DIE GRÜNEN* – have only 127 out of 630 seats. Consequently, the members of Parliament of the parliamentary opposition groups do not reach the quorums – enshrined in the Basic Law and provided for at statutory level – necessary to exercise certain parliamentary minority rights.

On 3 April 2014, Parliament rejected both bills that had been proposed by parliamentary opposition groups to change these quorums.

II. The Federal Constitutional Court held that the applications are unfounded.

Parliament is not under any obligation to realise its oversight function by creating the opposition rights requested by *DIE LINKE*, neither at a constitutional, nor statutory level, nor at the level of its Rules of Procedure.

The Basic Law contains a general constitutional principle of an effective opposition, which has been further defined by the case-law of the Federal Constitutional Court. The protection of the opposition under constitutional law is rooted in the principle of democracy. Forming and exercising an organised political opposition is constitutive of the free and democratic basic order.

To enable the opposition to carry out its parliamentary oversight function, the minority rights provided under the Basic Law must be construed in a way rendering them effective: the principle of an effective opposition

applies. In exercising its powers of oversight, the opposition must not be dependent on the good will of the parliamentary majority. This follows from the fact that the opposition is provided with such powers of oversight not only in its own interest, but mainly in the interest of the democratic state applying the principle of separation of powers, thus to publicly control the government that is supported by the parliamentary majority, and the government's agencies. Therefore, within the German parliamentary system, the principle of separation of powers guarantees that parliamentary oversight of the executive branch can be effectively exercised in particular also by the parliamentary opposition.

The parliamentary minority has a right to initiate abstract judicial review proceedings and to file an application in *Organstreit* proceedings. The individual right, both structurally and in individual situations, to oppose policies pursued by the government and by the parliamentary majority supporting it is grounded on the freedom and equality of members of Parliament guaranteed under the second sentence of Article 38.1 of the Basic Law. As representatives of the whole people, they are not bound by orders and instructions, and only responsible to their conscience.

However, the Basic Law does not explicitly establish specific rights for parliamentary opposition (groups). Nor can one derive from the Basic Law an obligation to create such rights. Rather, within the system under the Basic Law, the rights of the parliamentary opposition are designed as rights of qualified parliamentary minorities. The minorities provided with such special rights are qualified in that they consist of a certain number of members of the *Bundestag*. There is no provision of the Basic Law providing special rights for parliamentary groups. Thus, the Basic Law has decided not to limit the exercise of parliamentary minority rights to oppositional actors – like parliamentary opposition groups – , but to provide such rights to members of Parliament who together reach a certain number, without regard to the group's composition.

Furthermore, the second sentence of Article 38.1 of the Basic Law precludes introducing specific rights for parliamentary opposition groups. Rights that are provided only to parliamentary opposition groups derogate from the principle of equality of members of Parliament and their affiliations, which cannot be justified.

Derogations from the principle of equality of Members of Parliament and their affiliations can only be justified under constitutional law through special reasons. Such reasons have to be constitutionally legitimised themselves and have to be of a weight that is equal to

that of the equality of Members of Parliament. In the case at hand, no convincing justifying reason for favouring oppositional Members of the Parliament compared to Members of Parliament who support the government, and their affiliations respectively, by providing specific opposition rights, has been put forward. Nor is such a reason evident.

The Federal Constitutional Court also finds that no interpretation of the Basic Law would justify a change in the quorum requirements: not on the basis of teleological reduction; nor of constitutional change; nor of original legislative intent; nor of failure of the original constitutional legislator to foresee certain developments.

Finally, the quorums specifically envisaged under the Basic Law exclude the possibility of a constitutional obligation to provide for more extensive opposition rights at statutory level.

Languages:

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



Identification: GER-2016-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 09.05.2016 / **e)** 1 BvR 2202/13 / **f)** / **g)** / **h)** *Zeitschrift für deutsches und internationales Bau- und Vergaberecht* 2016, 582; *Europäische Grundrechte Zeitschrift* 2016, 474; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Religion, activity, freedom / Religion, belief, protection / Religion, faith, public practice, interference / Religion, free exercise / Religion, religious community, right of self-determination.

Headnotes:

The importance of a religious rule of conduct is a genuinely religious question, which is as such not subject to an independent assessment by the state courts.

Summary:

I. The Second Chamber of the First Panel of the Federal Constitutional Court reversed a judgment of the Higher Administrative Court (*Verwaltungsgerichtshof*) of Baden-Württemberg, which denied a religious community the right to establish a place of burial for parish priests in their church. In applying the exception and exemption provisions of the German Building Code and interpreting undefined legal concepts included therein, the Higher Administrative Court of Baden-Württemberg gave insufficient consideration to the freedom of faith and freedom to profess a belief (Article 4.1 and 4.2 of the Basic Law). In particular, the binding character of the rule of faith invoked by the applicant cannot be denied without the use of expert help.

The applicant is a legally organised religious association and belongs to the archdiocese of the Syrian-Orthodox Church of Antioch (*Erzdiözese Syrisch-Orthodoxe Kirche in Antiochien*) in Germany. In 1994, it built a church on a piece of land located in an industrial area. In 2005, the applicant applied for a permit to change the use of a storeroom in the basement of the church to build a crypt with ten burial sites, which was denied by the competent authorities.

II. The Court decided as follows.

The applicant's fundamental right under Article 4.1 and 4.2 of the Basic Law has been violated. In the initial proceeding, the scope of protection of the conflicting fundamental rights was in part incorrectly determined and the performed balancing failed to reconcile them sufficiently with regard to their respective importance.

The protection of fundamental rights ascribed to religious communities includes the right to individually practice one's belief or religion, to profess the faith and to cultivate and promote the belief. The scope of protection of freedom of faith and freedom to profess a belief can cover a conduct irrespective of the specific importance the doctrines of faith attribute to the conduct at issue. The right to adjust one's conduct according to the doctrines of one's faith and to act according to one's inner religious beliefs is not only awarded with regard to imperative doctrines, but also to such religious beliefs which identify a

certain conduct as being the right approach in terms of handling a certain situation in life. Against that background, the burial of church dignitaries according to particular rites defined by faith and the corresponding mortuary practices are among the protected activities.

The denial to build a crypt constitutes an interference which is constitutionally not justified. Freedom of faith is not guaranteed without limits. However, these limits must be inherent in the Constitution. Such limits include fundamental rights of third persons as well as common values of constitutional status.

The post-mortem right to be respected does not constitute a limit inherent in the Basic Law for the applicant's freedom of faith and freedom to profess a belief. The peace of the dead does not constitute a limit inherent in the Basic Law either, given that it is open to subjective determination categories in the same way as the post-mortem right to be respected. Consequently, measures do not violate the peace of the dead if they respect the dignity of the deceased and take the assumed will of the deceased into account. The applicant's freedom of faith and freedom to profess a belief is not hampered by the sense of reverence of the bereaved or of the general public either. The basic liberties demand that there be scope for an individual definition of dignified remembrance of the dead. Accordingly, the state has to act with restraint, at least as far as borderline cases are concerned, when deciding which form of remembrance of the dead is still or is no longer respectful.

However, in general the applicant's freedom of faith and freedom to profess a belief can conflict with the fundamental right to property (Article 14.1.1 of the Basic Law) as well as the freedom of occupation (Article 12.1 of the Basic Law) of the neighbouring land owners.

The fundamental right to property includes but is not limited to the right to use the neighbouring production plants to their full capacity. Limitations of use such as those requiring the owners to operate their machines only in compliance with certain noise control measures or only within certain hours would directly interfere with the freedom of occupation protected under Article 12.1 of the Basic Law.

The remaining conflict of fundamental rights between the applicant's freedom of faith and freedom to profess a belief on the one hand and the neighbouring land owners' fundamental right to property and the freedom of occupation on the other hand, is to be resolved by balancing all circumstances according to the principle of practical concordance (*praktische*

Konkordanz is a legal principle of German Constitutional Law which describes the process of considerably balancing conflicting fundamental rights). This requires that none of the conflicting legal positions is favoured over the other or ultimately prevails but that all legal positions are to be balanced as fairly as possible.

The Higher Administrative Court does not meet these requirements in its decision. It failed to sufficiently take into account the applicant's freedom of faith and the freedom to profess a belief. Its decision lacks findings with regard to the actual use of the existing church. Furthermore, the Higher Administrative Court does not give sufficient consideration to what is guaranteed under Article 4.1 and 4.2 of the Basic Law. The Court thereby exceeds the limits of the – in principle constitutionally permissible – judicial plausibility check. The question of how much importance a religious community attaches to a rule of faith is, primarily, a genuinely religious question which is as such not subject to an independent assessment by state courts. Finally, the Higher Administrative Court gives predominant weight to the interests of the neighbours without sufficiently examining the possibility of balancing the interests in order to achieve practical concordance.

Languages:

German.



Identification: GER-2016-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 20.05.2016 / **e)** 1 BvR 3359/14 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
5.2 Fundamental Rights – **Equality**.

Keywords of the alphabetical index:

Damages, claim, access to courts / Damage, complaints, courts, access / Detainee, treatment, conditions / Detainee, treatment, poor conditions / Detention / Detention, conditions / Detention, humane / Human dignity / Human dignity, violation / Legal aid / Legal aid, equal access / Legal aid, equality / Legal aid, granting of / Legal aid, proceedings.

Headnotes:

The guarantee of equal legal protection requires that individuals with the requisite financial means and those without them be put on a broadly equal footing for obtaining legal protection.

If legal aid is sought for an action in which the points of law at issue cannot be easily resolved, it is necessary to conduct principal proceedings. Complex and so far unresolved points of law cannot be decided in proceedings relating to legal aid.

It has not yet been sufficiently clarified under which conditions the requirements following from the guarantee of human dignity under Article 1.1 of the Basic Law are satisfied in cases of group confinement in cells that proportionally provide less than 6 m² surface area per prisoner. The question requires further clarification that goes beyond a mere reference to the balancing process necessary in every individual case.

Summary:

I. The applicant was detained together with three other prisoners for a period of about six months. He alleges that he was detained in two quasi-identical cells, each having a total size of 16 m² and a toilet that was structurally separate from the rest of the cell. Arguing that the conditions of detention were in violation of human dignity, the applicant applied for legal aid to bring a public liability action against the Free State of Bavaria. The Regional Court (*Landgericht*) denied the application, holding that the applicant had not been detained under conditions that violated human dignity. The Higher Regional Court (*Oberlandesgericht*) rejected the immediate complaint (*sofortige Beschwerde*) challenging that decision. The constitutional complaint was directed against these decisions.

II. The Federal Constitutional Court decided that the challenged decisions violated the applicant's right to equal legal protection (*Rechtsschutzgleichheit*) under Article 3.1 of the Basic Law in conjunction with Article 20.3 of the Basic Law (*Grundgesetz*). It reversed the decision and remanded the matter to the Regional Court for a new decision.

The decision is based on the following considerations:

First, the guarantee of equal legal protection requires that individuals with the requisite financial means and those without them be put on a broadly equal footing for obtaining legal protection. It is not objectionable under constitutional law to base the granting of legal aid on whether the action a party intends to bring, or its defence against an action that has been brought against it, has sufficient prospects of success and does not seem frivolous. However, unresolved points of law and fact must not be decided in proceedings relating to legal aid. Rather, individuals who lack the requisite financial means must be put into an equal position in terms of having such questions resolved in principal proceedings. Different rules apply only if, in consideration of a statutory provision or in view of guidelines for interpretation provided by existing case-law, the point of law can be easily clarified. If this is not the case, and if the matter has not yet been resolved by the supreme federal courts, denying legal aid to a party lacking the requisite financial means is incompatible with the constitutional requirement to ensure equal legal protection if such denial is based on the action's lacking prospects of success. Otherwise, unlike a party with the requisite financial means, a party lacking them would be deprived of the opportunity to present its legal view in principal proceedings.

Second, measured against these standards, the orders denying legal aid do not stand up to constitutional review. The question of whether the detention of prisoners is compatible with human dignity depends on an overall assessment of the actual circumstances determining the conditions of detention. The parameters to be taken into account for assessing the detention of a group of prisoners in close quarters have not been sufficiently determined in case-law yet. Specifically, the following aspects are relevant:

When performing an overall assessment, the primary factors to be considered with respect to the amount of space are the surface area per prisoner and the situation concerning sanitary facilities. In particular, the question whether and under what conditions a surface area of less than 6 m² per prisoner, as is the case here, is able to satisfy the requirements following from the guarantee of human dignity has not been resolved yet in case-law and has been assessed differently by different courts.

Also unresolved is the question of how the requirements under Article 1.1 of the Basic Law relate to those under Article 3 ECHR. With regard to the prohibition of torture and of inhuman or degrading treatment or punishment pursuant to Article 3 ECHR, the European Court of Human Rights considers the guideline to be 4 m² of surface area per prisoner; if a prisoner has less than 3 m² of surface area, this is a strong indication of degrading conditions of imprisonment. The Federal Court of Justice has emphasised that the Basic Law imposes higher requirements. Hence, the question of law to be decided here also has not yet been resolved by the regular courts with regard to the relation between the Basic Law and the European Court of Human Rights.

Finally, the question raised by the applicant concerning the assessment of the conditions of detention in the case of group confinement in close quarters has remained largely unresolved in the case-law of the regular courts. It is yet to be determined how the space requirements are affected by stress and conflict situations that arise in the case of higher occupancy in close quarters, and by the requirements following from indispensable privacy. It is also unclear what – compensatory or aggravating – weight other factors have in the assessment, e.g. the daily amount of time spent locked up in cells.

Third, by denying from the very outset that the intended public liability action had any prospects of success and by denying legal aid without regard to these unresolved points of law, the Regional Court and the Higher Regional Court violated the applicant's right to equal legal protection. The proceedings relating to legal aid are not the permissible forum for addressing the points of law that are decisive for assessing the applicant's intended action. Rather, such questions must be decided in the principal proceedings; this also enables the applicant to submit them, if necessary, to the Federal Court of Justice for clarification.

Cross-references:

Federal Constitutional Court:

- 1 BvR 154/55, 22.01.1959, Official Digest (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 9, 124 <130 et seq.>;
- 1 BvR 94, 802, 887, 997, 1094, 1158, 1247, 1274, 1439, 1513/88, 13.03.1990, *BVerfGE* 81, 347 <356 et seqq.>;
- 1 BvR 1229/94, 24.01.1995, *BVerfGE* 92, 122 <124>;
- 1 BvR 1127/14, 14.07.2015, Third Chamber of the First Panel, *Bulletin* 2015/2 [GER-2015-2-017];

- 2 BvR 566/15, 22.03.2016, Second Chamber of the Second Panel.

European Court of Human Rights:

- *Testa v. Croatia*, no. 20877/04, 12.07.2007;
- *Ananyev and others v. Russia*, nos. 42525/07 and 60800/08, 10.01.2012;
- *Kalashnikov v. Russia*, no. 47095/99, 15.07.2002, *Reports of Judgments and Decisions 2002-VI*.

Languages:

German.



Identification: GER-2016-2-013

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 21.06.2016 / **e)** 2 BvR 637/09 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Treaties and constitutions**.

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Treaties and legislative acts**.

2.3.7 Sources – Techniques of review – **Literal interpretation**.

2.3.8 Sources – Techniques of review – **Systematic interpretation**.

2.3.9 Sources – Techniques of review – **Teleological interpretation**.

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

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

Keywords of the alphabetical index:

Data, personal, collection / Data, personal, protection / Data processing / Informational self-determination, right to / International agreement, direct applicability / Treaty, non-self-executing / Treaty, approval / Treaty, assenting act / Treaty, effect in domestic law / Treaty, international, direct applicability.

Headnotes:

Decision on the admissibility of a constitutional complaint against the Act of Assent to the Council of Europe's Convention on Cybercrime of 23 November 2001 [Official Headnotes].

Without implementing legislation, international treaties are only in exceptional cases directly applicable in the German legal order in the sense that they directly create legal effects in the same way as national legal provisions do.

Without implementing legislation, international treaty provisions can only be directly applicable if they feature all the characteristics that a law must have under national law to create rights and obligations for its addressees.

While German law, if possible, is to be interpreted in accordance with the principle of the Constitution's openness to international law, the limits of such interpretation are set by the German Constitution. Therefore, the principle of openness to international law cannot require the courts to interpret and apply the law in a way that is incompatible with the Constitution.

The right to informational self-determination (Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) encompasses the protection of any individual against unlimited collection, storage, use and transfer of personal data. Generally, individuals have the right to decide themselves on the disclosure and the use of their personal data.

However, as a rule, the state is not prohibited from taking note of data that is publicly available, including personal data. Therefore, if a state body collects communication content available online and addressed to the general public or at least to an audience that is not further defined, it does not interfere with the right to informational self-determination. An interference with that right is possible only where information obtained from content that is publicly available is specifically collected, stored and analysed, consulting further data where necessary, and thereby gains an

additional meaning from which results a specific risk situation for the personality of the person concerned.

Factually, it follows from access by foreign states to computer data stored in Germany that the guarantees provided under the Constitution are not applied as such to further use of such data abroad, in particular regarding its storage and targeted analysis, which might also involve the consultation of further data; instead, the standards applicable abroad are applied.

Nevertheless, public authority is not as such prohibited from authorising foreign states to access publicly available data, as the German Constitution is open to international cooperation. This includes cases in which foreign legal systems and rules do not entirely correspond to the German legal system.

Summary:

I. On 23 November 2001, the Federal Republic of Germany signed the Council of Europe 2008 Convention on Cybercrime (hereinafter, the “Convention”). Upon approval by Parliament (*Bundestag*) pursuant to the first sentence of Article 59.2 of the Basic Law, the Convention entered into force in Germany on 1 July 2009. In their constitutional complaint, the applicants challenged some provisions of the German Act of Assent to the Convention. Those provisions concern international mutual assistance. They implement Articles 25 to 34 of the Convention. The applicants asserted that Articles 1.1 and 2.1 in conjunction with Articles 1.1, 10, 13, 19.4, 101, 102 and 104 of the Basic Law had been violated.

II. The Federal Constitutional Court held that the constitutional complaint was inadmissible.

The decision is based on the following considerations:

With regard to Articles 25 to 31, 33 and 34 of the Convention, the applicants did not meet the admissibility requirement of being directly affected, as the Articles of the Convention mentioned-above were not self-executing. This already follows from the wording of the relevant provisions, which only places obligations on the Contracting Parties, not on their citizens. In addition, in describing the methods of cooperation between the states in mutual assistance matters, Article 23 of the Convention does not mention direct applicability of the Convention in the Contracting States as a possible tool; instead, Article 25.2 of the Convention provides that each Party is to adopt such legislative or other measures as may be necessary to carry out their obligations. Thus, the Parties’ understanding was

that implementing measures were required. A systematic interpretation of the relevant provisions also yields such a result: According to the wording of the corresponding provisions on procedural and substantive criminal law, in particular Articles 16 *seqq.* of the Convention, they also require implementation. Furthermore, the object and purpose of the Convention also argues against direct applicability of the Convention: It can be deduced from the Explanatory Report to the Convention that the Contracting Parties deliberately did not create a general new mutual assistance regime with the intention of allowing for the use of already existing and well-established tools. In addition, the content of Articles 25 to 31, 33 and 34 is not sufficiently specific to be self-executing. Standing to lodge a constitutional complaint does not follow from the fact that national law is to be interpreted, where possible, in accordance with the international obligations of the Federal Republic of Germany either (cf. headnotes above).

With regard to Article 32 of the Cybercrime Convention, the applicants could validly claim to be directly affected, as foreign states may directly access data stored in Germany pursuant to and in accordance with the conditions set out in Article 32 of the Convention. No German implementing act, which could be challenged before the German courts, exists in this respect. In addition, the applicants will usually not gain knowledge of data access by foreign state authorities and therefore will not be able to challenge them. However, the applicants did not demonstrate sufficiently plausibly that a violation of their fundamental rights was possible. With regard to Article 32.a of the Convention, which concerns publicly available data, they either did not – or not in sufficient detail – discuss the differences between access to data and further use of data in the context of a possible violation of the right to informational self-determination (for the applicable standards, see the headnotes above). With regard to Article 32.b of the Convention, which covers the cases in which the competent person consents to transfer of stored data, the applicants did not submit that and to which extent foreign authorities might interfere with fundamental rights.

III. Justice Huber submitted a separate opinion. In his view, the constitutional complaint was both admissible and well-founded with regard to Article 32.a of the Convention. According to him, this Article constituted an unconstitutional authorisation for foreign states to interfere with the right to informational self-determination. He held that while the collection of publicly available data by those wielding German public authority does not as such interfere with that right, a legal basis is required

where it does. In his opinion, as a rule, such an authorisation to interfere with fundamental rights can be accorded to German state organs; in addition, the exercise of sovereign powers can be transferred to supra – and international organisations. In his view, however, sovereign powers cannot be transferred to foreign states.

He emphasised that the constitutional organs' obligation to protect also applies in scenarios in which measures by a foreign state authority have effects *vis-à-vis* residents in Germany and that such an obligation can also follow from the right to informational self-determination. In his view, Article 32.a of the Convention authorises the impairment of interests protected under that right without any restrictions. According to him, the right to informational self-determination is also violated because foreign states are being authorised to commit serious interferences with fundamental rights in violation of the principle of the sovereignty of people and without constitutional basis. In his view, Article 32.a of the Convention also violates the "right to democracy"; the legislator must ensure that the legal situation under the Convention is made compatible with the requirements under the Constitution.

Languages:

German.



Identification: GER-2016-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 21.06.2016 / **e)** 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 / **f)** Outright Monetary Transactions (OMT) / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Wertpapier-Mitteilungen*, Teil IV 2016, 1275-1288; *Recht der Internationalen Wirtschaft* 2016, 519-536; *Neue Juristische Wochenschrift* 2016, 2473-2489; CODICES (German).

Keywords of the systematic thesaurus:

1.1.1.1.1 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Constitution.**

3.1 General Principles – **Sovereignty.**

3.3.1 General Principles – Democracy – **Representative democracy.**

4.17.1.5 Institutions – European Union – Institutional structure – **Court of Justice of the European Union.**

4.17.1.6 Institutions – European Union – Institutional structure – **European Central Bank.**

4.17.2.1 Institutions – European Union – Distribution of powers between the EU and member states – **Sincere co-operation between EU Institutions and member States.**

Keywords of the alphabetical index:

Constitution, identity / Constitutional Court / European Union act, *ultra vires* / European Union, economic policy, scope / Identity review / Preliminary ruling, Court of Justice of the European Communities, jurisdiction / Responsibility with respect to integration (*Integrationsverantwortung*).

Headnotes:

1. In order to ensure their possibilities of influence in the European integration process, citizens are generally entitled to the right that a transfer of sovereign powers only takes place in accordance with the requirements the Basic Law has set out in the second and third sentences of Article 23.1 of the Basic Law and Article 79.2 of the Basic Law to that end.

2. *Ultra vires* acts of institutions, bodies, offices and agencies of the European Union violate the European integration agenda laid down in the Act of Approval pursuant to the second sentence of Article 23.1 of the Basic Law and thus also the principle of sovereignty of the people (first sentence of Article 20.2 of the Basic Law). The *ultra vires* review aims to protect against such violations of the law.

3. Given their responsibility with respect to European integration, the constitutional organs must counter acts of institutions, bodies, offices and agencies of the European Union which violate the constitutional identity or constitute an *ultra vires* act.

4. The German *Bundesbank* may only participate in a future implementation of the Outright Monetary Transactions (OMT) programme if and to the extent that the prerequisites defined by the Court of Justice of the European Union are met; i.e. if:

- purchases are not announced;
- the volume of the purchases is limited from the outset;
- there is a minimum period between the issuing of the government bonds and their purchase by the European System of Central Banks (hereinafter, “ESCB”) that is defined from the outset and prevents the issuing conditions from being distorted;
- only government bonds of Member States are purchased that have bond market access enabling the funding of such bonds,
- purchased bonds are held until maturity only in exceptional cases; and
- purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.

Summary:

I. With their application for *Organstreit* proceedings (i.e., proceedings relating to disputes between constitutional organs), the complainants and the applicant challenge, first, the participation of the German Central Bank in the implementation of the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (hereinafter, “OMT Decision”), and secondly, that the German Federal Government and the German Parliament (*Bundestag*) failed to act regarding this Decision. The OMT Decision envisages that the ESCB can purchase government bonds of selected Member States up to an unlimited amount if, and as long as, these Member States, at the same time, participate in a reform programme as agreed upon with the European Financial Stability Facility or the European Stability Mechanism. The stated aim of the Outright Monetary Transactions is to safeguard an appropriate monetary policy transmission and the consistency or “singleness” of the monetary policy. The OMT Decision has not yet been put into effect.

II. The constitutional complaints and the *Organstreit* proceedings are partially inadmissible. In particular, the constitutional complaints are inadmissible to the extent that they directly challenge acts of the European Central Bank.

To the extent that the constitutional complaints and the application for *Organstreit* proceedings are admissible, they are unfounded.

By empowering the Federation to transfer sovereign powers to the European Union (second sentence of Article 23.1 of the Basic Law), the Basic Law also accepts a precedence of application of European Union law (*Anwendungsvorrang des Unionsrechts*). However, this only extends as far as the Basic Law and the relevant Act of Approval permit or envisage the transfer of sovereign powers. Therefore, limits for the opening of German statehood derive from the constitutional identity of the Basic Law guaranteed by Article 79.3 of the Basic Law and from the European integration agenda (*Integrationsprogramm*), which is laid down in the Act of Approval and vests European Union law with the necessary democratic legitimacy for Germany.

The Basic Law's fundamental elements of the principle of democracy (Article 20.1 and 20.2) are part of the Basic Law's constitutional identity, which has been declared to be beyond the reach both of constitutional amendment (Article 79.3) and European integration (third sentence of Article 23.1 in conjunction with Article 79.3). Therefore, the legitimacy given to state authority by elections may not be depleted by transfers of powers and tasks to the European level. Thus, the principle of sovereignty of the people (*Volkssouveränität*) (first sentence of Article 20.2 of the Basic Law) is violated if institutions, bodies, offices and agencies of the European Union that are not adequately democratically legitimised through the European integration agenda laid down in the Act of Approval exercise public authority.

When conducting its identity review, the Federal Constitutional Court examines whether the principles declared by Article 79.3 of the Basic Law to be inviolable are affected by transfers of sovereign powers by the German legislature or by acts of institutions, bodies, offices and agencies of the European Union. This concerns the protection of the fundamental rights' core of human dignity (Article 1 of the Basic Law) as well as the fundamental principles that characterise the principles of democracy, of the rule of law, of the social state, and of the federal state within the meaning of Article 20 of the Basic Law.

When conducting its *ultra vires* review, the Federal Constitutional Court (merely) examines whether acts of institutions, bodies, offices and agencies of the European Union are covered by the European integration agenda (second sentence of Article 23.2 of the Basic Law), and thus by the precedence of application of European Union law. Finding an act to be *ultra vires* requires – irrespective of the area concerned – that it manifestly exceeds the competences transferred to the European Union.

Similar to the duties to protect (*Schutzpflichten*) mandated by the fundamental rights, the responsibility with respect to European integration (*Integrationsverantwortung*) requires the constitutional organs to protect and promote the citizens' rights protected by the first sentence of Article 38.1 in conjunction with the first sentence of Article 20.2 of the Basic Law if the citizens are not themselves able to ensure the integrity of their rights. Therefore, the constitutional organs' obligation to fulfil their responsibility with respect to European integration is paralleled by a right of the voters enshrined in the first sentence of Article 38.1 of the Basic Law. This right requires the constitutional organs to ensure that the drop in influence (*Einflusssknick*) and the restrictions on the voters' "right to democracy" that come with the implementation of the European integration agenda do not extend further than is justified by the transfer of sovereign powers to the European Union.

However, just like the duties of protection inherent in fundamental rights, the responsibility with respect to European integration may in certain legal and factual circumstances concretise in such a way that a specific duty to act results from it.

According to these standards and if the conditions listed below are met, the inaction on the part of the Federal Government and Parliament with regard to the policy decision of the European Central Bank of 6 September 2012 does not violate the complainants' rights under the first sentence of Article 38.1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law. Furthermore, the Parliament's rights and obligations with regard to European integration – including its overall budgetary responsibility – are not impaired.

The Federal Constitutional Court bases its review on the interpretation of the OMT decision formulated by the Court of Justice in its judgment of 16 June 2015. The Court of Justice's finding that the policy decision on the OMT programme is within the bounds of the respective competences and does not violate the prohibition of monetary financing of the budget still remains within the mandate of the Court of Justice (second sentence of Article 19.1 TEU).

Nevertheless, the manner of judicial specification of the Treaty on the Functioning of the European Union evidenced in the judgment of 16 June 2015 meets with serious objections on the part of the Panel. These objections concern the way the facts of the case were established, the way the principle of conferral was discussed, and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted.

Despite these concerns, if interpreted in accordance with the Court of Justice's judgment, the policy decision on the OMT programme does not – within the meaning of the competence retained by the Federal Constitutional Court to review *ultra vires* acts – "manifestly" exceed the competences attributed to the European Central Bank.

If interpreted in accordance with the Court of Justice's judgment, the policy decision on the technical framework conditions of the OMT programme as well as its possible implementation also do not manifestly violate the prohibition of monetary financing of the budget.

Since, against this backdrop, the OMT programme constitutes an *ultra vires* act if the framework conditions defined by the Court of Justice are not met, the Central Bank may only participate in the programme's implementation if and to the extent that the prerequisites defined by the Court of Justice and set out in headnote no. 4 are met.

Furthermore, if interpreted in accordance with the Court of Justice's judgment, the OMT programme does not present a constitutionally relevant threat to the Parliament's right to decide on the budget.

However, due to their responsibility with respect to European integration, the Federal Government and Parliament are under a duty to closely monitor any implementation of the OMT programme.

Cross-references:

Federal Constitutional Court:

- 2 BvR 1390, 1421, 1438, 1439, 1440, 1824/12, 2 BvE 6/12, 18.03.2014, *Bulletin* 2014/1 [GER-2014-1-012];
- 2 BvR 2728, 2729, 2730, 2731/13, 2 BvE 13/13, 14.10.2014, *Bulletin* 2014/1 [GER-2014-1-005];
- 2 BvR 2134, 2159/92, 12.10.1993, *Bulletin* 1993/3 [GER-1993-3-004]
- 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 2 BvR 182/09, 30.06.2009, *Bulletin* 2009/2 [GER-2009-2-019];
- 2 BvR 987, 1485, 1099/10, 07.09.2011, *Bulletin* 2011/3 [GER-2011-3-017];
- 1 BvR 1916/09, 19.07.2011, *Bulletin* 2011/3 [GER-2011-3-015].

Languages:

German; English (on the Court's website).



Identification: GER-2016-2-015

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 29.06.2016 / e) 1 BvR 1015/15 / f) / g) to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / h) *Wertpapiermitteilungen* 2016, 1497; *Deutsche Wohnungswirtschaft* 2016, 262; *Wohnungswirtschaft und Mietrecht* 2016, 540; CODICES (German).

Keywords of the systematic thesaurus:

1.1.1.1.1 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Constitution.**

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

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

Keywords of the alphabetical index:

Contract, parties, autonomy / Contractual freedom, restriction.

Headnotes:

In order to counter social or economic imbalances, the legislator may restrict, on the basis of its assessment of the demand situation regarding rented accommodation, by introducing an obligation under which the party who engages the letting agent must pay the agent's commission for facilitating the tenancy agreement (*Bestellerprinzip*), the freedom, protected under Article 12.1 of the Basic Law to agree a fee for professional services in individual contracts.

Summary:

I. The statutory arrangements introduced in the Act to Curb the Increase in Rents in Overheated Housing Markets and to Strengthen the *Bestellerprinzip* in the Facilitation of Residential Tenancy Agreements (Tenancy Law Amendment Act) on 21 April 2015 oblige the party who engages the letting agent to pay the agent's commission for facilitating the tenancy agreement (*Bestellerprinzip*). Agreements obliging flat seekers to pay commission which is owed by the landlord or a third party are also invalid. Violations render letting agents liable to fines of up to

EUR 25,000. This amendment largely deprives agents of the receipt of a commission from prospective tenants.

Applicants 1 and 2 are estate agents and with their constitutional complaint they are essentially complaining of a violation of their freedom of occupation under Article 12.1 of the Basic Law. Applicant 3 is the tenant of a flat and is essentially complaining of the violation of his freedom of contract as protected by Article 2.1 of the Basic Law.

II. The First Panel of the Federal Constitutional Court decided that these arrangements satisfy constitutional requirements. The legislator balances the conflicting interests of flat seekers and letting agents in a way which meets proportionality requirements.

The Court decided as follows:

The constitutional complaint by Applicant 3 is inadmissible. The constitutional complaint by Applicants 1 and 2 is admissible, but unfounded.

First, Applicants 1 and 2 may raise their constitutional complaint against the statutory provisions directly because, as estate agents, they are directly affected by the amendment of the law. Without any special executing act being required in that respect, they now may no longer demand commission from flat seekers within what was used to be a common form of a contractual structure that can be designed freely with regard to its form and content.

Second, while it is true that the challenged provisions restrict the freedom of occupation (Article 12.1 of the Basic Law) of Applicants 1 and 2, this is constitutionally justified.

In order to counter social or economic imbalances, the legislator may restrict by mandatory statutory law the freedom, protected under Article 12.1 of the Basic Law, to agree a fee for professional services in individual contracts. As with other private law provisions, which place limits on the freedom to make contractual arrangements, this is a matter of balancing interests so as to bring the freedom of one party into harmony with the freedom of the other party. The legislator has a wide margin of appreciation and leeway to design such a balance.

The statutory implementation of the *Bestellerprinzip* satisfies the constitutional requirements. It brings the opposing interests into balance, which satisfies proportionality requirements, and is, in particular, in line with the legislator's powers to shape matters with regard to the social state. It has clearly established, in a transparent way, that social and economic

imbalances exist in the market for rented accommodation to the detriment of flat seekers, and has created arrangements intended to bring about a reasonable and appropriate balance, also in terms of the social state.

The challenged provisions bring about a reasonable and appropriate balance between conflicting interests. Letting agents are not compelled to make fundamental changes to their commercial activities and offerings and can continue to be active in this field of business, since it is still possible for them to be engaged to facilitate residential tenancy agreements subject to commission.

The interests of Applicants 1 and 2 in the free exercise of their profession, which is protected as a fundamental right, collides with the equally legitimate interests of flat seekers. The statutory implementation of the *Bestellerprinzip* is intended to remove obstacles for flat seekers in renting flats. The aim is to avoid overburdening flat seekers, especially those who are in an economically weak position. This, and protection against disadvantages due to the demand situation in the housing market, moreover justifies including, on the flat seekers' side of the scales, considerations reflecting the social state principle (Articles 20.1 and 28.1 of the Basic Law) in the balance of interests.

Taking into consideration the wide margin of appreciation and leeway to design such a balance available to the legislator, the aim of creating a reasonable and appropriate balance is not missed. The legislator is taking account of an imbalance arising due to demand for rented accommodation outstripping scarce supply. In this regard, it has addressed the burdening of flat seekers with a not inconsiderable cost factor that results from letting agents' commissions and created arrangements allocating these costs to the landlords, since it is they in whose interests such expenditure is typically incurred. Its decision to choose to do this by limiting the contractual possibilities available to letting agents and thus their freedom of occupation is within the wide leeway to design afforded to the legislator.

3. There is no indication that the introduction of the *Bestellerprinzip* violates other fundamental rights. In particular, Applicants 1 and 2 have not put forward any property rights position which would come under the protection of Article 14 of the Basic Law.

4. Nor is the freedom of occupation of Applicants 1 and 2 violated by the requirement which was introduced at the same time and according to which facilitation agreements for residential tenancy agreements should be concluded in writing (§ 2.1.2 of

the Law Regulating the Facilitation of Residential Tenancies). This text-form requirement serves the legitimate purpose of reliably informing the parties of the content and legal implications of their declarations and thus promotes legal certainty and legal clarity. The text-form is not only suitable and necessary, but also appropriate for achieving this purpose.

Languages:

German.



Identification: GER-2016-2-016

a) Germany / b) Federal Constitutional Court / c) Second Chamber of the Second Panel / d) 14.07.2016 / e) 2 BvR 661/16 / f) g) h) CODICES (German).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.9 General Principles – **Rule of law**.
4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.

Keywords of the alphabetical index:

Independence, judge, court / Judiciary, independence / Judiciary, independence, guarantees.

Headnotes:

Article 97 of the Basic Law, concerning the independence of judges, is not a fundamental right within the meaning of § 90 of the Federal Constitutional Court Act. Therefore, a violation of Article 97 of the Basic Law as such cannot be claimed by means of a constitutional complaint. However, the Federal Constitutional Court has already recognised that judges, as a special group belonging to the civil service, are also covered by the scope of Article 33.5 of the Basic Law, which protects the traditional principles of the professional civil service. Article 33.5 of the Basic Law accords judges individual rights similar to fundamental rights to the extent that one can prove the existence of traditional principles of the law on the judicial office, which the legislator would have to observe and which shape the

personal legal status of judges. These principles, in particular, include the principle of personal independence and independence in judicial decision-making. However, the traditional principles of the law on the judicial office under Article 33.5 of the Basic Law can only contain such guarantees as protected by the independence of the judiciary within the meaning of Article 97 of the Basic Law.

All judges are guaranteed independence in judicial decision-making by Article 97.1 of the Basic Law. According to Article 97.1 of the Basic Law, judges are free from instructions; judicial independence in judicial decision-making is institutionally protected by the guarantee of personal independence pursuant to Article 97.2 of the Basic Law. The statutory provisions on the loss of the judicial position if convicted and on the removal from office in the course of formal disciplinary proceedings are compatible with Article 97.2 of the Basic Law because the premature end of judicial duties results from “a judicial decision” and on grounds and within the form provided by law.

As a rule, the independence in judicial decision-making guaranteed in Article 97.1 of the Basic Law only covers the relationship of the judiciary to non-judicial public authority. Therefore, a statute that requires a judge to follow another court’s decision does not violate the judge’s independence in judicial decision-making. Due to the independence in judicial decision-making guaranteed under Article 97.1 of the Basic Law, a judge may base his or her decisions on his own legal views, even if all other courts – including those at higher tiers – take the opposite view where no binding effect of another court’s decision is provided by statute. It is constitutive of the independence of judges that the administration of justice is not uniform.

However, pursuant to Article 20.3 of the Basic Law, the judiciary is bound by law and statute. The judge, who is subject to statutory law, is not impaired in his or her independence guaranteed by the Constitution (Article 97.1 of the Basic Law) by being bound in this way, such a binding effect derives from the rule of law. Both being bound by the law and being subject to statutory law shape and specify the exercise of judicial power entrusted to the judges (Article 92 of the Basic Law). Against this background, it is precisely the requirement that courts only base their decisions on law and statutes that judicial independence in judicial decision-making, guaranteed under Article 97.1 of the Basic Law, is meant to ensure compliance with.

Summary:

I. The applicant is a former Local Court judge. In that position, he was subject to disciplinary proceedings for having produced too little output and for having used the official court letterhead to complain about unsatisfactory street cleaning *vis-à-vis* the senior mayor of the town. Since 1997, he worked in the Local Court’s administrative offences division. Since about 2002, he felt overburdened with work. However, for lack of objective grounds, work overload was not officially confirmed. In 2010 and 2012, the applicant notified the Director of the Local Court of his condition. The subjective feeling of being overburdened also derived from health problems. In the course of the criminal proceedings against the applicant, a psychiatrist diagnosed traits of an anancastic personality disorder. However, the applicant did not submit to sufficient treatment for his health problems. Therefore, his general psychological condition deteriorated continually.

Already before 2005, the applicant reprimanded administrative authorities competent for administrative fining for not submitting the relevant measurement reports with the files in the context of proceedings relating to, e.g., speeding. He also informed them that he intended to render “different decisions” if they would not submit those reports in the future. Between 2006 and 2008, the applicant acquitted several accused in similar proceedings where the measurement reports were not in the files. In his reasons, he argued that he was unable to verify the correctness of the measurements for lack of measurement reports. In his view, this presented an impediment to proceedings. In several cases, the Higher Regional Court reversed such decisions. The applicant then treated the cases remanded to him as required. In 2011, the applicant again acquitted several accused for lack of measurement reports or calibration certificates in proceedings for speeding, driving through red lights and for exceeding permissible maximum weights for vehicles. In his reasoning, he stated that the Higher Regional Court, in its past decisions, had failed to recognise the function of the judicial duty to investigate and had reversed the roles of investigating authorities and courts. He further stated that it was not the court’s task to remedy the deficiencies in administrative file management, but rather to ensure procedural “equality of arms” for the person concerned.

As a consequence of these decisions, he was indicted for perversion of justice in 2011, but acquitted by the competent Regional Court in 2013. The Federal Court of Justice reversed that decision and remanded it to the Regional Court. In the following decision, the applicant was convicted for perversion of justice on seven counts.

In his constitutional complaint, he challenged the Federal Court of Justice's decision and his conviction for perversion of the course of justice by the Regional Court. He asserted that his right to judicial independence had been violated.

II. The Federal Constitutional Court did not admit the constitutional complaint for decision, as the admission criteria under § 93a.2 of the Federal Constitutional Court Act were not met. In addition, it held that the constitutional complaint was unfounded.

The decision is based on the following considerations:

The challenged decisions are not objectionable under constitutional law. There was no violation of judicial independence. The applicant was bound by law and statutes pursuant to Article 20.3 of the Constitution. However, in his decisions, the applicant resorted to considerations other than law and statutes alone. In particular, he at least partially also pursued the aim of disciplining the authorities competent for administrative fining and the prosecution.

In addition, while not every misconduct by a judge that results from chronic work overload fulfils the constituent elements of a perversion of justice, the applicant's untenable application of the law was not solely based on such work overload. While chronic work overload can be taken into account in individual cases, it was not relevant in the applicant's case.

Languages:

German.



Hungary Constitutional Court

Important decisions

Identification: HUN-2016-2-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 08.07.2016 / **e)** 13/2016 / **f)** On the ban on protesting in front of the Prime Minister's house / **g)** *Magyar Közlöny* (Official Gazette), 2016/106 / **h)**

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Protest, ban / Prime minister, residence.

Headnotes:

The constitutional right to freedom of assembly is not violated by a police ban on staging demonstrations in front of the Prime Minister's house and the Supreme Court headquarters, but the existence of contradictory laws on the subject is unconstitutional.

Summary:

1. In December 2014 people affected by adverse interest rates from foreign currency denominated loans held protests around Budapest. Some of the protests were to have taken place in front of the Prime Minister's Budapest residence and at the Supreme Court headquarters, but police prevented that from happening. A private individual who had participated in a series of demonstrations held in December 2014 by troubled foreign-currency loan holders challenged the constitutionality of police and court bans. A petition was filed with the Constitutional Court, arguing that the police action violated the constitutional rights of citizens to assemble. The applicant claimed that banning demonstrations at the Prime Minister's residence and at the Supreme Court headquarters violated the constitutional right to peaceful assembly.

II. The Constitutional Court held that the protestors' constitutional right to freedom of assembly was not violated but, rather, lawfully curtailed by the police, because holding the demonstration would have interfered with the rights and freedoms of others (namely the Prime Minister). The Court noted that demonstrations could be held at other sites apart from the banned premises. The Court decision in question was not unconstitutional.

Concerns were, however, raised over the legal regulations concerning the constitutional right to assembly and the right to privacy. No legal framework currently exists to guide the police on how to act when faced with a clash between the fundamental rights of the right to a home and freedom of movement and the right to demonstrate. The Court ruled that Parliament should enact appropriate legislation by the end of 2016 to assist the police and the courts in cases of such conflict.

The Constitutional Court decision also requires the police to write to organisers suggesting alternative locations when a demonstration is banned. To date the police have left organisers to choose new locations.

III. Judge Ágnes Czine attached a concurring opinion; Judges Salamon and Stumpf attached dissenting opinions to the decision.

Cross-references:

- no. 3/2013, 14.02.2013, *Bulletin* 2013/1 [HUN-2013-1-002];
- no. 75/2008, 29.05.2008, *Bulletin* 2008/2 [HUN-2008-2-004].

Languages:

Hungarian.



Identification: HUN-2016-2-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 22.07.2016 / **e)** 3151/2016 / **f)** On the refugee quota referendum / **g)** *Magyar Közlöny* (Official Gazette), 2016/17 / **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.**

1.3.4.6.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of referendums and other instruments of direct democracy – **Admissibility.**

Keywords of the alphabetical index:

Refugee quota, referendum / Review, procedural limits.

Headnotes:

The Constitutional Court may examine the merits of a parliamentary resolution ordering a referendum if, between the authentication of the question and the ordering of the referendum, circumstances had changed in a way that might significantly affect the decision. It cannot examine the content of the referendum question itself.

Summary:

I. On 24 February 2016 the Hungarian Government called for a referendum allowing the electorate to vote on this question:

“Do you want the European Union, without the consent of Parliament, to order the compulsory settlement of non-Hungarian citizens in Hungary?”

The National Election Committee has the power to review the formulation and content of the referendum question. Its decision can be challenged before the Supreme Court. The applicants raised concern over the question, particularly its inaccurate wording, contending that the notion of “compulsory settlement” in the question does not exist in Hungarian or in EU law. The terms used in connection with refugee matters are “transfer” or “resettlement”. Despite these concerns the referendum question was passed both by the National Election Committee and the Supreme Court.

Therefore in May 2016, the Hungarian Parliament adopted Parliamentary Resolution no. 8/2016 and ordered the referendum. Under the Act on the Constitutional Court, it is open to anybody to file a petition with the Court to review the constitutionality and lawfulness of this parliamentary decision, but the scope of such constitutional review is limited by Section 33 of this Act. The Constitutional Court can examine the merits of the resolution if, between the authentication of the question and the ordering of the referendum, circumstances changed to a significant degree in a manner that may significantly affect the decision. It cannot examine the content of the referendum question itself.

Several applicants had asked the Court to declare the parliamentary resolution ordering the referendum unconstitutional. Under the Constitution, national referenda may be held about “any matter within the tasks and competences of Parliament”. The applicants’ main concern was that it was not within Parliament’s power to pass such a resolution, since the referendum question would affect EU common policy. Title V Chapter 2 of the Treaty on the Functioning of the European Union deals with policies on external border control, asylum and immigration as EU common policies. Consequently, the Hungarian Parliament has no direct competence over dealings between Hungary and the European Union on migration matters.

The applicants also claimed that between the authentication of the question and the ordering of the referendum, circumstances had changed significantly in a manner that significantly affected the decision. On 4 May 2016, the European Commission presented legislative proposals to reform the Common European Asylum System *inter alia* by providing “for tools enabling sufficient responses to situations of disproportionate pressure on Member States’ asylum systems” through a “corrective allocation mechanism”.

II. The Constitutional Court refused the petitions against the parliamentary resolution, on the basis that it only had the power to investigate the actions of Parliament, not the referendum question itself. It found that the parliamentary proceedings had not breached the Rules of Procedures of Parliament and also rejected the petitions on the grounds that the applicants did not have the right to challenge the resolution based upon the arguments concerning the competencies of the Hungarian Parliament and the EU and the changed circumstances. They should instead have raised a constitutional right violation.

With regard to the contention that the subject of the referendum concerned EU common policies, the Constitutional Court stressed that the merits of the referendum question should not be examined in the current proceedings.

As the Constitutional Court’s decision upheld the parliamentary resolution, the referendum was held on 2 October 2016, but was invalid due to low turnout.

Languages:

Hungarian.



Italy

Constitutional Court

Important decisions

Identification: ITA-2016-2-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 15.06.2016 / **e)** 174/2016 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 29, 20.07.2016 / **h)**.

Keywords of the systematic thesaurus:

3.20 General Principles – **Reasonableness**.
 3.22 General Principles – **Prohibition of arbitrariness**.
 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Pension, survivor's / Pension, new calculation / Spouse, solidarity / Spouse, pension / Society, changing traditions.

Headnotes:

By basing the reduction in a survivor's pension on the age of the "direct" pension holder (over 70 years old), on the age difference between the spouses (more than 20 years) and on the duration of the marriage, the impugned article introduces a rule that runs counter to the principle of reasonableness (Article 3 of the Constitution) and contrasts with the aim of establishing a social safety net (Articles 36 and 38 of the Constitution) and of "solidarity" between spouses. The provision is all the more unreasonable since life expectancy has increased considerably.

Summary:

I. An article of a legislative decree, adopted by the government to address a serious financial crisis during the summer of 2011, provided that survivor's pensions payable as from 1 January 2012 would be reduced – in cases where the direct pension holder was over 70 years old and the age difference between the spouses exceeded 20 years – by 10 % for every year of marriage, up to 10.

The provision was not applicable in the presence of children who were under age, students or disabled. The Court of Audit, which deals with pension cases, complained that the rule violated Article 3 of the Constitution (the criterion of reasonableness and the principle of equality), Article 29 of the Constitution (the freedom to marry guaranteed by this article is undermined by a pensioner's fear of not being able to guarantee their surviving spouse sufficient means of subsistence, as a result of the reductions introduced by the provision in question), Article 36.1 of the Constitution and Article 38.2 of the Constitution (concerning the "deferred income" character of a pension, which must be proportional to the quantity and quality of work carried out during a person's working life and cannot be subject to discriminatory deductions).

II. After having dismissed the objections relating to the non-applicability of the challenged rule in the specific case brought before the lower court and the alleged failure to provide sufficient justification for raising the issue of constitutionality, the Court examined the distinctive features of a survivor's pension. It is a social welfare instrument designed to protect citizens from financial difficulties by guaranteeing them the minimum economic and social conditions in which to exercise their civil and political rights (Article 3.2 of the Constitution), while however favouring workers over other citizens, as is moreover provided for by Article 38.2 of the Constitution. In pursuance of Articles 36.1 and 38.2 of the Constitution, the survivor's pension must be proportional to the work carried out throughout the "direct" pension holder's working life and must suffice to ensure a "free and dignified" life.

Survivor's pensions are intended as a social safety net, which is also based on a link of "solidarity" beyond death between the spouses, because they are intended to guarantee the surviving spouse's livelihood. In a field where decisions of a personal nature and inviolable freedoms are highly important, the principles of equality and reasonableness must guide any legislative intervention: parliament must ensure adequate social protection while weighing many interests, so as to guarantee the balance of the social protection system as a whole, without interfering, however, in the decisions of citizens who, even though they are elderly, wish to establish an emotional attachment.

The measure in question was adopted within the framework of legislation aimed at addressing a financial crisis and went hand in hand with other measures to reduce spending, such as an increase in the retirement age for women working in the private sector, a change of pension indexation system and an increase in pension contributions.

It is clear that the basis for the measure subject to constitutional review lies in the presumption that the marriage of a person over the age of 70 with a partner who is at least 20 years younger is solely a means of cheating the system, unless there are children who are minors, students or disabled persons.

This is an absolute presumption (*juris et de jure*) which, by excluding all evidence to the contrary, can be seen to breach the principle of reasonableness. The provision in question exaggerates the potentially unhealthy aspect of a “late marriage”, since it implies that any marriage between an older person and a younger person is fraudulent. It therefore has the sole aim of preventing abuses which are already sanctioned by other pre-existing rules in the Italian legal system.

The provision is inconsistent with the evolution of society and the considerable changes that have taken place in social behaviour (conduct), which constitutional case-law has taken into consideration in that the Court held contrary to the Constitution similar provisions that denied the right to a survivor's pension in the case of a marriage celebrated after the definitive termination of service, one spouse being over 65 years of age and the marriage having lasted less than two years (Decision no. 123 of 1990), and in the case of a marriage celebrated when one spouse was over the age of 65 and the age difference between the spouses was more than 20 years (Decision no. 587 of 1988).

Languages:

Italian.



Japan Supreme Court

Important decisions

Identification: JPN-2016-2-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 16.12.2015 / **e)** (O) 1079/2013 / **f)** / **g)** *Minshu* (Official Gazette), 69-8 / **h)** *Hanreitaimuzu* 1421; *Hanreijiho* 2284; *Kateinohotosaiban (Family Court Journal)* 5; CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**

Keywords of the alphabetical index:

Marriage, remarriage, prohibition period, women / Paternity, determination, after divorce / Child, family, stability.

Headnotes:

With the advancement in medical techniques and scientific technology and the changes in the social situation, the part of the relevant provision prescribing the prohibition of remarriage for a period exceeding 100 days had come to impose an excessive restriction on women's freedom to marry and had become unconstitutional by 2008 at the latest.

Summary:

1. With regard to the constitutionality review of the provision of Article 733.1 of the Civil Code, which prescribes a six-month period of prohibition of remarriage imposed on women, the majority opinion stated as summarised below.

While the part of this provision which prescribes the 100-days period of prohibition of remarriage does not violate Articles 14.1 or 24.2 of the Constitution, the part of the same provision which prohibits women from remarrying for a period exceeding 100 days had come to violate Articles 14.1 and 24.2 of the Constitution by 2008.

Article 772 of the Civil Code provides that a child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived by the wife during marriage and thus presumed to be the child of the husband. The legislative purpose of the period of prohibition of remarriage under Article 733.1 of the Civil Code is to avoid confusion over paternity that may arise from such presumption. In light of the importance of ensuring the legal stability of the child's family status by determining the father-child relationship at an early date, the part of the relevant provision prescribing the 100-day period of prohibition of remarriage can be deemed to be reasonable in relation to this legislative purpose and therefore constitutional. However, the part of the relevant provision prescribing the prohibition of remarriage for a period exceeding 100 days cannot be considered to be necessary in order to avoid confusion over paternity. This part may have had significance in preventing the occurrence of a dispute over a father-child relationship in the past, but with the advancement in medical techniques and scientific technology and the changes in the social situation, it had come to impose an excessive restriction on women's freedom to marry and had become unconstitutional by 2008 at the latest.

2. With regard to whether the appellant's claim for state compensation can be upheld, the majority opinion stated as summarised below.

In order to find illegality in the context of the application of Article 1.1 of the State Redress Act with regard to the Diet's failure to amend or abolish unconstitutional provisions of law, the provisions of law in question must be held to be obviously unconstitutional due to restricting the people's rights or interests without reasonable grounds. However, it cannot be said that as of 2008, when the part of the provision of Article 733.1 of the Civil Code prescribing the prohibition of remarriage for a period exceeding 100 days had become unconstitutional, it was obvious that said part was unconstitutional.

Therefore, the appellant's claim for state compensation is groundless.

Supplementary information:

As a consequence of this decision, Article 733 of the Civil Code has been amended.

Languages:

Japanese, English (translation by the Court).



Identification: JPN-2016-2-002

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 16.12.2015 / **e)** (O) 1023/2014 / **f)** / **g)** *Minshu* (Official Gazette), 69-8 / **h)** *Hanreitaimuzu* 1421; *Hanreijiho* 2284; *Kateinohotosaiban (Family Court Journal)* 5; CODICES (English).

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**.

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

Keywords of the alphabetical index:

Surname, choice, marriage.

Headnotes:

Freedom from being forced to change one's surname at the time of marriage cannot be regarded as a part of personal rights that are guaranteed as constitutional rights. The same surname system prescribed in this provision, which requires a married couple to use the same surname, does not involve in itself gender inequality as a matter of form. The same surname system cannot be found to be unreasonable immediately in light of the requirement of individual dignity and the essential equality of the sexes.

Summary:

With regard to constitutionality review of the provision of Article 750 of the Civil Code, which stipulates that a husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage, the majority opinion stated that the provision of Article 750 of the Civil Code does not violate Articles 13, 14.1 or 24 of the Constitution, for the reasons summarised below.

1. In relation to Article 13 of the Constitution, "freedom from being forced to change one's surname" at the time of marriage cannot be regarded as a part of personal rights that are guaranteed as constitutional rights.

2. In relation to Article 14.1 of the Constitution, the provision of Article 750 of the Civil Code leaves it to the persons who are to marry to discuss and decide which surname they are to adopt. The same surname system prescribed in this provision, which requires a married couple to use the same surname, does not involve in itself gender inequality as a matter of form.

3. With regard to matters concerning marriage and the family, Article 24 of the Constitution leaves it primarily to the Diet's reasonable legislative discretion to establish specific systems, and it further indicates the legislative requirement or guideline that laws to specify such matters should be enacted from the standpoint of individual dignity and the essential equality of the sexes, thus defining the limits to the Diet's discretion. Accordingly, it is necessary to examine whether the legal provision concerning marriage and the family, which complies with Articles 13 or 14.1 of the Constitution, also stays within the limits of the Diet's discretion defined by Article 24 of the Constitution.

The same surname system has been established in the Japanese society. It is found to be reasonable to determine a single appellation for a family, which is a natural and fundamental unit of persons in society. In addition, the same surname system enables a husband and wife to publicly indicate to others that they are members of one unit, i.e. a family, and functions to distinguish the couple from others. It may also be meaningful to some extent to secure a framework wherein a child born to a married couple uses the same surname as that used by his or her parents.

Under the same surname system, it cannot be denied that a person who is to change his or her surname upon marriage would feel a loss of identity or suffer other disadvantages due to such change, and it is presumed that women are more likely to suffer such disadvantages. However, these disadvantages can be eased to some degree as the use of the pre-marriage surname as the by-name after the marriage has become popular.

Taking all the other circumstances into consideration as well, the same surname system cannot be found to be unreasonable immediately in light of the requirement of individual dignity and the essential equality of the sexes. Consequently, the provision of Article 750 of the Civil Code does not violate Article 24 of the Constitution.

The implementation of the same surname system largely depends on how the public regards the marriage system, including the legitimacy system.

The appropriate design of this type of system is a matter that needs to be discussed and determined by the Diet.

Languages:

Japanese, English (translation by the Court).



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2016-2-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 27.04.2016 / **e)** KT11-N7/2016 / **f)** On the procedure for removing the immunity of a Member of Parliament (*Seimas*) / **g)** TAR (Register of Legal Acts), 10540, 28.04.2016, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

Keywords of the alphabetical index:

Member, parliament, removal / Member, parliament, immunity.

Headnotes:

In cases where the Statute of the *Seimas* lays down more demanding requirements than the Constitution in terms of safeguarding the immunity of Members of Parliament, Parliament must comply with these requirements.

Summary:

In response to a petition from a group of Members of Parliament, the Constitutional Court held that a resolution of Parliament – through the adoption of which Parliament had given its consent to a Member of Parliament being held criminally liable, being detained or otherwise having his or her liberty restricted – was in conflict with the Constitution and the Statute of the *Seimas* in view of the process of its adoption.

Under the Constitution, sub-statutory legal acts of Parliament as well as laws must be adopted in compliance with the rules established in the Statute of the *Seimas* regarding the adoption of legal acts. The provision of Article 69.1 of the Constitution, under which laws must be adopted in Parliament in accordance with procedures established by law, may

not be interpreted only in a linguistic or literal manner. A substantial violation of the procedure laid down in laws or the Statute of the *Seimas* regarding the adoption of any legal acts of Parliament leads concurrently to a violation of Paragraph Article 69.1 of the Constitution.

The Constitution sets out additional guarantees for the inviolability of the person of Members of Parliament, which are necessary for the proper performance of their duties as Members of Parliament and representatives of the Nation; the immunity enjoyed by Members of Parliament must allow Parliament to perform, without hindrance, the functions provided for under the Constitution. The right of a Member of Parliament to liberty and the inviolability of his or her person during the established term of office can only be restricted with the consent of Parliament.

Members of Parliament are given immunity to protect them from persecution on political or other grounds due to their activities as Members of Parliament. This immunity is not granted in order to create the preconditions for a Member of Parliament who is suspected to have committed a crime to avoid criminal liability. A legal regulation governing the procedure for removing the inviolability of the person of a Member of Parliament must be couched in such a way that, should there be grounds to hold a Member of Parliament criminally liable, there would be no preconditions for him or her to avoid criminal liability, otherwise the administration of justice would be precluded.

The Constitutional Court noted that, under the Statute of the *Seimas*, it is incumbent on Parliament to ascertain the reasons which lead (or could lead) to the non-participation in a parliamentary session of a Member of Parliament (or a member of Parliament authorised by him or her) when the removal of his or her immunity is being considered. Parliament is also under a duty to assess the significance of these reasons. The material of the case made it clear that, at the parliamentary session under discussion, a draft resolution on removing the immunity of Rimas Antanas Ručys, a Member of Parliament was considered, and the resolution of the Parliament was adopted, in the absence of the above Member of Parliament or another Member of Parliament authorised by him. No reasons for this absence were ascertained and no assessment was carried out as to whether such reasons were significant, or whether R. A. Ručys had a proper opportunity to authorise another Member of Parliament to represent him. It was established that R. A. Ručys was not present at this particular sitting due to his health condition: he had been taken to hospital by ambulance. There was

no data in the case to indicate that R. A. Ručys, in seeking to avoid participation in the above parliamentary session, could have acted in bad faith or abused the possibility of permitted non-participation in parliamentary sessions for significant and justifiable reasons.

By adopting the resolution, Parliament did not comply with the procedure laid down in the Statute of the *Seimas* regarding the consent of Parliament to hold a Member of Parliament criminally liable, to detain him or her or restrict his or her liberty. The adoption of the resolution in question amounted to a substantial violation of the procedure laid down in the Statute of the *Seimas* regarding the removal of the immunity of a Member of Parliament, and consequently amounted to a concurrent violation of the Constitution.

At the same time, the Constitutional Court held that, although the resolution of Parliament was declared to be in conflict with the Constitution in view of the procedure of its adoption, no grounds existed for denying the legitimacy of the legal consequences that had appeared during the period when the presumption of the constitutionality of the resolution had been valid.

Supplementary information:

In this ruling, attention was paid to the standards of the European Commission for Democracy through Law (the Venice Commission) consolidated in a Report on the Scope and Lifting of Parliamentary Immunities adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014) CDL-AD(2014)011-e.

Cross-references:

General Court of the European Union:

- T-346/11, T-347/11, *Gollnisch v. European Parliament*, 17.01.2013.

European Court of Human Rights:

- *Tsalkitzis v. Greece*, no. 11801/04, 16.11.2006;
- *Kart v. Turkey*, no. 8917/05, 03.12.2009, *Reports of Judgments and Decisions* 2009.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2016-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 16.05.2016 / **e)** KT16-S9/2016 / **f)** On the interpretation of the provisions of the Constitutional Court's rulings of 12 July 2001 and 1 July 2004 relating to the right of judges to have another job and to receive other remuneration / **g)** TAR (Register of Legal Acts), 12865, 16.05.2016, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities**.
5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.

Keywords of the alphabetical index:

Judge, remuneration / Judge, independence, impartiality / Judges, participation, international projects.

Headnotes:

Judges may receive remuneration for participating in support projects funded by the European Union, by other international organisations, or by foreign states, or for participating in projects financed under the Lithuanian Development Cooperation and Democracy Promotion Programme, where such projects are related to improving the justice system and the activity of courts only if they are engaged in educational or creative activities while participating in the said projects. Judges may also receive remuneration in the capacity of a judge of an international court (in cases where they combine the duties of a judge of a national court and those of a judge of an international court). However, they are not allowed to receive the remuneration of a judge of a national court at the same time.

Summary:

I. The Speaker of Parliament had lodged a petition raising questions over the right of judges to receive other remuneration.

II. The Constitutional Court interpreted the provisions of its ruling of 12 July 2001, according to which judges may receive only the remuneration of a judge paid from the state budget; they may not receive any other remuneration with the exception of payment for educational or creative activities.

Under the Constitution, the role of courts is not limited to the administration of justice; along with other institutions of state power, courts, within their constitutional competence, independently or in cooperation with other state institutions, may participate in carrying out the general tasks and functions of the state. Courts may also participate in the activity of achieving the constitutional objectives of the foreign policy of the State of Lithuania and in the activity of fulfilling international obligations and those related to full membership in the European Union and NATO, including the participation in projects for international cooperation and the promotion of democracy. This geopolitical orientation, which has been chosen by the Republic of Lithuania and is a constitutional value, also implies such an activity performed by the State of Lithuania, by its institutions, and by individuals employed therein. It is aimed at contributing to the partnership with other states, the European Union or with NATO, or at contributing to the integration of the said states in these international organisations by promoting the dissemination of universal and democratic values, the principles of EU law, including the dissemination of such values and principles in the spheres of the improvement of the justice system and the activity of courts. Judges could accordingly take part in support projects funded by international organisations or foreign states, or in projects financed under the Lithuanian Development Cooperation and Democracy Promotion Programme which are related to improving the justice system and the activity of courts.

Since, under Article 113.1 of the Constitution, judges may not receive any remuneration other than that established for them and payment for educational or creative activities, judges may only receive remuneration for participating in the international projects mentioned above if they are engaged in educational or creative activities while participating in these projects.

The Constitutional Court emphasised that judges may only participate in activities that are compatible with their impartiality and independence.

The Constitutional Court held that the prohibition imposed on judges on holding any other elective or appointive office, or working in any business or commercial, or other private establishments or enterprises is not an objective in itself. It is aimed at

ensuring the independence and impartiality of judges and the proper administration of justice. Under the Constitution, judges may perform certain other judicial duties specified *expressis verbis*, including duties in judicial self-government bodies.

Judges of national courts may also perform the duties of judges of international courts if such a possibility is provided for in the obligations consolidated in international treaties of the Republic of Lithuania to participate in the activity of international courts and implying the duty of the state to appoint highly qualified representatives (such as judges of national courts) to international institutions or international judicial institutions. The activity of such representatives, where they combine the duties of a judge of a national court and those of a judge of an international court, contributes to the achievement of the constitutional aims of the foreign policy pursued by the Republic of Lithuania, to the fulfilment of the international obligations in the sphere of the administration of justice, as well as the creation of the international order based on law and justice. This activity need not be continuous; it may also be carried out on a temporary basis.

Under the Constitution, judges are allowed to perform certain other specified duties in courts and in judicial self-government bodies, whereas international treaties of the Republic of Lithuania may also provide for situations where judges may perform the duties of judges of international courts (in cases where they combine the duties of a judge of a national court and those of a judge of an international court). Such an activity may not interfere with the discharge of the main constitutional judicial duty, arising from Article 109 of the Constitution, to administer justice in a proper and effective manner.

The right of judges to perform the duties of judges of international courts (in cases where they combine the duties of a judge of a national court and those of a judge of an international court) implies their right to receive remuneration for the performance of such duties, however, when performing the duties of judges of international courts, judges are not allowed to receive the remuneration of a judge of a national court and that of a judge of an international court at the same time.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2016-2-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 27.06.2016 / **e)** KT19-N10/2016 / **f)** On dismissing criminal proceedings after the expiry of a statutory limitation period for criminal liability / **g)** TAR (Register of Legal Acts), 17705, 27.06.2016, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

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 liability / Statutory limitation period / Acquittal, criminal proceedings / Question, guilt.

Headnotes:

Under the Constitution, in regulating criminal proceedings in cases where time periods for applying criminal liability to persons who committed a crime have expired, the legislator has the duty to balance constitutional values – the presumption of innocence and the right of a person to due process. The legislator must establish a legal regulation that creates preconditions for ensuring that, once these statutory limitations have expired, courts will decide whether the accused has been reasonably charged with having committed a crime and that, in cases where guilt is not established, the person is cleared of all charges. In cases where, upon the expiry of statutory limitation periods, it is ascertained that charges brought against the accused for having committed a crime were unfounded, the Court must deliver an acquittal.

Summary:

I. Petitions had been received from courts which questioned the compliance of the provision of the Code of Criminal Procedure (hereinafter, “CCP”) with the Constitution, to the extent that it provides that criminal proceedings must be terminated if a statutory limitation period for criminal liability has expired.

II. The Constitutional Court found that this provision was not in conflict with the Constitution. However, other provisions of the CCP, which regulated the dismissal of a case upon the expiry of a statutory limitation period for criminal liability, were in conflict with the Constitution, insofar as, under these provisions, a case was dismissed by the court without assessing charges brought against the accused and without ascertaining whether he or she was reasonably charged with having committed a crime or whether the acquitted person was reasonably acquitted of a crime with which he or she had been charged.

The Constitutional Court did not accept the applicants’ contentions that, under that provision, upon the expiry of a statutory limitation for criminal liability, it is prohibited to continue proceedings in a court where the continuation of proceedings is requested by the accused person. The Constitutional Court ruled that in the cases at issue, regardless of the wishes of the accused, proceedings must be continued until the public charges upheld by the prosecutor are confirmed or refuted. Once the impugned provision was understood in this way, there were no legal grounds for considering that it created preconditions for causing irreversible damage to the honour and dignity of the accused, or that it precluded a court from deciding a case fairly, or that it violated the constitutional principles of the equality of persons and a state under the rule of law.

However, the Constitutional Court took a different view of the other impugned provisions of the CCP, which regulated the dismissal of a case upon the expiry of a statutory limitation period for criminal liability. The Constitutional Court held that these provisions created the preconditions for a court to dismiss a criminal case without assessing the charges brought against the accused person, without ascertaining whether it was reasonable to have brought these charges against the accused person, or without determining whether it was reasonable to have acquitted somebody of a crime with which he or she had been charged. Consequently, the Constitutional Court held that this legal regulation precluded a court from acting in such a way that the truth in a criminal case could be established and the question of guilt of the person accused of having

committed a crime would be fairly resolved. If a court fails to assess whether charges brought against the accused person are reasonable and the case is dismissed for the reason that the statutory limitation period for criminal liability has expired, the impression is created that the accused is not convicted only because the prescribed limitation period has expired. Thus, preconditions are created for continued doubts over whether the accused was reasonably charged with having committed a crime, as well as for continued doubts as to his or her reputation. The Constitutional Court therefore declared that this legal regulation disregarded the constitutional right of a person to due process.

The finding that these provisions of the CCP were not in conflict with the Constitution did not, in the Constitutional Court's opinion, provide grounds to renew criminal proceedings and review the final decisions of courts in cases that had been dismissed upon the expiry of statutory limitation periods for criminal liability.

The Constitutional Court also drew attention to the fact that situations where statutory limitation periods for criminal liability expire at the time of a pre-trial investigation differ from situations where these periods expire after charges have been made and the case has been referred to a court for consideration. During a pre-trial investigation, justice is not administered; a pre-trial investigation involves collecting and assessing information that is necessary for deciding whether public charges must be brought against the person and the criminal case must be referred to a court. Consequently, the termination of a pre-trial investigation upon the expiry of statutory limitation periods for criminal liability means that, within the prescribed periods, no necessary data has been collected to bring charges against the person and that there are no grounds to believe that he or she has committed a crime.

Cross-references:

European Court of Human Rights:

- *Didu v. Romania*, no. 34814/02, 14.04.2009;
- *Capeau v. Belgium*, no. 42914/98, 13.01.2005, *Reports of Judgments and Decisions 2005-I*;
- *Vulakh and others v. Russia*, no. 33468/03, 10.01.2012;
- *Allenet de Ribemont v. France*, no. 15175/89, 10.02.1995, Series A, no. 308;
- *Adolf v. Austria*, no. 8269/78, 26.03.1982, Series A, no. 49;
- *Giosakis v. Greece*, no. 5689/08, 03.05.2011;
- *Constantin Florea v. Romania*, no. 21534/05, 19.06.2012.

Languages:

Lithuanian, English (translation by the Court).



Moldova

Constitutional Court

Important decisions

Identification: MDA-2016-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 10.05.2016 / **e)** 10 / **f)** On the constitutionality of certain provisions of Article 345.2 of the Contravention Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 12.07.2016, 204-205 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.7.1.2 Institutions – Judicial bodies – Jurisdiction – **Universal jurisdiction.**

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

Keywords of the alphabetical index:

Penalty, administrative, appeal / Penalty, petty offence / Punishment, flexibility.

Headnotes:

Under the Constitution, there is a universal entitlement to effective remedy from competent courts of law against acts which impinge on individuals' legitimate rights, freedoms and interests. The right of access to justice makes it incumbent on the legislator to grant all persons every opportunity to access a court of law and to ensure the effectiveness of the right of access to justice by adopting an appropriate legislative framework.

Parliament has the power, under the Constitution, to regulate criminal offences, punishments and the process of their execution. However, the constitutional principle of legality requires differentiation between penalties established for infringements of the law.

Summary:

I. On 10 May 2016, the Constitutional Court delivered a judgment on the constitutionality of certain provisions of Article 345.2 of the Contravention Code.

The case originated in the exception of unconstitutionality of the phrase “fine of 300 conventional units for legal entities ((letters d) and e)) and officials ((letters a) – f))” from Article 345.2 of the Contravention Code, raised by the lawyer Vladimir Grosu, in case-files nos. 5r-110/16 and 5r-109/16, pending before the Centru District Court of Chişinău.

Under Article 345 of the Contravention Code, the violation of metrology rules constitutes an offence. Infringement of the rules set out in Article 345.2 is sanctioned by a fine of 300 conventional units for legal entities and for officials.

The applicant questioned the compliance of the sanction set out in Article 345.2 with Article 20 of the Constitution, as it allows courts no scope to individualise sanctions in relation to the unusual circumstances of the case.

II. The Court noted that under the right of access to justice, the legislator must grant all persons all possibilities to access a court of law and to ensure the effectiveness of the right of access to justice by adopting an appropriate legislative framework.

The Court held that the exclusive jurisdiction of Parliament to define a contravention and to decide the sanctions which should apply does not preclude the duty to respect the principle of legality derived from Article 1.3 of the Constitution (the rule of law).

The constitutional principle of legality requires a differentiation between penalties established for infringements of the law. In this regard, the Court held that legislative individualisation of the sanction does not suffice in achieving the goal of the law on contraventions, to the extent that judicial individualisation is not possible.

In terms of legal individualisation, the legislator must provide the judge with the power to establish the penalty within certain predetermined limits, more specifically the minimum and maximum of the penalty. Judges must also be provided with the instruments which will allow them to select a concrete sanction in relation to a particular offence and the person who committed it.

The Court noted that the system of contravention sanctions needed to allow for individualisation of sanctions in relation to the circumstances of the deed. When establishing sanctions, the legislator must therefore provide judges or other authorities vested with the right to apply contravention sanctions the possibility to establish the sanction within minimum and maximum limits, taking into account the nature

and degree of prejudice caused by the contravention, the personality of the perpetrator and any mitigating or aggravating circumstances. Unless such a system is in place, individuals have no real and adequate possibility of benefiting from the protection of their rights through judicial means.

The Court held that the legislator is entitled to establish contravention sanctions, but must observe strictly the proportionality between the circumstances of the deed, its nature and degree of prejudice.

The Court found that, in the absence of mechanisms for sanction individualisation in the case concerned, the court of law lacks the possibility to conduct an effective judiciary review and litigants are deprived of the right to a fair trial.

Pursuant to the constitutional principle of legality, the legislator cannot regulate a sanction in a way which would deprive the court of law of the opportunity to individualise the sanction in light of the circumstances of the case. In such a situation, the court of law would only have limited competences, which could pave the way to infringement of constitutional rights, including that of the right to a fair trial.

The Court held that the absence of mechanisms which would allow for judicial individualisation distorts the effective, proportionate and dissuasive nature of the contravention sanction and gives courts of law no scope to exercise effective judicial control. It also infringes the individual's right of access to justice.

The Constitutional Court declared unconstitutional the text "fine of 300 conventional units for legal entities (letters d) and e)) and for officials (letters a) – f))" of Article 345.2 of the Contravention Code of the Republic of Moldova no. 218-XVI, 24 October 2008, to the extent that it did not allow for the individualisation of the sanction.

Supplementary information:

Legal norms referred to:

- Articles 1, 20 and 54 of the Constitution;
- Contravention Code of the Republic of Moldova no. 218-XVI, 24.10.2008.

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2016-2-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 25.07.2016 / **e)** 23 / **f)** On the exception of unconstitutionality of Article 27 of the Law on the Government Agent / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 21.10.2016/361-367 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

- 4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**
- 4.7.3 Institutions – Judicial bodies – **Decisions.**
- 4.7.16.1 Institutions – Judicial bodies – Liability – **Liability of the State.**
- 4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**

Keywords of the alphabetical index:

Decision, judicial, criticism / Judiciary, independence / Judge, sanctions.

Headnotes:

Judicial independence is not a privilege or a prerogative granted to a judge for his or her own interests, but a guarantee against external pressures in the decision-making process, justified by the necessity to allow judges to fulfil their attributions as guardians of human rights and freedoms. Judicial independence is a fundamental aspect of the rule of law and a guarantee of a fair trial.

The State is entitled to establish its own national mechanisms for holding judges liable for disciplinary, civil or criminal infringements, provided that the guarantees inherent in the independence of judges are observed.

However, exercising the right of the State to a recourse action simply on the grounds of a judgment by the European Court of Human Rights, a friendly settlement or a unilateral declaration in which a violation of the Convention is found, with no judicial sentence which actually proves the culpability of the judge concerned, affects the independence of the judiciary and is out of line with the Constitution.

Summary:

I. The case stemmed from complaints lodged by a group of former and current judges, parties to cases pending before the courts of law, opened on the grounds of Article 27 of Law no. 151, 30 July 2015, on the Government Agent (hereinafter, the "Law no. 151/2015"). Under this provision, the State has the right of recourse against individuals whose actions or inaction determined or significantly contributed to the violation of the European Convention of Human Rights, found by a judgment, a friendly settlement of a case pending before the European Court of Human Rights or the submission of a unilateral declaration.

The applicants claimed that this provision, which could be lodged against judges inclusively, affected the principles of the separation of powers and independence of the judiciary, as guaranteed by Articles 6 and 116 of the Constitution.

II. In the course of its deliberations, the Court requested the opinion of the European Commission for Democracy through Law of the Council of Europe (the Venice Commission) on the right of the State to recourse against judges provided by Article 27 of the Law no. 151/2015. On 13 June 2016 the Venice Commission communicated to the Court its *amicus curiae* (CDL-AD (2016)015) adopted at the 107th plenary session (Venice, 10-11 June 2016).

The Court held that the provisions of Article 27 of Law no. 151/2015, unlike those of Article 1415 of the Civil Code, do not provide for the guilt of the person concerned to be proved by a judicial sentence, which means that the recourse action of the State could be initiated simply on the grounds of a judgment or decision of the European Court of Human Rights.

In accordance with European standards, liability of judges may not result only from findings of the European Court of Human Rights to the effect that a violation of the Convention has occurred. The national judge must take international case law into account, if this is well established.

Previously (no. 12, 07.06.2011, *Bulletin* 2011/2 [MDA-2011-2-002]) the Court had held that in order for a judge to be held individually liable, he or she must have exercised his or her duties in bad faith or with gross negligence. The existence of a judicial error affecting human rights and fundamental freedoms does not suffice.

Judicial independence requires judges to be protected from the influence of other branches of State power and that each judge shall enjoy

professional freedom in interpreting the law, in evaluating the facts and assessing the evidence in each individual case. Incorrect decisions are to be corrected through the appeal process; they are not to lead to individual liability of judges.

Judges cannot be compelled to perform their duties under threat of sanction. This could adversely influence the decisions they take.

In this case, the Court observed that the provision on recourse action from Article 27 of Law no. 151/2015 exceeds the general framework of judges' liability in relation to existing legal provisions, including the special law on the status of judges, because it allows judges to be held liable with no judicial sentence proving their guilt.

The Court emphasised that the institution of recourse action itself is not contrary to constitutional principles, provided that the mechanism of holding a judge financially liable is in line with the guarantees inherent in judicial independence.

The Court concluded that exercising the right of the State to recourse action in terms of Article 27 of the Law no. 151/2015 only on the grounds of a European Court of Human Rights judgment, a friendly settlement or a unilateral declaration in which a violation of the Convention was found, with no judicial sentence proving the guilt of the judge, affects the independence of the judiciary and is contrary to Articles 6, 116.1 and 116.6 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 1, 116.1 and 116.6 of the Constitution;
- Article 27 of the Law no. 151, 30.07.2015, on the Governmental Agent.

Cross-references:

Constitutional Court:

- no. 12, 07.06.2011, *Bulletin* 2011/2 [MDA-2011-2-002].

European Court of Human Rights:

- *Giuran v. Romania*, no. 24360/04, 21.06.2011, *Reports of Judgments and Decisions* 2011.

Languages:

Romanian, Russian (translation by the Court).



Monaco Supreme Court

Important decisions

Identification: MON-2016-2-001

a) Monaco / **b)** Supreme Court / **c)** / **d)** 28.06.2016 / **e)** TS 2015-02 / **f)** / **g)** *Journal de Monaco* (Official Gazette) / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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.**

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

Keywords of the alphabetical index:

Administrative act, reasons, obligation / Residence, renewal, refusal.

Headnotes:

The exception to the principle of the obligation to state reasons for administrative acts, as provided for by law, regarding a refusal to allow a natural person to settle on the territory of the Principality, should not be extended to a refusal to renew a residence permit for a person residing in the Principality.

A decision to refuse the renewal of a residence permit must be justified in writing and include, in the body of the decision, the wording of the legal and factual considerations on which the decision is based.

Summary:

I. Mr Ivo Rittig, a resident of Monaco since 2005, was orally informed by the Police Department on 9 September 2014 that his residence permit would not be renewed.

In an appeal lodged with the General Registry Office of the Principality of Monaco on 7 November 2014, Mr Rittig requested the annulment of the decision taken on 21 May 2014 by the Minister of the Interior, and notified on 9 September 2014.

II. The Supreme Court firstly noted that under Section 1 of Law no. 1.312 of 29 June 2006 on the statement of grounds for administrative acts, “administrative decisions of an individual nature which restrict the exercise of public freedoms or constitute a control measure must state the grounds on which they are based, failing which they shall be null and void”. Section 6 of the same Law no. 1.312 provides that “as an exception to the provisions of Section 1.3°, the refusal to allow a natural person to settle on the territory of the Principality shall not be subject to the obligation to state grounds”.

After referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 6.1 and 6.3 ECHR and its Additional Protocols, and taking into account both the principle of strict interpretation of exemptions and the preparatory documents of the law, the Supreme Court concluded that this exception should not be extended to a refusal to renew a residence permit of a person residing in the Principality and that Section 2 of Law no. 1.312 according to which “reasons must be given in writing and include, in the body of the decision, the wording of the legal and factual considerations on which that decision is based” applied to a decision to renew a residence permit.

In addition, in order to exercise its review of the legality of the impugned decision, the Supreme Court, in an interlocutory decision on 3 December 2015, invited the Minister of State to produce the memorandum notified orally to Mr Ivo Rittig on 9 September 2014. Having observed that the said memorandum did not include any legal consideration on which the decision could be based, the Supreme Court set aside the decision refusing the renewal of Mr Ivo Rittig’s residence permit.

Languages:

French.



Montenegro Constitutional Court

Important decisions

Identification: MNE-2016-2-002

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 11.07.2016 / **e)** UŽ-III355/14 / **f)** / **g)** / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
3.10 General Principles – **Certainty of the law.**
5.3.13.1.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings.**

Keywords of the alphabetical index:

Criminal proceedings, costs, reimbursement.

Headnotes:

Costs related to the crime for which a person has been lawfully acquitted, can be separated from the overall costs incurred in a single set of proceedings conducted for two crimes.

Summary:

I. The applicant submitted a constitutional complaint against the decision of the High Court in Podgorica, Kvs. no. 28/14, 27 March 2014, alleging a violation of rights under Article 32 of the Constitution and Article 6 ECHR regarding the rejection of his claim for reimbursement of the costs of criminal proceedings under Article 229.2 of the Criminal Procedure Code. He contended that under Article 230 of the Criminal Procedure Code, the costs of criminal proceedings should be awarded to the person who was acquitted; that the Court could not apply Article 229.2 and that the conclusion of the Court was vague in terms of the allegations that the proceedings were conducted for the offence for which the applicant had been convicted and thus it could not be considered that the costs had arisen in connection with such offence.

II. The Constitutional Court noted that in the first-instance decision, of the defendant's claim (the applicant of the constitutional complaint for the reimbursement of costs of criminal proceedings in the case Ks. no. 2/12) was rejected as unfounded. In the second-instance decision, the appeal of the defendant was rejected as unfounded.

The applicant considered that the challenged decision breached his right to a fair trial under Article 32 of the Constitution and Article 6.1 ECHR.

Examination of the decision showed that, for the crime of mediation in prostitution under Article 210.1 of the Criminal Code, the applicant was sentenced to a one year prison term, whereas for the crime of human trafficking, under Article 444.2 in connection with paragraph 1 of the Criminal Code, he was acquitted and pursuant to Article 229.2 of the Criminal Procedure Code, the High Court found that the costs relating to the crime for which the defendant was lawfully acquitted could not be separated from the overall costs incurred in a single set of proceedings conducted for both of the crimes with which he was charged. It can also be concluded that all actions that have been taken, for which the defendant has claimed the reimbursement of costs, have been taken in connection with both crimes with which he was charged and that this represents connected factual and material matter for which the costs of proceedings relating to the crime of human trafficking, under Article 444.2 in connection with paragraph 1 of the Criminal Code, cannot be separated or allocated as costs incurred solely for the crime for which he was acquitted.

The Constitutional Court found that the High Court had wrongly applied the provisions of Article 229.2 of the Law on Criminal Procedure to the establishment of facts, finding that the costs relating to the crime for which the defendant was lawfully acquitted could not be separated from the overall costs incurred in a single set of proceedings conducted for both crimes.

The Constitutional Court accordingly found that the High Court had violated the right of the applicant to a fair trial guaranteed in Article 32 of the Constitution and Article 6.1 ECHR and upheld the constitutional complaint and repealed the decision of the High Court in Podgorica, Kvs. no. 28/14, 27 March 2014. The case was returned to the High Court for renewed proceedings.

Cross-references:

European Court of Human Rights:

- *Golder v. United Kingdom*, no. 4451/70, 21.02.1975, Series A, no. 18;
- *Barberà, Mességué and Jabardo v. Spain*, no. 10590/83, 06.12.1988, Series A, no. 146;
- *Vusić v. Croatia*, no. 48101/07, 01.07.2010, paragraph 44;
- *Beian v. Romania* (no. 1), no. 30658/05, 06.12.2007, *Reports of Judgments and Decisions* 2007-V (extracts).

Languages:

Montenegrin, English.



Poland

Constitutional Tribunal

Important decisions

Identification: POL-2016-2-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17.05.2016 / **e)** SK 37/14 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2016, item 1238 / **h)** CODICES (Polish).

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:

Legal costs, reimbursement.

Headnotes:

The court exemption of a losing party from the obligation to reimburse the legal costs of a winning party in particularly justified instances, without burdening the State Treasury with the said costs, does not infringe on the right to a fair trial, as regards to a properly devised court procedure that complies with the principles of justice.

Summary:

I. The Constitutional Tribunal considered a constitutional complaint submitted with regard to Article 102 of the Civil Procedure Code (hereinafter, the “CPC”), insofar as it does not impose on the State Treasury the obligation to reimburse the legal costs of a winning party which was not adjudged to be paid by a losing party.

II. The Constitutional Tribunal stated that Article 102 of the CPC constitutes a purposeful departure, justified by the principles of equity, from the principle of liability for the outcome of a trial. According to the Constitutional Tribunal, it is necessary to have a certain safety valve, i.e., in particularly justified instances, the possibility that a court may lift the obligation of a losing party to reimburse the legal costs of a winning party. Courts apply Article 102 of

the CPC only by way of an exception, and the catalogue of recurring instances regarded as particularly justified is directly linked to the facts of a given case, and not merely with the financial situation of a losing party (as in the case in the context of which the constitutional complaint was submitted, where an allegation had been put forward effectively about the expiry of the claims of the petitioner, i.e. the losing party).

The Constitutional Tribunal found it necessary to point out that, within the meaning of the jurisprudence of the Supreme Court, Article 102 of the CPC is applicable to:

1. cases concerning a legal relationship that may be determined only by a court judgment, even though the parties might concur with each other;
2. unfair or manifestly inappropriate conduct of a winning party, which generates costs;
3. dismissal of a legal action on the basis of Article 5 of the Civil Code or due to the lapse of a set time-limit;
4. a precedent-setting case;
5. resolution of a dispute solely on the basis of circumstances considered by a court *ex officio*; as well as
6. due to the financial situation of a losing party that was sure of the validity of its claim, when bringing a legal action.

Thus, impugned Article 102 of the CPC is not – on the basis of a literal interpretation, the doctrine of law, and, more importantly, the jurisprudence of courts which complements the semantic scope of “particularly justified instances” – construed as a manifestation of the so-called ‘poor law’. Courts exempt a losing party from the obligation to reimburse the legal costs of a winning party, where particularly justified circumstances of a given case weigh in favour of this, and where a different determination of the issue of costs would be unfounded or even unjust.

In the opinion of the Constitutional Tribunal, impugned Article 102 of the CPC constitutes a justified exception to the principle of liability for the outcome of a trial, and it does not infringe on a component of the constitutional right to a fair trial, namely the right to a proper court procedure that complies with the principles of justice. Article 102 of the CPC is thus a proper example of a departure – justified by particular circumstances of a case – from the principle of liability for the outcome of a trial.

The Tribunal deemed that it was necessary to underline that the constitutional standard of the right to a fair trial – as provided for in Article 45.1 of the Constitution – does not require free-of-charge court

proceedings where the State Treasury covers the whole financial burden of the pursuit of claims by parties before courts. Therefore, the legislator may – by respecting the principle of liability for the outcome of a trial, which is regarded in the jurisprudence of the Constitutional Tribunal as basic with regard to legal costs – determine rules for covering legal costs by parties to proceedings, taking account of certain axiological and functional considerations.

The Tribunal held that, in light of the constitutional right to a fair trial, there is no direct correlation between the court's exemption of a losing party from the obligation to reimburse legal costs and the obligation of the State Treasury to reimburse legal costs. Such a solution could be justified only and exclusively, in a situation where the assumption about free-of-charge proceedings is adopted together with the principle of liability for the outcome of a trial, namely where a winning party would always have to be reimbursed for its legal costs, either by a losing party or by the State Treasury, even if this breached the principle of equity.

The Constitutional Tribunal pointed out that, in the consistent jurisprudence of the Tribunal, the right to a fair trial has been linked to the principle of payment for the administration of justice.

According to the Tribunal, this does not entail the Tribunal to depart from the view presented in its jurisprudence that, as a rule, legal costs should be awarded to a losing party. Obviously, the principle of liability for the outcome of a trial is not and should not be absolute in character. There is no doubt that the legislator ought to provide for exceptions to that rule, such as impugned Article 102 of the CPC, which complies with the principle of equity. For this reason, it ought to be deemed that Article 102 of the CPC not only causes no violation of a proper court procedure, which constitutes a component of the constitutional right to a fair trial, but it also actually manifests the conformity of the said procedure with the principle of justice.

The Tribunal found it necessary to emphasise that, from the point of view of a proper court procedure that is consistent with the principle of justice, it is vital that the principle of equity arising from Article 102 of the CPC be applied by way of an exception and would not become a measure within the scope of the so-called 'poor law'. If this was the direction in which the jurisprudence of courts was headed, as regards to complementing the content of the term 'particular justified instances', lacking sufficient specificity, as used in Article 102 of the CPC, then the allegation raised in this constitutional complaint should be evaluated differently. Indeed, what we would deal

with would not be the principle of equity – which permits a court to determine the issue of legal costs in a different way than in accordance with the principle of basic liability for the outcome of a trial – but actually the legal institution of 'poor law'.

Cross-references:

Constitutional Tribunal:

- P 13/01, 12.06.2002, *Bulletin* 2002/2 [POL-2002-2-019];
- K 25/01, 02.07.2003;
- SK 14/03, 30.03.2004;
- P 4/04, 07.09.2004;
- SK 21/05, 12.09.2006;
- P 29/07, 17.10.2007;
- P 37/07, 16.06.2008;
- SK 33/07, 17.11.2008;
- P 8/12, 27.07.2012;
- SK 30/09, 07.03.2013.

Supreme Court:

- I CZ 80/65, 12.08.1965;
- II CZ 223/73, 14.01.1974;
- IV PZ 34/79, 31.08.1979;
- V CZ 23/11, 15.06.2011;
- III CZ 10/12, 26.01.2012;
- V CZ 26/12, 09.08.2012;
- III CZ 75/12, 18.04.2013;
- IV CZ 58/13, 05.07.2013.

Languages:

Polish.



Identification: POL-2016-2-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.05.2016 / **e)** Kp 5/15 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2016, item 793 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
4.7.11 Institutions – Judicial bodies – **Military courts.**

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

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

Keywords of the alphabetical index:

File, access, Minister of Justice, power to grant / Judiciary, independence, interference, excessive.

Headnotes:

External access to court case files affects the administration of justice by courts, as both the course and effect of the basic activity of courts, namely adjudication, are reflected in court case files. The Constitution grants courts complete independence as regards considering cases and delivering rulings, which also implies that courts are guaranteed to exercise their judicial powers without any interference on the part of other authorities, including the Minister of Justice, i.e. a representative of the executive branch of government.

Summary:

I. In his application of 6 October 2015 filed within the scope of an *a priori* review provided for in Article 122.3 of the Constitution, the President of Poland requested the Tribunal to examine the conformity to the Constitution of certain provisions of the Act of 11 September 2015 amending the Act of 21 August 1997 on the Organisational Structure of Military Courts. The Act provided the following powers of the Minister of Justice:

- to request court case files as part of external administrative supervision over military courts;
- to request court case files related to cases considered by a judge before any disciplinary measures are taken with regard to the judge;
- as well as to manage the personal data of parties, attorneys, and other participants in court proceedings.

II. The Tribunal took into account the fact that analogous legal regulations, pertaining to common courts, had already been assessed in the Tribunal's Judgment Kp 1/15. The Tribunal stressed that, notwithstanding the structural separateness of military courts, the constitutional principles of the independence of courts and judges also refer to military courts.

With regard to the allegation concerning the granting of powers to access court case files by the Minister of Justice as part of external administrative supervision over military courts, the Tribunal deemed that the challenged provision made it possible for an executive authority to interfere in the realm of competence reserved only for courts. A request made by the Minister of Justice for the provision of files concerning cases that are pending would affect the course of the consideration of the cases. Moreover, this could cause a situation where judges would feel pressured, and this might in turn affect their determinations.

The Tribunal held that the challenged provision constitutes excessive interference with the principle of the independence of the judiciary as well as the principle of the independence of judges. Consequently, it may threaten the exercise of the individual's right to have his or her case considered by an independent and impartial court. At the same time, entrusting the Minister of Justice with the power to request court-case files for the purpose of verifying activities undertaken within the scope of internal administrative supervision would also mean the disclosure of information included in such files to the Minister of Justice, including personal data, and also sensitive data. Thus, the legislator had disproportionately limited the rights specified in Articles 47 and 51 of the Constitution.

The above arguments also weigh in favour of declaring the unconstitutionality of the regulation which grants the Minister of Justice the power to request the president of a circuit military court to provide court-case files in cases that were supervised by a judge before any disciplinary measures are taken with regard to the judge. Due to the significance of the value infringed by that power, i.e. the independence of the judiciary and judges, the Tribunal held that the regulation is unnecessary and constitutes excessive interference in the independence of the judiciary, and may possibly impact the independence of judges. Furthermore, the Tribunal confirmed the validity of the allegation about an infringement of the constitutional standards for the protection of the individual's privacy and of the terms of obtaining information on the individual by public authorities, since the transfer of court case files is linked with collecting and processing personal data.

The legislator had also authorised the Minister of Justice to manage the personal data of parties, attorneys, and other participants in court proceedings. According to the Tribunal, the duties of the Minister of Justice specified in the Act on the Organisational Structure of Military Courts do not justify entrusting said Minister with the discretionary competence to

determine the objectives and means of processing personal data collected in unspecified “registers run on the basis of separate provisions”. The legislator – unlike in regulations concerning common courts – granted the Minister of Justice general provisions to manage data without indicating that those were to be data from telecommunications systems, without any restrictions as to time or scope. Consequently, the Tribunal deemed that the analysed provision, within the challenged scope, does not meet the requirements for restricting the constitutional right to privacy, which are specified in Article 31.3 of the Constitution, as well as does not fulfil the premise that the obtaining of information on citizens must be necessary, as set out in Article 51.2 of the Constitution.

The impossibility of determining the actual scope of powers vested in the Minister of Justice also raises reservations in the light of the principle of specificity of legal provisions (Article 2 of the Constitution). Moreover, in the opinion of the Tribunal, the lack of a link between the admissible scope of processing personal data and the duties of the authority that has been vested with said competence justifies ruling that the challenged provision is inconsistent with Article 173 in conjunction with Article 10.1 of the Constitution.

Cross-references:

Constitutional Tribunal:

- K 28/04, 19.07.2005;
- K 45/07, 15.01.2009;
- K 31/12, 07.11.2013;
- U 9/13, 08.05.2014;
- Kp 1/15, 14.10.2015;
- K 47/15, 09.03.2016, *Bulletin* 2016/1 [POL-2016-1-003].

European Court of Human Rights:

- *Kinský v. the Czech Republic*, no. 42856/06, 09.02.2012.

Languages:

Polish.



Identification: POL-2016-2-006

a) Poland / b) Constitutional Tribunal / c) / d) 11.08.2016 / e) K 39/16 / f) / g) / h) CODICES (Polish).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts.**

1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – **Independence.**

1.3.4.10.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – **Limits of the legislative competence.**

1.4.11.2 Constitutional Justice – Procedure – Hearing – **Procedure.**

1.5.6.2 Constitutional Justice – Decisions – Delivery and publication – **Time limit.**

1.5.6.3 Constitutional Justice – Decisions – Delivery and publication – **Publication.**

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

Keywords of the alphabetical index:

Legislation, appropriate, Tribunal, independence / Institutions, public, diligence, efficiency, balance of powers.

Headnotes:

Statutes may be reviewed by the Tribunal from the day of their promulgation in the Journal of Laws. One of the purposes of a period of *vacatio legis* (i.e. a period between the promulgation of a statute and its entry into force) is to make it possible for the Tribunal to review a statute before it begins to have legal effects.

Summary:

I. The Constitutional Tribunal considered joint applications filed by two groups of *Sejm* Deputies and the Ombudsman (all applications of 2 August 2016), with regard to the new Constitutional Tribunal Act of 22 July 2016 (Journal of Laws – Dz. U., item 1157).

II. The legal basis of the Tribunal's adjudication in the present case was the Constitutional Tribunal Act of 25 June 2015 (Official Gazette – *Dziennik Ustaw* of 2016, item 293), in the version arising from the Tribunal's Judgment no. K 47/15 of 9 March 2016.

The Constitutional Tribunal reviewed the constitutionality of the Constitutional Tribunal Act of 22 July 2016 before its entry into force. Statutes may be reviewed by the Tribunal from the day of their promulgation in the Journal of Laws. One of the purposes of a period of *vacatio legis* (i.e. a period between the promulgation of a statute and its entry into force) is to make it possible for the Tribunal to review a statute before it begins to have legal effects. All three applications instituting the constitutional review in the present case were filed shortly after the promulgation of the 2016 Constitutional Tribunal Act in the Journal of Laws. The applicants requested that the Tribunal review the Act during the 14-day period of *vacatio legis*, arguing that, after its entry into force, the Act would produce irreversible legal effects.

The Tribunal deemed that all the legal matters in the present case had already been sufficiently examined and hence it was possible to consider the case at a sitting *in camera*.

The Constitutional Tribunal stated that what constituted the common background of all the allegations raised by the applicants was the legislator's excessive interference, which infringed on the principle of the separation and balance of powers as well as the principle of the separation and independence of the judiciary.

Notably the following have been ruled as unconstitutional by the Tribunal:

- the requirement that a full bench of the Tribunal should adjudicate in situations where three judges of the Tribunal will file a relevant motion in this respect within 14 days from the date of receiving the certified copies of constitutional complaints, applications, or questions of law (Article 26.1.1.g of the Constitutional Tribunal Act of 22 July 2016) (hereinafter, the "CT Act");
- the rules for setting the dates of hearings at which applications are to be considered in the order in which cases are received by the Tribunal, as well as the rules for considering cases by bypassing that requirement (Article 38.3-6 of the CT Act);
- the provision which permits the President of the Tribunal to shorten, to 15 days, the time-limit after which a hearing may be held with regard to questions of law, constitutional complaints, and disputes over powers (Article 61.3 of the CT Act), in the part which assigns absolute and automatic precedence to the consideration of constitutional complaints, questions of law, and applications concerning disputes over powers, in contrast to the consideration of other applications;

- the correlation of the consideration of a case with the attendance of the Public Prosecutor-General, or his or her representative, at a hearing, where the said persons have been notified in a proper way, in circumstances where the Act provides for the mandatory participation of those persons (Article 61.6 of the CT Act);
- the possibility for a group of four judges of the Tribunal to raise an objection to a proposed determination with regard to a case considered by a full bench of the Tribunal. The effect of the objection would be the adjournment of the judges' deliberation for three months, and in the event of another objection – the adjournment for another three months (Article 68.5-7 of the CT Act);
- the transitional solutions adopted by the CT Act (Articles 83-87) concerning the procedure and the time-limit for considering the cases pending prior to the date of entry into force of the CT Act of 2016;
- the rules for publication of judgments and decisions of the Constitutional Tribunal (Article 80.4) and the transitional solutions concerning the publication of determinations of the Tribunal issued before 20 July 2016 (Article 89 of the CT Act);
- the transitional provision concerning the status of judges who have been sworn in before the President of the Republic of Poland and who have not so far assumed the judicial duties (Article 90 of the CT Act).

The second constitutional principle underlying the judgment in the present case was the principle of diligence and efficiency in the work of public institutions, derived from the Preamble to the Constitution.

III. Three dissenting opinions were attached to the judgment, concerning the breach of the rules of procedure by the Tribunal as regards i.e. the composition of the Tribunal, the order of considering cases, the rules for considering cases at a sitting *in camera*, the rules concerning the judge's exclusion from the consideration of a case.

Cross-references:

Constitutional Tribunal:

- K 8/99, 14.04.1999, *Bulletin* 1999/1 [POL-1999-1-009];
- P 3/00, 14.06.2000;
- K 14/03, 07.01.2004;
- P 20/04, 07.11.2005;
- P 16/04, 29.11.2005;
- K 28/04, 19.07.2005;

- Kp 2/05, 09.11.2005;
- U 4/06, 22.09.2006;
- K 54/05, 12.03.2007;
- K 45/07, 15.01.2009;
- K 6/09, 24.02.2010, *Bulletin* 2010/2 [POL-2010-2-004];
- K 9/11, 20.07.2011, *Bulletin* 2012/1 [POL-2012-1-002];
- K 27/12, 27.03.2013;
- K 31/12, 07.11.2013;
- Kp 1/15, 14.10.2015;
- K 34/15, 03.12.2015, *Bulletin* 2016/1 [POL-2016-1-001];
- K 35/15, 09.12.2015, *Bulletin* 2016/1 [POL-2016-1-002];
- K 47/15, 09.03.2016, *Bulletin* 2016/1 [POL-2016-1-003].

Languages:

Polish.



Portugal Constitutional Court

Important decisions

Identification: POR-2016-2-007

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 04.05.2016 / **e)** 251/16 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.20 General Principles – **Reasonableness**.
 3.21 General Principles – **Equality**.
 3.22 General Principles – **Prohibition of arbitrariness**.
 5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.

Keywords of the alphabetical index:

Deference, judicial / Imprisonment period, reduction.

Headnotes:

The difference between two regimes, which set out divergent rules concerning the necessity to deduct time from a prisoner's sentence of imprisonment, can be justified by the different situations they cover and are not unconstitutional. The Court can only check whether a difference between regimes is reasonable and based on valid grounds in the light of objective criteria, themselves determined by questions of objective relative constitutional importance. What the Court cannot do is replace the legislator's judgment with its own, or assess the merit of legislative policies.

Summary:

I. The precautionary measures that can be imposed while disciplinary proceedings are pending in prisons are set out in the Code governing the Execution of Freedom-Depriving Penalties and Measures (hereinafter, "CEP"). One norm in the Code says that if an inmate is subjected to the measure of confinement to his or her accommodation or a disciplinary cell, the time spent so confined can be deducted entirely, or in part, or not at all, from the effective duration of any final sanction imposed in those proceedings. The Criminal Code (hereinafter, "CP"), on the other hand,

contains a different regime, under which the duration of any restriction of the accused's freedom prior to conviction and sentencing – be it in custody, or under house arrest for example – must obligatorily be discounted in full from the total length of the final punishment.

The appellant in this concrete review case was a citizen serving a prison term who had been the object of a precautionary confinement measure while awaiting the outcome of disciplinary proceedings for a serious disciplinary offence. The measure was imposed by the prison warden. The inmate challenged it before the Sentence Execution Court (hereinafter, "TEP"), which denied the challenge. He then brought the present appeal against that judicial decision, alleging the unconstitutionality of the legal norm under which the length of the precautionary confinement measure was not deducted in full from the final sanction imposed for his original disciplinary offence. The appellant argued the existence of an analogy with the provisions of the Criminal Code, under which the duration of an initial period of detention, remand in custody and/or house arrest is then deducted in full from any ensuing prison term.

II. The Court considered the difference between the two regimes to be justified by the different situations they cover. The CEP permits limitations on fundamental rights when those limitations are inherent in the content and significance of a decision to convict and the resulting sentence, or of a measure involving the deprivation of freedom; and when (subject to the conditions laid down in the CEP itself) they are necessary for reasons linked to order, safety and security in prison. The effects that precautionary measures have in the legal sphere of subjects who are already deprived of their freedom because they are subject to penal sanctions are not the same as those in the legal sphere of other citizens subjected to coercive measures provided for in the CP.

The Court thus found no unconstitutionality in the norm deduced from the CEP provision, whereby there is no obligation to discount the length of the precautionary confinement measure from the duration of any final sanction that is subsequently imposed.

The Constitutional Court had already ruled on a fairly similar question in the past, when it found no unconstitutionality in the norm before it at that time.

In the present case, the Court recalled the consistency of its past positions on the principle of equality, the grounds for which are the equal social dignity of every citizen. There are a number of dimensions to this principle: the prohibition on arbitrariness (which makes differentiated treatments unacceptable in the absence

of reasonable justification); the prohibition on discrimination (which precludes different treatments for different citizens based on merely subjective categories); and the obligation to differentiate (which presupposes that the public authorities must eliminate factual social, economic and cultural inequalities by means of mechanisms that compensate for unequal opportunities).

At stake in the present situation was the prohibition on arbitrariness, seen as a limit on the ordinary legislator's freedom to shape legal regimes.

Portuguese constitutional jurisprudence has stated that the principle of equality cannot concretely orient the choice of one valuation criterion rather than or above another. The Court can only check whether a difference between regimes is reasonable and based on valid grounds in the light of objective criteria, themselves determined by questions of objective relative constitutional importance. What the Court cannot do is replace the legislator's judgment with its own, or assess the merit of legislative policies. In the case before it, the Court rejected the existence of any prohibited discrimination.

It said that this case involved a differentiation between the regime governing criminally unlawful acts and the applicable sanctions, and that governing disciplinarily unlawful acts and their sanctions. In previous rulings, the Court had emphasised that one cannot confuse unlawful acts and sanctions in the criminal domain with those of other types, particularly disciplinary ones. The Constitution (CRP) gives exclusive competence to produce legislation on matters regarding the definition of crimes, penalties and the respective preconditions, and the applicable procedure, to the Assembly of the Republic (this competence is actually partially exclusive, because the AR can also authorise the government to legislate). With regard to disciplinary infractions, however, that exclusivity is limited to the general regime and does not cover the details.

The CRP extensively regulates criminally unlawful acts and the applicable sanctions. It is true that the pertinent part of the principles the CRP defines with regard to the actual criminal law (crimes) have been extended to other areas in which sanctions can be imposed, such as disciplinarily unlawful acts – this is true, for example, of the principles of legality, non-retroactivity, and the retroactive application of the most favourable law, and the principle that sanctions must be necessary and proportionate. However, this extension does not negate the fact that these areas are different – indeed, it confirms it, and as such sustains the idea that penal measures and disciplinary measures are not the same in normative terms.

Disciplinary law and procedure and criminal law and procedure are designed to protect different legal interests or assets. Criminal law protects general and fundamental community interests, while disciplinary law is linked to the specific needs and the interest of the public service, protecting the specific bond that exists in the performance of functions pertaining to an administrative service. The scope and nature of the sanctions in these two branches of the law are also different.

The execution of the penalty of deprivation of freedom to which the inmate was subjected must consider the principles of necessity, participation, responsibility and co-responsibility, and must bear in mind that this is a particular disciplinary regime with specific purposes. Penitentiary law, of which the sanctioning law that governs the execution of criminal sanctions forms a part, is autonomous from both criminal law and criminal procedural law. The differences that separate criminal procedure from any other sanctioning regime, and especially the disciplinary regime applicable to inmates, are clear and substantial. The Constitution also distinguishes between criminal procedure and the other procedural domains, specifying the guarantees which the former must provide. It is from this specification with regard to criminal procedure that some of the respective guarantees have also spread into other areas in which sanctions can be imposed.

The Court stated that the general restrictions on the right of freedom permitted in the Constitution and applicable in criminal law are not the same thing as the imposition of precautionary measures while disciplinary proceedings against prison inmates are pending. The latter affect subjects who are already in a situation in which they are deprived of their freedom and which represents the concrete implementation of one of the exceptions to the principle of freedom that are provided for in the CRP.

The purposes pursued by the coercive measures imposed while criminal proceedings are underway and those sought by the precautionary measures applied in disciplinary proceedings – i.e. those brought against an inmate for a disciplinary infraction in prison – are different. Whereas the former are designed to prevent a flight risk or the danger that the accused will disrupt the proceedings, continue to engage in criminal activities or disturb the public order and peace, the latter are intended to ensure safe and orderly communal life within prisons – an objective that also includes the socialisation of inmates. The two groups of situation are not qualitatively or quantitatively the same in any respect.

Accordingly, the Court found no unconstitutionality in the norm before it and denied the inmate's appeal.

Cross-references:

Constitutional Court:

- nos. 157/88, 07.07.1988; 263/94, 23.03.1994; 96/05, 23.02.2005; 370/07, 26.06.2007; 218/12, 26.04.2012; 129/13, 27.02.2013 and 635/15, 09.12.2015.

Languages:

Portuguese.



Identification: POR-2016-2-008

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 04.05.2016 / **e)** 252/16 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.20 General Principles – **Reasonableness.**
- 3.21 General Principles – **Equality.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

Keywords of the alphabetical index:

Fundamental rights, limitation / Penalty, regime, difference / Prison rules.

Headnotes:

There is no unconstitutionality in an interpretation of a norm deduced from the Code governing the Execution of Freedom-Depriving Penalties and Measures (hereinafter, "CEP"), such that in cases in which a prison inmate is found guilty of the effective commission of more than one disciplinary infraction and the same type of sanction is imposed for all of them, the resulting disciplinary measures are applied consecutively, and not concurrently as if they were a single sanction.

The Constitution distinguishes between criminally unlawful acts and criminal sanctions on the one hand, and other sanctioning regimes on the other. The CEP permits limitations on inmates' fundamental rights, both in accordance with the terms of the decision in which the court imposed the measure depriving the person of his or her freedom, and for reasons linked to order, safety and security in prison.

The combined consideration of the special needs to maintain order, safety and security in a prison establishment and the pursuit of the objectives of promoting the sense of responsibility of an inmate who is serving a penal sentence justifies the option embodied in the norm in question.

Summary:

I. This concrete review case was brought by a prison inmate who appealed against a decision of the Lisbon Sentence Execution Court (hereinafter, "TEPL"). The question of constitutionality was whether it is constitutionally permissible to sentence an inmate to disciplinary measures involving more than one sanction of the same type because he had committed more than one disciplinary infraction, and for those sanctions to be applied consecutively (i.e. in the form of a material accumulation) rather than concurrently.

II. The Constitutional Court had never pronounced itself on this specific question before, but it had considered other questions that presented certain parallels with this one in terms of both the grounds for differences between the Criminal Code regime and other sanctions-imposing regimes, and the constitutional parameters relied on therein.

It had already given its views on the material accumulation of sanctions as part of the law governing mere social administrative offences in the tax field, when it concluded that a norm under which the sanctions imposed for such offences should be materially cumulative was not unconstitutional.

The Portuguese penal legislator has adopted a system in which the agent of a crime is sentenced to a single penalty (which takes account of the combination of the facts of the case and the agent's personality), and not to the material accumulation of all the penalties applied for each one of multiple infractions. The legislator took the view that a solution in which penalties are materially accumulated can lead to the imposition of excessive or inappropriate punishments that go beyond the limit of the agent's guilt, namely because they do not take account of the evolution of his or her personality and because they compromise the purposes that penalties are intended to achieve, especially the agent's reintegration into society. When

more than one crime is committed by the same agent, the constitutional principles of guilt/blame, proportionality and sociability require the imposition of a single penalty.

In its jurisprudence, the Constitutional Court had already noted that in Portugal, while both the law governing mere social administrative offences and the criminal law both reject the idea of objective responsibility, there are substantive reasons that require a distinction between crimes and administrative offences, one of which is the nature of both the unlawful acts and the sanctions involved. The particular nature of a given unlawful act conditions the possibility of applying the principles of guilt/blame, proportionality and sociability, according to which the state must seek the socialisation of convicted persons. The reasons that justify concurrent sentences in criminal law cannot be transposed unaltered into the law governing mere social administrative offences.

The need for the limit on the length of prison terms to remain within parameters such as whether it is physically possible to execute them, humanity, respect for the legislator's choices with regard to maximum penalties, and the idea of resocialisation justifies concurrence in the criminal system, but does not make sense in the case of multiple administrative offences punished solely by pecuniary sanctions.

At the same time, the criminal-law point of reference – i.e. guilt/blame – that makes it possible to combine the various facts for which the convicted person is responsible into the basis for a concurrent penalty does not possess the same structural importance in the case of mere social administrative offences.

The Constitutional Court pointed out that this reflection on how the extent to which the principles of guilt/blame proportionality and sociability cannot be transposed from the criminal law to the law on administrative sanctions is to a large extent also capable of precluding the transposition without alteration of those principles' expansive force to the domain of disciplinary sanctions in general, and specifically to the regime set out in the Code governing the Execution of Penalties.

The CEP itself says that the assessment and determination of each of the disciplinary sanctions imposed for each infraction that is committed must be shaped by those principles, and the accumulation of disciplinary sanctions is not without its limits. However, the field of application *par excellence* of those principles is the criminal law, and they are not projected with the same intensity into other branches of the law under which sanctions can be imposed.

Using them as parameters does not lead to a prohibition under which the ordinary legislator is not allowed to opt for a solution in which the sanctions imposed for the effective commission of disciplinary infractions by an inmate are materially cumulative.

The norm before the Court applies to cases in which there are effectively multiple disciplinary infractions, with a sanction for each one that has effectively been committed, so there is no violation of the principles of guilt/blame, proportionality and that double punishments for a single act are prohibited. As to the principle of equality, the dimension of the prohibition of arbitrariness is pertinent to the present situation, when seen as a limit on the ordinary legislator's freedom to shape legal regimes. However, the Court took the view that the norm did not entail any constitutionally prohibited discrimination of a kind based on the personal characteristics to which the Constitution refers in this respect, so the solution could only be criticised if one were to prove the absence of any relationship between the purpose pursued by the law and the differences between regimes which the law lays down in order to achieve that goal. The Court said that in order to gauge whether the legislator's option is reasonable, one must analyse the reasons for the specific differentiation between the regime established in the criminal-law field and that governing discipline among prison inmates. Finding no such unreasonableness in the norm before it, the Court rejected the allegation of unconstitutionality and denied the appeal.

Cross-references:

Constitutional Court:

- nos. 263/94, 23.03.1994; 96/05, 23.02.2005; 370/07, 26.06.2007; 336/08, 19.06.2008 and 635/15, 09.12.2015.

Languages:

Portuguese.



Identification: POR-2016-2-009

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 18.05.2016 / **e)** 309/16 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Parentage, right to know / Paternity, contested / Right to personal identity.

Headnotes:

A Civil Code norm, under which a son or daughter has three years in which to bring an action challenging his or her presumed father's paternity, counting from the date on which he or she becomes aware of circumstances which could lead to the conclusion that he or she is not the biological child of his or her mother's husband (these three years can be added to the ten years that any child has for this purpose following his or her coming of age or emancipation), is constitutional.

The normative scope of the right to personal identity includes not only each human person's natural right to their own difference, but also the right to one's 'personal historicity', as expressed in each person's relationship with those who gave rise to him or her. This relational dimension includes the right to know who one's parents are or were, and it is this that leads on to the right to investigate one's paternity and/or maternity. However, the right to establish a bond of filiation is not an absolute one. It falls to the legislator to use its freedom to shape legislation in order to choose the way or ways that seem most appropriate to it in order to concretely implement that right, naturally within the limits imposed by the Constitution.

Summary:

I. The Public Prosecutors' Office was legally required to bring this concrete review case in the form of an appeal against a decision in which the Supreme Court of Justice (hereinafter, "STJ") refused to apply a norm on the grounds that it was unconstitutional. The norm in question is contained in the Civil Code (hereinafter, "CC"), and states that when sons or daughters become aware of circumstances which suggest their mother's husband is not their biological father, they have three years in which to legally challenge his paternity. The

paternity in this situation is one that results from the (rebuttable) legal presumption that the husband of a mother whose children are born or conceived during the couple's marriage is the children's father. The norm sets a subjective *dies a quo* time limit that is available in addition to an objective *dies a quo* limit under which a son or daughter can challenge presumed paternity for up to ten years after coming of age or emancipation.

II. The Constitutional Court had already considered the constitutionality of norms according to which the ability to investigate or challenge paternity lapses, both before and after the significant amendments to them made by a 2009 Law, under which the applicable time limits were substantially increased.

In its jurisprudence on the subject of time limits on the ability to bring filiation actions – i.e. paternity investigations and challenges – the Court had never absolutely rejected the constitutional admissibility of a system under which that right can lapse with time, nor had it ever said there is any constitutional requirement for an unlimited determination of the biological truth of parenthood. It had, however, considered that the existence of excessively short objective or subjective *dies a quo* time limits (which start counting when the holder of the right becomes aware of the fact that leads him or her to act) is capable of reducing the scope of the essential content of the constitutional rights to personal identity and to form a family, which include the right to know who one's mother and father are or were, and that such limits could violate the principle of proportionality.

The Court had also already pronounced itself on the specific norm before it in the present case, but on those occasions the issue was the concrete time limit set in the norm and not the inability to ever challenge paternity once the limit is passed.

Norms that establish a time limit for bringing filiation actions always involve a weighing up of various rights and interests to which the Constitution affords its protection, and the ensuing balance can vary one way or the other, depending on the greater or lesser weight attached to each of the values or assets the legislator is seeking to protect. In the light of the constitutional principle under which the ordinary law is only allowed to restrict constitutional rights, freedoms and guarantees in cases in which the Constitution itself expressly permits it, and that such restrictions must be proportional to that which is necessary in order to safeguard other such rights, freedoms and guarantees, it is thus possible to conclude that in some cases the legislator has disproportionately restricted a fundamental right, and in others, not.

As the Court had repeatedly said in the past, the right to know one's biological paternity and the right to form and/or destroy the respective legal bond fall within the scope of protection applicable to the fundamental rights to personal identity and to form a family.

The normative scope of the right to personal identity includes not only each human person's natural right to their own difference, but also the right to one's 'personal historicity', as expressed in each person's relationship with those who gave rise to him or her. This relational dimension includes the right to know who one's parents are or were, and it is this that leads on to the right to investigate one's paternity and/or maternity.

It is in the interest of public order that filial bonds be constituted and determined, inasmuch as the legal efficacy of the genetic bond of filiation not only has repercussions for the parent/child relationship, but is also projected beyond it. It is in the public interest to establish the match between biological parenthood and legal parenthood, thereby rendering the legal bond of filiation and all its effects operable, as soon as possible. This interest is also projected into the subjective dimension, in the form of security for the investigated party and his family. The Court noted that it is important for someone whom it is suggested may or may not be someone else's father (a bond with both personal and material effects) not to be subject to the possibility of an investigation action for an unlimited period of time.

The attribution of paternity on the basis of the general rule that the mother's husband is the father, which is itself based on judgments of normality and probability, results in the formation of a filial relationship that possesses significance on the constitutional level. The Constitution recognises that the family possesses a specific importance, both within the dimension of the fundamental rights of family members, and as an institution which structures life in society. This family relationship would be seriously undermined if actions to challenge paternity could be brought at an unlimited point in time. The life of the family community and the stability of family and social relations would be compromised. Notwithstanding the firmly established nature of the right to know one's biological origins, the law must also consider the need to protect constituted families.

To allow legal bonds that are not in line with the biological truth to be ended at any time would be to ignore any interest on the part of the presumed father in maintaining a fatherhood which he had thus far assumed. Even if the legal and biological bonds

between the two individuals do not match, there is a point in time at which the presumed father's personal and material interests justify the definitive legal consolidation of a paternity that does not correspond to the biological truth.

It is justifiable to say that a presumed child who finds out that his or her mother's husband is not his or her biological father should declare whether he or she wants to maintain or extinguish the existing legal bond between them as soon as possible.

The means *par excellence* of protecting these deserving public and private interests is the setting of time limits after which the ability to exercise the right in question lapses. Such limits serve as a way of inducing the right-holder to exercise his or her right quickly.

However, notwithstanding their constitutional-law nature, these rights are not absolute, nor do they always project the same intensity of value when confronted with other values and interests that also warrant constitutional protection. It falls to the legislator to use its freedom to shape legislation in order to choose the way or ways that seem most appropriate to it in order to concretely implement that right, naturally within the limits imposed by the Constitution.

If there were no time limit on paternity investigation actions, and someone at a later stage of their life were to be able to exercise a right they had previously neglected, the right to personal identity might enjoy the highest possible level of protection, but this optimised protection is not necessarily what the Constitution demands.

Objective reasons linked to legal certainty and security, themselves dictated by society's interest in the stability of established family relationships, justify placing a certain time limit on the right to challenge one's paternity, thereby ensuring that once that limit has passed, the core family is unalterably defined and its members can orient their own lives on the basis of an existing legal reality. Assuming the right-holder is in possession of the facts that enable him or her to exercise the right, it is legitimate for the legislator to set a time limit from the moment at which that knowledge is acquired for bringing an action to challenge paternity, thereby preventing the interest in legal certainty and security from being undermined at a later date by a consciously omissive and uninterested attitude on the part of the presumed offspring.

The Court said that when the legislator opted to simultaneously protect other relevant legal values by imposing time limits following which the right to challenge lapses, it did not disrespect the requirement that the protection afforded to this right be sufficient, inasmuch as the restriction only places the right-holder under the burden of exercising his or her right within a given period of time.

The Court thus concluded that the Constitution does not preclude subjecting the bringing of actions to challenge presumed paternity, when filed by the offspring, to a statute of limitations. Based on its assessment of the relative values present before it, the Court found no unconstitutionality in the norm in question.

Supplementary information:

One Justice dissented from the majority decision, arguing that there should be no time limit on a presumed son or daughter's right to challenge paternity. She took the view that the rights to personal identity and the free development of one's personality trump the interests in legal certainty, the protection of constituted families and the privacy of personal life, and society's interest in the stability of family relations.

Cross-references:

Constitutional Court:

- nos. 23/06, 29.03.2006; 609/07, 11.12.2007; 99/88, 28.04.1988; 413/89, 31.05.1989; 456/03, 14.10.2003; 486/04, 07.07.2004; 23/06, 10.01.2006; 626/09, 02.12.2009; 65/10, 04.02.2010; 401/11, 22.09.2011; 247/12, 22.05.2012; 547/14, 15.07.2014; 704/14, 28.10.2014; 14/09, 13.01.2009; 589/07, 28.11.2007; 593/2009, 18.11.2009; 179/10, 12.05.2010; 279/08, 14.05.2008; 546/14, 15.07.2014; 446/10, 23.11.2010; 39/11, 25.01.2011; 449/11, 11.10.2011; 634/11, 20.12.2011 and 441/13, 15.07.2013.

Languages:

Portuguese.



Identification: POR-2016-2-010

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 19.05.2016 / **e)** 331/16 / **f)** / **g)** *Diário da República* (Official Gazette), 22 (Series I), 02.02.2016, 333 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Citizenship, right, refusal / Penalty, criminal law.

Headnotes:

Norms in the law and regulations concerning nationality, according to which conviction and sentencing followed by transit *in rem judicatam* for commission of a crime punishable by a prison term of three or more years under Portuguese law (albeit with application of a mechanism whereby the penalty was dispensed with) constituted grounds for denying an application for Portuguese nationality, are unconstitutional. The legislator cannot create legal criteria for access to the legal bond constituted by Portuguese citizenship which imply an automatic loss of civic, professional or political rights because of a penalty that was imposed in the past. Any legal criteria that are linked to the imposition of penalties and are created as part of the process of gaining access to Portuguese citizenship must enable whoever applies the law to weigh up the circumstances in the concrete case at hand.

Summary:

I. This concrete review case came about because the Public Prosecutors' Office is legally required to appeal to the Constitutional Court when other courts refuse to apply a norm on the grounds that it is unconstitutional.

The norms concerned are those in the Nationality Law (LN) and the Regulations governing Portuguese Nationality (RNP), according to which conviction and sentencing followed by transit *in rem judicatam* for commission of a crime punishable by a prison term of three or more years under Portuguese law (albeit with application of a mechanism whereby the penalty was dispensed with) constituted grounds for denying an application for Portuguese nationality.

The question of constitutionality here was not entirely new to the Court – something similar had already been the object of Rulings nos. 599/05, 2 November 2005 and 106/16 of 24 February 2016. In the latter, the Court (a different Chamber from the one that heard the present case) saw fit to use an option given to it by the Court's Organic Law, thereby avoiding a finding of unconstitutionality: this organic norm allows the Court to base its view of the constitutionality of a norm which a court *a quo* has refused to apply on an interpretation 'in conformity with the Constitution', which the other court must then apply instead of its own original interpretation when the case is returned to it.

II. In the present Ruling the Court took the position that for the purposes of the concrete review of their constitutionality, the norm or normative interpretation before it should be taken as a given, and that regardless of whether the court *a quo*'s interpretation was the best one or not, it was not the Constitutional Court's place to pronounce itself in that regard. The only exception to this would be if the interpretation clearly had no basis in law, which is the only situation in which its Organic Law enables the Court to interpret a norm in accordance with the Constitution. This would indeed have to be an exceptional situation, inasmuch as it would mean that the Constitutional Court was taking the place of the ordinary courts and effectively judging their interpretation of legal norms, as applied in their concrete decisions.

Quoting its own jurisprudence, the Court said that when the Constitution of the Portuguese Republic (hereinafter, "CRP") talks about the concept of citizenship (a term it employs instead of nationality), it does not always refer to Portuguese nationality.

There is no doubt that when the CRP says that a declaration of a state of siege or emergency cannot affect the right to citizenship, the latter concept is applied in a broad sense that encompasses both Portuguese and foreign citizens, and one that is attentive to the radical connection the CRP makes between the right to citizenship and the principle of human dignity. However, when it says that everyone is recognised to possess the right to citizenship and can only be deprived of it in the cases and under the terms laid down in the ordinary law, it is referring to Portuguese citizenship. Among other things, this is clear from the fact that the CRP then goes on to say that citizenship can only be withdrawn and civil capacity can only be restricted in the cases provided for by law. Albeit they must respect the parameters set out in International Law, it is up to states to define who their citizens are, and it is up to the ordinary legislator to lay down the details of how people can gain access to Portuguese citizenship.

Portuguese constitutional jurisprudence takes the view that the right to citizenship possessed by nationals is a subjective right. The CRP recognises that other persons can possess a legal expectation to acquire Portuguese nationality, subject to the fulfilment of certain preconditions which the country's legislator sees as expressing a bond based on effective integration into the Portuguese community.

The legal structure of the "right to gain access" to Portuguese citizenship is very different to that of the subjective right to Portuguese citizenship. According to constitutional jurisprudence, the former's status as a legal expectation leaves the ordinary legislator much more freedom in which to shape the criteria governing that access, notwithstanding the fact that their definition must comply with the principles of appropriateness, necessity and proportionality, in such a way that the essential core of the right is preserved.

Among the various alleged violations of constitutional precepts that were argued before it, the Court focused on the constitutional norm which precludes any penalty from having the necessary effect of causing the loss of any civic, professional or political rights.

The respondent in the present case had been convicted of a crime of causing an injury to simple physical integrity, but was dispensed from any penalty. The Court said that the ordinary legislator seemed to have overlooked the mechanism whereby a judge can dispense a convicted person from a penalty. As such, the negative criterion whereby Portuguese nationality could not be granted following "conviction and sentencing followed by transit *in rem judicatam* for commission of a crime punishable by a prison term of three or more years under Portuguese law" required the automatic rejection of applications made by persons thus convicted and sentenced. This in turn meant that the entity with the competence to grant or deny an application for nationality was precluded from adequately evaluating the applicant's situation in the light of the constitutional principle of proportionality.

Although what was at stake in the present case was not the imposition of a penalty, but rather an obstacle to the continuation of an administrative process designed to acquire Portuguese nationality, in past cases the Constitutional Court had generically held that the imposition of a penalty cannot lead to effects that automatically imply a loss of civic, political or professional rights – a constitutional norm on which it effectively also ended up relying on this occasion. The important element in this case was that the legislator cannot create legal criteria for access to the

legal bond constituted by Portuguese citizenship which imply an automatic loss of civic, professional or political rights because of a penalty that was imposed in the past.

Any legal criteria that are linked to the imposition of penalties and are created as part of the process of gaining access to Portuguese citizenship must enable whoever applies the law to weigh up the circumstances in the concrete case at hand.

Whoever is responsible for judging whether the criterion under which applications for Portuguese nationality can be rejected on the grounds of a conviction (and its transit *in rem judicatam*) for commission of a crime punishable by a prison term of three years or more years is fulfilled or not, cannot be prevented from also attaching value to the other circumstances linked to that conviction and the ensuing sentence – particularly whether the penalty was effectively executed, the length of time between the commission of the crime and the decision, any repeat offences or continuation of criminal activities, and whether the prison term was served in full, or dispensed with.

The Court therefore found the norm before it unconstitutional.

Supplementary information:

One Justice dissented from the Court's decision, arguing that the fact that the Constitution prohibits penalties from necessarily leading to the loss of any civic, professional or political rights cannot be used to gauge the constitutionality of this negative requisite for the acquisition of Portuguese nationality. In his view, when the majority mobilised this constitutional parameter, it disregarded a structural difference between a positive expectation (the "right of access" to Portuguese citizenship) and a negative subjective right (the right not to be deprived of Portuguese citizenship), in that one cannot lose – i.e. be deprived of – something one does not possess in the first place, in this case citizenship. He was also of the opinion that when seen from the viewpoint of the principle of proportionality, the requisite imposed by the norm was not inappropriate, unnecessary or excessive in relation to the intended purpose of ensuring the existence of effective ties to the Portuguese community.

Cross-references:

Constitutional Court:

- nos. 327/99, 26.05.1999; 176/00, 22.03.2000; 154/04, 16.03.2004 and 599/05, 02.11.2005.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2016-2-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 02.06.2016 / **e)** 374/2016 / **f)** Decision on the exception of unconstitutionality of first sentence of Articles 54.1 and 57 of Law no. 317/2004 on the Superior Council of Magistracy / **g)** *Monitorul Oficial al României* (Official Gazette), 504, 05.07.2016 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office.**

4.7.4.3.4 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Term of office.**

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

Keywords of the alphabetical index:

Law, precision / Term of office, expiry.

Headnotes:

Having regard to the main feature of the Superior Council of Magistracy as a collegial body, its members' term of office expires at the end of a period of 6 years, thus on the same date for all members. Therefore, those who acquire membership in the Council during the period of 6 years, occupying a vacancy within the collegial body, will fulfil their legal and constitutional powers as from the date of validation or election, as the case may be, for the remaining period up to the expiry of that period. Any contrary interpretation is unconstitutional, in the sense that each member of the Superior Council of Magistracy can be validated or elected for a term of office of 6 years, which elapses individually, independently of the other members' term of office.

Summary:

I. A case has been referred to the Constitutional Court to on the grounds of the second sentence of Article 146.d of the Constitution, with the exception of unconstitutionality of the provisions of the first sentence of Article 54.1 and Article 57 of Law no. 317/2004 on the Superior Council of Magistracy, regarding the term of office of the elected members of the Superior Council of Magistracy and the procedure to be followed in the case of termination of membership of the Superior Council of Magistracy before the 6 year term of office expires.

The applicant claimed that the provisions of the first sentence of Article 54.1 and Article 57 of Law no. 317/2004 on the Superior Council of Magistracy are not set out with sufficient precision so as to enable the citizen (in this case, the Magistrate, member of a professional association) to regulate his or her conduct on candidacy in the elections to the Superior Council of the Magistracy. Furthermore, the national authorities' interpretation is not consistent and coherent enough as to render the law foreseeable. In essence, reference is made to the interpretation of the term of office of 6 years provided for by the Constitution and by law, namely whether it elapses individually or is one collective term of office.

II. Having examined the exception of unconstitutionality, the Court firstly made a comparative analysis of the term of office of two collective constitutional bodies: Parliament and the Superior Council of the Magistracy. The Court noted that, by Article 63.1, the Basic Law establishes the term of office of the two Chambers of Parliament, and by Article 133.4, the term of office of the members of the Superior Council of Magistracy. In both cases, the purpose of the constitutional legislator, therefore the regulatory object of the constitutional provisions, was to establish the duration of the constitutional term of office of each of the two public authorities, irrespective of the language used. The constitutional term of office is unique, collective and applicable only to the constitutional authority and not to each of its individual members. The Court further held that the same interpretation, consistent with the spirit and the letter of the Constitution, can also be found in the constitutional regulation of other constitutional authorities, such as the Constitutional Court or the Court of Accounts.

Taking into account the constitutional provisions governing the aforementioned similar situations, the Court concluded that the provisions of Article 133.4 of the Constitution lay down only the duration of the term of office of the Superior Council of Magistracy, collegial body and constitutional public authority, and not the individual term of office exercised autonomously by

each member separately. Consequently, the Council shall be renewed under the conditions laid down by its own law of organisation and functioning, every 6 years, in respect of the elected members – 9 judges, 5 prosecutors, 2 civil society representatives – and whenever their term of office, by which they acquire the membership of the Superior Council of Magistracy, ceases. For example, this is the case of the Minister of Justice, the President of the High Court of Cassation and Justice and the General Prosecutor's Office of the High Court of Cassation and Justice.

Following the systematic analysis of the legal provisions, it results that the election procedure of the Superior Council of the Magistracy shall be a single procedure, taking place simultaneously for all categories of judges and prosecutors, according to the relevant courts of law or prosecutors' offices. Thus, under Article 6.2 of Law no. 317/2004, "The date on which the general meetings of judges and prosecutors takes place shall be established by the plenum of the Superior Council of Magistracy at least 90 days before the expiry of the term of office of its members and published in the Official Gazette of Romania, Part III, and on the website of the Superior Council of Magistracy". The cited rule uses the concept of "term of office" in the singular, and assigns it to the phrase "members of the Superior Council of Magistracy", which uses the plural for the determining noun. It follows that the term of office is unique and belongs to the members of the Council as a collective matter of law, as the Council is a collegial body. Thus, such an interpretation excludes the one according to which the term of office is individual, belonging to a person, since it does not use the concept of "terms of office", so the plural, corresponding to "members of the Superior Council of Magistracy".

Having regard to the aforementioned considerations, the Court held that it could conclude that the provisions of Law no. 317/2004 on the election procedure and the duration of the term of office of the members of the Superior Council of Magistracy are clear, foreseeable and in line with the provisions of Articles 1.5 and 133.4 of the Constitution. In the present case, the author of the exception has drawn the Constitutional Court's attention to a change in the interpretation of the legal provisions set forth in the first sentence of Article 54.1, in conjunction with Article 57 of Law no. 317/2004, namely the classification of the 6-year term of office of the elected members of the Superior Council of Magistracy as an individual term of office, independently of the collegial body. This change has been caused by the letter of the Superior Council of Magistracy requesting the Senate to correct certain decisions in order to clarify "the inconsistencies in the Senate's rulings on the

validation of the members of the Superior Council of Magistracy, with reference to the duration of the term of office of some members, in view of the fact that, in the course of 2016, elections to the Superior Council of Magistracy are to be held”.

The Court considered the new interpretation and application of the provisions of the first sentence of Article 54.1, in conjunction with Article 57 of Law no. 317/2004 were undertaken by the two public authorities with decision-making powers in this field (the Senate and the Superior Council of Magistracy). The Court also noted that their adopted acts take legal effect, determining the procedure for the election of new members of the Council, changing the organisational and functioning structure of this collective body. As such, the Court found that those stated above in its case-law on the unconstitutionality of legal rules resulted from their interpretation, and its competence in this regard is applicable also to the present case.

As a result, the Court found unconstitutional the impugned rules by reference to the constitutional provisions contained in Article 1.5, which enshrine the principle of the supremacy of the Constitution and the obligation to comply with the law, referring to the clarity and foreseeability of rules and in Article 133.4, which sets the duration of the term of office of the members of the Superior Council of Magistracy. The duration of the constitutional and legal term of office of the Council concern the public authority as a whole, while the elected persons become members of the Council and exercise it until the expiry of a period of 6 years. Therefore, having regard to the main feature of the Superior Council of Magistracy as collegial body, its members’ term of office shall expire at the end of the period of 6 years, thus on the same date for all members. In other words, those who acquire membership of the Council during the period of 6 years, occupying a vacancy within the collegial body, shall fulfil their legal and constitutional powers as from the date of validation or election, as the case may be, for the remaining period up to the expiry of that period. Any contrary interpretation is unconstitutional, in the sense that each member of the Superior Council of Magistracy can be validated or elected for a term of office of 6 years, which elapses individually, independently of the other members’ term of office.

For these reasons, the Court upheld the exception of unconstitutionality and found that the provisions of the first sentence of Article 54.1 of Law no. 317/2004 are constitutional insofar as the person elected to occupy a vacant position shall remain a member of the Superior Council of Magistracy for the remaining period until the expiry of the 6 year term.

Languages:

Romanian.



Identification: ROM-2016-2-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 15.06.2016 / **e)** 405/2016 / **f)** Decision on the exception of unconstitutionality of the provisions of Article 246 of the 1969 Criminal Code, of Article 297.1 of the Criminal Code and of Article 13² of Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts / **g)** *Monitorul Oficial al României* (Official Gazette), 517, 08.07.2016 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.12 General Principles – **Clarity and precision of legal provisions.**
4.6.10.1.3 Institutions – Executive bodies – Liability – Legal liability – **Criminal liability.**

Keywords of the alphabetical index:

Law, precision / Performance, defective.

Headnotes:

The provisions of Article 246 of the 1969 Criminal Code and Article 297.1 of the Criminal Code incriminating the abuse of functions violate Article 1.5 of the Constitution, as the phrase “defectively performs” contained in the above-mentioned texts is unclear. The quoted phrase can only be interpreted as the performance of a duty “in breach of the law”, within the meaning of primary regulation, namely the only interpretation that can determine the compatibility of the criticised criminal rules with the constitutional provisions on the clarity and predictability of the law.

Summary:

I. A case has been referred to the Constitutional Court on the grounds of the second sentence of Article 146.d of the Constitution, with the exception of unconstitutionality of the provisions of Article 246 of

the 1969 Criminal Code, of Article 297.1 of the Criminal Code and of Article 13² of Law no. 78/2000 on preventing, discovering and sanctioning corruption, published in the Official Gazette of Romania, Part I, no. 219 of 18 May 2000, as subsequently amended and completed, referring to the offence of abuse of functions.

The applicants of the exception have stated that the criticised legal provisions lack predictability and accessibility. Given how the offence of abuse of functions is defined, the phrase “does not perform an act or defectively performs it” cannot be determined exactly, to wit the conduct which defines the material element of the offence. Similarly, the phrase “damage of legitimate rights or interests of a person” cannot be understood either, which is the consequence of the alleged criminal activity. The legislator has established an indictment having a general character, so that the actions or inactions related to the activities carried out by the official may be mentioned in the provisions of other legislative acts than the criminal law (undetermined), in the job description or they can be factual situations, not regulated in writing. Therefore, the criticised provisions have an ambiguous character, with possible regulation of the official’s conduct by another authority, other than the legislative one.

II. Examining the exception of unconstitutionality, the Court noted first that the legislator has the obligation to demonstrate, in the legislative act, regardless of the field in which it exercises this constitutional competence, particular attention to the observance of the principle of clarity and predictability of the law. On the other hand, the judicial bodies, in their mission to interpret and apply the law and to establish the defective performance of the duty, have the obligation to apply the objective standard, as established by the law. Given the specificity of criminal law, the Court appreciated that, although proper to be used in other fields, the term “defectively” cannot be considered a proper term in the criminal field, particularly because the legislator did not circumscribe the existence of this element of the constitutive content of the offence of abuse of office on the fulfilment of certain criteria. The Court also noted that the doctrine held that the phrase “defectively performs” means the performance realised in another way than it ought to have been realised, the defective performance having regard to the content, form or extent of the performance, the time and the conditions in which it was realised.

The Court also noted that the case-law welcomed what the doctrine has highlighted without establishing the criteria for defective performance of duties, namely to show that the active subjects of the offence have defectively performed duties either by reference to the legal provisions or reference in

Government decisions, ministers’ orders, rules of procedure, codes of conduct or job descriptions. Thus, the Court found that the term “defectively” is not defined in the Criminal Code and the element about which the defective performance is analysed is not specified, which determines its lack of clarity and predictability. This lack of clarity, precision and predictability of the phrase “defectively performs” within the criticised provisions creates the premise for its application as a result of an arbitrary interpretation or appreciation.

Given these aspects, as well as the fact that the person who has the official capacity under criminal law must be able to determine unequivocally which conduct may have a criminal significance, the Court found that the phrase “defectively performs” in the content of the provisions of Article 246 of the 1969 Criminal Code and of Article 297.1 of the Criminal Code can be only interpreted in that the performance of the duty is realised “in breach of the law”. This is the only interpretation that can determine the compatibility of the criticised criminal rules with the constitutional provisions referring to the clarity and predictability of law. The Court has also noted that Article 19 of the United Nations Convention against Corruption, adopted in New York, expressly states that, in the case of the offence of “abuse of functions”, the public agent in discharge of his or her functions must perform or fail to perform an act, in violation of laws.

As for the term “law”, the Court noted that in the criminal matter, the principle of legality of criminal offences, “*nullum crimen sine lege, nulla poena sine lege*”, requires that the primary legislator is only able to establish the conduct which the recipient of the law is obliged to have, otherwise being subject to criminal sanctions.

For these reasons, the Court found that the impugned provisions violate Article 1.4 and 1.5 of the Constitution by allowing for the material element of the objective aspect of the offence of abuse of functions to be configured by the activity of other bodies than Parliament – by the adoption of the law, pursuant to Article 73.1 of the Constitution – or the Government – by the adoption of ordinances and emergency ordinances, under the legislative delegation provided by Article 115 of the Constitution. Thus, unanimously, the Court admitted the exception of unconstitutionality having as object the provisions of Article 246 of the 1969 Criminal Code and of Article 297.1 of the Criminal Code, and found them constitutional to the extent that the phrase “defectively performs” contained therein means “performs in breach of the law”.

Cross-references:

European Court of Human Rights:

- *Liivik v. Estonia*, no. 12157/05, 25.06.2009, paragraph 97;
- *Cantoni v. France*, no. 17862/91, 15.11.1996, paragraph 29, *Reports* 1996-V;
- *Coeme and others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, 22.06.2000, paragraph 145, *Reports of Judgments and Decisions* 2000-VII;
- *E.K. v. Turkey*, no. 28496/95, 07.02.2002, paragraph 51;
- *Achour v. France*, no. 67335/01, 29.03.2006, paragraphs 41 and 42, *Reports of Judgments and Decisions* 2006-IV;
- *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01, 77196/01, 24.05.2007, paragraphs 33 and 34;
- *Kafkaris v. Cyprus*, no. 21906/04, 12.02.2008, paragraph 140, *Reports of Judgments and Decisions* 2008;
- *Sud Fondi SRL and others v. Italy*, no. 75909/01, 20.01.2009, paragraphs 107 and 108;
- *Scoppola v. Italy* (no. 2), no. 10249/03, 17.09.2009, paragraphs 93, 94 and 99;
- *Del Rio Prada v. Spain*, no. 42750/09, 21.10.2013, paragraphs 78, 79, *Reports of Judgments and Decisions* 2013;
- *S.W. v. United Kingdom*, no. 20166/92, 22.11.1995, paragraph 36, Series A, no. 335-B.

Constitutional Court of Lithuania:

- no. 01/04, 10.11.2005.

Constitutional Court of Portugal:

- no. 179/12, 04.04.2012, *Bulletin* 2012/1 [POR-2012-1-008].

Constitutional Court of Hungary:

- no. 18/2004 (V.25).

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-2016-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 31.05.2016 / **e)** 14 / **f)** / **g)** Government agency responsible for publishing legislation online, www.pravo.gov.ru / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Road, public / Vehicle, oversized, damage, compensation.

Headnotes:

The provisions of laws establishing the regulatory system for mandatory public contributions and instituting the payment of compensation for damage caused to federal public motorways by heavy goods vehicles are compatible with the Constitution of the Russian Federation.

Summary:

I. The Constitutional Court reviewed the constitutionality of the provisions of Article 31¹ of the Federal Law on motorways and road activities of the Russian Federation, the Governmental Decree on the collection of compensation relating to damage caused to federal public motorways by vehicles with a gross vehicle mass of more than 12 tonnes and Article 12.21³ of the Russian Federation Code of Administrative Offences.

II. The review by the Constitutional Court focused on the legislative provisions that establish, as part of the regulatory system for mandatory public contributions, the introduction of the payment of compensation for damage caused to federal public motorways by vehicles with a gross vehicle mass of more than 12 tonnes (hereinafter, "heavy goods vehicles") and the powers of the Government of the Russian Federation to set the amounts and regulate the payment procedure, in addition to focusing on the duties of the collection system operator and the grounds of administrative liability for non-payment.

The Constitutional Court ruled that the disputed norms were compatible with the Constitution of the Russian Federation for the following reasons:

- the Federal Assembly and the Government of the Russian Federation are deemed to have an obligation to guarantee and support the regulatory system for mandatory contributions to highway funds which does not allow an excessive total financial burden to be placed on the owners of heavy goods vehicles based on an analysis of the expediency and economic justification for each specific payment (the amount thereof) and of the system as a whole, having due regard to the balance of interests of the levels of the Russian Federation's budgetary system;
- the amount of compensation for damage to federal public motorways by heavy goods vehicles cannot be higher than the monetary value of the damage caused by the vehicles in question (average amount) compared with vehicles of a lower permitted gross vehicle mass. The payment in question is not a tax and, for this reason, the federal legislature has the right to assign to the Government of the Russian Federation responsibility for determining the specific amount of the mandatory public payment;
- the payment set by the Government of the Russian Federation may not be increased, except by index linking within the statutory limits laid down, except where there is a corresponding provision in federal law and a guarantee is given to the persons required to pay regarding a period in which that increase will be phased in;
- the obligation for heavy goods vehicle owners to pay compensation for damage caused to federal public motorways in addition to the road tax and the excise duty on petrol and diesel does not represent a double taxation because these contributions serve different purposes;
- the operator cannot restrict payers' (potential payers') access to the system for collecting compensation for damage caused to federal public motorways and cannot prohibit access to the system if this possibility and the grounds therefor are not provided for by law. The operator cannot directly apply measures comparable to the administrative constraint measures applied by the public authorities;
- the resources received by the operator may be used solely for transfer to the federal budget and to reimburse payers in the cases provided for by law. Any other use of the resources is prohibited;
- failure to comply with the regulations set out in the provisions in question cannot give rise to a fine as an administrative punishment, where the person concerned is not at fault. In the administrative proceedings, the defendant is given the opportunity to submit evidence that the objective formal attributes of the administrative offence specific to his or her actions (or inaction) were caused by traffic, the highway infrastructure or other circumstances beyond his or her control.

The Constitutional Court declared that the provisions in point 4 of the Rules approved by Governmental Decree no. 504 of the Russian Federation of 14 June 2013 on the collection of compensation for damage caused on federal public motorways by vehicles with a gross vehicle mass of more than 12 tonnes were not in conformity with the constitution of the Russian Federation insofar as the operators of the collection system – individual entrepreneurs and legal persons as parties to business transactions – were able to issue regulatory acts (acts creating rules, including regulations on the payment procedure, the transfer thereof to the federal budget, and reimbursement to payers for overpayment).

The Constitutional Court set a deadline (15 November 2016) to make the appropriate amendments to the current regulations while emphasising that heavy goods vehicle owners continued to be under an obligation to pay in accordance with the current regulations and that the acts issued by the system operators would not be repealed before the date indicated.

Languages:

Russian.



Identification: RUS-2016-2-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 05.07.2016 / **e)** 15 / **f)** Government agency responsible for publishing legislation online, www.pravo.gov.ru / **g)** Government agency responsible for publishing legislation online www.pravo.gov.ru / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.8.8.2.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione loci*.**
 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

Keywords of the alphabetical index:

Real estate, rateable value, assessment, local government.

Headnotes:

A law which prevents a local authority body from challenging before the courts the outcome of the assessment of the rateable value of a plot of land which was not municipally owned, but which was located within its territory, is not compatible with the Constitution of the Russian Federation.

Summary:

I. The Constitutional Court assessed the constitutionality of the provisions of Article 24¹⁸ of the Federal Law of 29 July 1998, no. 135-FZ “On valuation activities in the Russian Federation”.

The disputed provision was submitted for examination by the Court, insofar as it was used as a basis for settling the issue of whether local authorities were entitled to challenge the outcome of the assessment of the rateable value of real estate property which the municipality did not own but which was located within its territory.

II. The Constitutional Court ruled that the disputed provision was not incompatible with the Constitution of the Russian Federation, insofar as, in order to guarantee the rights and legitimate interests of the

owners of property located on municipal territory, it set out the standard procedure for challenging before the local authorities the outcome of the assessment of the rateable value, which provided for such an appeal in cases concerning real estate owned by the municipality.

The disputed provision was ruled to be incompatible with the Constitution of the Russian Federation, insofar as it prevented local authorities from challenging before the courts the outcome of the assessment of the rateable value of a plot of land which the municipality did not own, but which was located within its territory. Such a situation could arise in the event that, at the plot owner’s request, its rateable value had been considerably reduced on the basis of the establishment of the market value, which could affect the rights and interests of the municipality, including those relating to tax revenue in the local budget.

Languages:

Russian.



Identification: RUS-2016-2-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 19.07.2016 / **e)** 16 / **f)** / **g)** Government agency responsible for publishing legislation online, www.pravo.gov.ru / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Pension, right / Pension, survivor’s.

Headnotes:

The provisions of the law are incompatible with the Constitution insofar as, when determining the pension to be paid to surviving parents, no account is taken of the death of two (or more) children while carrying out their military service or serving in the law-enforcement agencies.

Summary:

I. The Constitutional Court assessed the constitutionality of the provisions of Article 7.1 and 7.3 of the Federal Law “On the pension scheme for persons having completed military service or served in the law-enforcement agencies, the public fire service, drug trafficking monitoring bodies or the Federal National Guard Troops Service and their families”.

The disputed regulations were submitted for examination insofar as they served as a basis for determining the amount of pension for parents of two or more children who had died while carrying out their military service or while serving in the law-enforcement agencies.

II. The Constitutional Court ruled that the disputed provisions were compatible with the Constitution of the Russian Federation insofar as they were part of the legal mechanism granting entitlement to a pension for family members of military personnel and law-enforcement officers who had died in service, and established preferential conditions for family members to receive the survivor’s pension.

At the same time, the Constitutional Court ruled that the disputed provisions were incompatible with the Constitution, insofar as, when determining the amount of pension to be paid to surviving parents, they made no provision for the death of two (or more) children to be taken into consideration.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2016-2-002

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 16.06.2016 / **e)** UŽ-1607/2013 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 76/2016 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
 5.3.21 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:

Infringement, libel / Compensation, damages.

Headnotes:

Compensation for damages for breach of honour and reputation must be proportionate to the non-pecuniary damage suffered.

Summary:

I. The applicant submitted a constitutional appeal against the Appellate Court judgment, alleging a violation of the right to a fair trial under Article 32.1 of the Constitution and freedom of expression under Article 46.1 of the Constitution, because, as the defendant in civil proceedings, he was obliged to pay a certain amount in respect of non-pecuniary damage for the infringement of honour and reputation. The infringement has been caused by the fact that in a letter sent to multiple addresses of state institutions, he presented untrue facts about the claimant, the director general of state-owned company.

Previously, by the final judgment, the applicant was found guilty of libel, sentenced to a fine and obliged to pay the costs of the criminal proceedings.

In civil proceedings – regarding the existence of the offense and criminal liability – the Court is bound by the final judgment of the criminal court in terms of Article 13 of the Law on Civil Procedure.

II. The Constitutional Court noted that in this particular case, there is a conflict of two legitimate rights – the right to reputation of the claimant, and the right to freedom of expression of the applicant. Therefore, the question of relevance is whether the amount awarded as compensation for damage is proportionate to the legitimate aim of protecting the claimant's reputation (the standard of proportionality). Other standards, being observed in the context of the relationship between the freedom of expression and the right to reputation (legality, legitimacy and "necessity in a democratic society") have been fulfilled in this particular case.

According to the standpoints of the European Court of Human Rights, which the Constitutional Court has accepted, compensation of damage has to be proportionate to non-pecuniary (moral) damage suffered by the claimant. In this regard, the Constitutional Court referred to the European Court of Human Rights' judgments in the cases *Koprivica v. Montenegro*, *Tolstoy Miloslavsky v. the United Kingdom* and *Steel and Morris v. the United Kingdom*.

Further, although the awarded damage may be considered modest according to contemporary standards, it may be very important and gains weight when compared with the modest income of the applicant, and in certain cases the amount of damage awarded, may be the basis for the finding a violation of the Convention law (see judgments of the European Court of Human Rights *Lepojić v. Serbia* and *Tešić v. Serbia*). In the judgment *Tešić v. Serbia* there is a detailed analysis of the gravity of the awarded compensation of damage in relation to financial position of the applicant and it was the main reason for finding a violation of freedom of expression.

The applicant, in his appeal against the first instance judgment, stated that the awarded amount is too high and that it will lead him, as a pensioner, to a state of poverty. The Appellate Court reduced the amount, but it did not deal specifically with this issue, which is, in the opinion of the Constitutional Court, of crucial importance in this case. The applicant is a retired journalist, with a monthly income of 13.000 RSD. Firstly, he was sentenced in criminal proceedings to a fine of 30.000 RSD and to pay the costs of the

criminal proceedings of 38.800 RSD. Then, in the civil procedure, he was obliged to pay non-pecuniary damage and legal costs – 100.000 RSD and 21.947 RSD, respectively. These amounts, placed in relationship with his income, may represent a major financial burden for the applicant.

Also, the fact which indicates that there is no proportional relationship between the non-pecuniary (moral) damage and the monetary compensation is that the information suitable to harm the honour and reputation of the claimant was not placed through the media or social networks, where an indefinite number of persons could have had access to it. Instead, it was communicated to a limited and narrow circle of people and only with respect to the manner in which a public function in a significant company was conducted.

Another fact indicating a disproportion is that, at the relevant time, the claimant was the general director of the state-owned company. This means that he was not an ordinary private person. He should expect articles, texts and letters on him, and that some may contain harmful statements on him, related to his position. These statements entered the domain of protection of freedom of expression because they contain information of public interest (see European Court of Human Rights judgments *Bladet Tromsø and Stensaas v. Norway* and *Lepojić v. Serbia*). Thus, according to the finding of the Constitutional Court, the claimant had to have a greater degree of tolerance (see judgment of the European Court of Human Rights *Bodrožić v. Serbia*).

In view of the above, the Constitutional Court adopted the constitutional appeal and found that the judgment of the Appellate Court violated the freedom of expression of the applicant guaranteed by Article 46.1 of the Constitution, quashed the judgment and ordered that the Appellate Court again decide the appeal filed by the applicant against the judgment of the first instance court. Bearing in mind the established infringement and ordered removal of harmful consequences, the Constitutional Court did not examine specific allegations of violation of the right to a fair trial under Article 32.1 of the Constitution.

Cross-references:

European Court of Human Rights:

- *Koprivica v. Montenegro*, no. 41158/09, 22.11.2011;
- *Tolstoy Miloslavsky v. the United Kingdom*, no. 18139/91, 13.07.1995, Series A, no. 316-B;

- *Steel and Morris v. the United Kingdom*, no. 68416/01, 15.02.2005, *Reports of Judgments and Decisions* 2005-II;
- *Lepojić v. Serbia*, no. 13909/05, 06.11.2007;
- *Tešić v. Serbia*, nos. 4678/07, 50591/12, 11.02.2014;
- *Bladet Tromsø and Stensaas v. Norway*, no. 21980/93, 20.05.1999, *Reports of Judgments and Decisions* 1999-III;
- *Bodrožić v. Serbia*, no. 32550/05, 23.06.2009.

Languages:

English, Serbian.



Slovakia Constitutional Court

Important decisions

Identification: SVK-2016-2-002

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 29.04.2015 / **e)** PL. ÚS 10/2014 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 29.12.2016, 443/2015 / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
 5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications**.
 5.3.36.3 Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications**.

Keywords of the alphabetical index:

Data, retention, electronic communication / Data, personal, protection, disclosure.

Headnotes:

Obliging telecommunications and internet providers to store data concerning communications parties in case prosecuting authorities should require them, regardless of whether these communications parties' conduct may be linked to serious crime and without providing safeguards against possible misuse of these data, constitutes a violation of the right to private life for failing the second part of the proportionality test due to not being necessary for achieving the pursued objective.

Summary:

I. On 29 April 2015, the Constitutional Court decided on the non-conformity of several provisions of the Electronic Communications Act, Criminal Procedure Code and Police Force Act with the Constitution,

Charter of Fundamental Rights and Freedoms and European Convention on Human Rights.

The challenged provisions of the Electronic Communications Act introduced an obligation for internet providers and mobile phone service providers to store, for a certain period of time, traffic data, location data, and data concerning communications parties if needed by state authorities. The challenged provisions of the Criminal Code and Police Force Act then regulated the access of prosecution authorities to these data.

The motion for the commencement of the proceedings on the constitutional conformity of these laws was filed by a group of 31 members of Parliament (hereinafter, the “applicants”). The applicants stressed, *inter alia*, that the introduction of the duty to store data on electronic communications constitutes a major interference with privacy, since it implies the monitoring of all inhabitants of Slovakia, regardless of their integrity and reputation. Data would be thus collected daily on every inhabitant of Slovakia, including with whom he or she makes phone calls, to whom he or she sends text messages and emails, when he or she did so and where he or she was at the time, what type of telephone or service he or she used, how long the phone call lasted, etc. A complete personality and communications profile of an individual can be made using this information. Furthermore, it enables them to track the movements of the individual and may reveal a number of essential characteristics of his or her identity or behaviour, in other words, a substantial part of his or her private life.

II. After examining the motion, the Constitutional Court concluded that the challenged legislation requiring the storing of data for the purposes of their possible disclosure to state authorities served a legitimate aim of public interest, i.e. fight against serious crime and protection of public security.

However, this fact in itself is insufficient to conclude that the said legislation conforms to the Constitution. As indicated, it is possible to learn a great deal of information about the private lives of individuals by analysing stored communications data. This situation together with sustained, systematic and pervasive data collection might have induced a feeling in the minds of the affected individuals that their private life is subject to continuous surveillance.

Under these circumstances it was necessary to assess whether the challenged legislation is proportionate and necessary for the realisation of the pursued objectives.

The challenged provisions of the Electronic Communications Act applied to all forms of electronic communications, which is very widespread and of increasing importance in the daily life of the inhabitants. Data retention applied to all persons using electronic communications services. It was thus also applied to persons in whose case there was no reason to suppose that their conduct could be even indirectly or remotely linked to serious crime.

For that reason, the legislation on electronic communications could not be considered as proportionate and necessary for the realisation of the pursued objective. It is certainly possible to fight serious crime and ensure public security through other means which constitute a less intensive interference with right to privacy in comparison to preventive data retention. One possibility would be for example to monitor and store data only on specific, predefined communications participants and under specific conditions.

It followed then from the wording of the Criminal Procedure Code and Police Force Act provisions that, contrary to the regulation found in the Electronic Communications Act, the power of prosecuting authorities to require identification and disclosure of data on electronic communications applies not only to specific, predefined crimes, but rather to all intentional crimes (according to the challenged provision of the Criminal Procedure Code) or to any crime (according to the challenged provision of the Police Force Act). In the opinion of the Constitutional Court, these conditions for the interference with the fundamental right to protection of privacy, private life and personal data are defined too broadly and vaguely.

The power of prosecuting authorities to require identification and disclosure of data on electronic communications cannot be considered a usual and routine means of prevention and detection of crime due to the intensity of its interference with fundamental rights. This measure can be used solely in cases where there are no other means to achieve this objective, which would be less of an interference with fundamental rights.

Any adequate legal regulation should furthermore contain clear and detailed rules for securing stored data. The legislator should also consider introducing more detailed rules for the contents of the court order to identify and disclose data on communications traffic as well as of the motion of prosecution authorities seeking to have this court order issued. Given the nature of the proceedings and decision-making in these matters, where the participation of the person concerned in the proceedings is not

expected, the court's task is also one of "finding a balance" in the procedural situation and it is unacceptable for the Court to be in the position of an "assistant" to the indictment, since the Court must remain impartial under all circumstances.

Languages:

Slovak.



South Africa Constitutional Court

Important decisions

Identification: RSA-2016-2-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 14.06.2016 / **e)** CCT 55/16 / **f)** Electoral Commission v. Aaron Pasela Mhlope and Others / **g)** www.saflii.org/za/cases/ZACC/2016/15.pdf / **h)** [2016] ZACC 15; CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes**.
 3.13 General Principles – **Legality**.
 3.23 General Principles – **Equity**.
 4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls**.
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.
 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.
 5.3.41.6 Fundamental Rights – Civil and political rights – Electoral rights – **Frequency and regularity of elections**.

Keywords of the alphabetical index:

Act, suspension of operation / Election, electoral commission, obligations / Election, voters' list, flaws / Electoral roll, invalidity, effect.

Headnotes:

Non-compliance by an organ of state with an obligation arising out of an Act of Parliament is inconsistent with the rule of law and therefore must be declared constitutionally invalid.

The Constitutional Court has the remedial power under Section 172.1.b of the Constitution to suspend this kind of declaration of invalidity. Where it is just and equitable, it may in effect suspend the legislative obligation.

Summary:

I. In November 2015, the Constitutional Court in *Kham v. Electoral Commission (Kham)*, ordered the Electoral Commission (hereinafter, "IEC") to hold fresh by-elections in the Tlokwe Municipality. The Court also declared that the voters' roll that the IEC must provide under Section 16.3 of the Electoral Act had to contain the addresses of voters, where available. The IEC investigated the roll for Tlokwe and found that just over 1 000 people were registered in incorrect segments of the voters' roll. It gave them notice of its intention to remove them. It removed 749 of them. It further identified approximately 4 500 people whose addresses potentially fell outside the voting districts in which they were registered. It sent out notices of intended removal. Of these, it ultimately removed some 1 600.

On 16 February 2016, eight days before the court-ordered by-elections were to be held, independent candidates lodged an official complaint with the IEC. This was that, contrary to *Kham*, the voters' roll omitted the physical addresses of 4 160 voters. On 18 February 2016, the IEC met with representatives of the independent candidates. It explained that it understood the effect *Kham* to be prospective. Thus, it was obliged to provide the addresses only of voters who had registered or re-registered 'after' the date of that order, 30 November 2015. For voters who had registered or re-registered before this date, the IEC understood that was only obliged to provide addresses that were already recorded on its system and readily available. In other words, it was not obliged to go out and obtain those that were not already recorded.

In the Electoral Court, the independent candidates sought a postponement of the election, arguing that the omission of the 4 160 addresses was impermissible. The IEC maintained its stance regarding the prospective obligation to provide voters' addresses. The Electoral Court rejected the IEC's arguments and ordered the postponement of the by-elections.

The IEC applied for leave to appeal to the Constitutional Court, contending that its understanding of its obligation to provide voters' addresses was correct. In the alternative, if its understanding was incorrect and leave to appeal was refused, it sought direct access to the Court. It stated that the country-wide local government elections due to be held in August 2016 may be imperilled as it did not have the addresses of over 12 million registered voters, and they would either all have to be removed from the roll (which was impossible in time for the elections), or, if they were left on the roll, the elections would be susceptible to

challenge. The relief sought in the direct access application was a moratorium of the IEC's statutory obligation to provide the voters' roll with the addresses until 2019 – in order to give it a chance to remedy the defect.

II. Both the first judgment by Madlanga J (Khampepe J, Mhlantla J concurring) and the majority judgment by Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J and Zondo J concurring) held that IEC's appeal should fail but direct access should be granted. The two judgments concluded that the voters' roll must contain addresses of registered voters that were objectively available or ascertainable, and not just those recorded by the IEC. The two judgments also held that the failure of the IEC to record addresses on the voters' roll meant it provided an unlawful voters' roll. The IEC's failure to record voters' ascertainable addresses was constitutionally invalid. The two judgments suspended this declaration for approximately two years, using the Court's powers under Section 172.1.b of the Constitution. This was just and equitable since the IEC's failure may have resulted in a mass-disenfranchisement, thus infringing the right of many to vote. These judgments thus gave the IEC the moratorium it asked for, but for a shorter period. The two judgments held that the IEC must collect the missing addresses by no later than 30 June 2018, and that the IEC should file reports on its progress at six-monthly intervals.

There were two differences between the first and majority judgments:

- i. the majority held that the IEC need only record on the voters' roll the addresses of voters who registered to vote after Section 16.3 came into effect in December 2003 (the first judgment held that Section 16.3 should apply also pre-December 2003); and
- ii. the majority declared that the IEC's failure to record the voter addresses was inconsistent with the rule of law and Section 1.c of the Constitution and therefore invalid, whereas the first judgment held that the failure was inconsistent with the IEC's obligations under Section 190 of the Constitution to hold free and fair elections and therefore invalid.

III. A minority judgment by Jafta J (Nkabinde J concurring) held that available addresses for the purposes of Section 16.3 are those in the IEC's possession, and further held that that Section 172.1.b of the Constitution should not be construed to give the courts the power to suspend a constitutionally compliant Act of Parliament.

Supplementary information:

Legal norms referred to:

- Sections 1.c, 1.d, 19, 39.2, 172.1.a-b, 173, 190.1.b of the Constitution of the Republic of South Africa, 1996;
- Sections 16.3, 16.4, 8.3 of the Electoral Act 73 of 1998.

Cross-references:

- *August and Another v. Electoral Commission and Others*, *Bulletin* 1999/1 [RSA-1999-1-002];
- *Bruce and Another v. Fleecytex Johannesburg CC and Others*, [1998] ZACC 3;
- *Doctors for Life International v. Speaker of the National Assembly and Others*, *Bulletin* 2006/2 [RSA-2006-2-008];
- *Ex Parte Women's Legal Centre: In re Moise v. Greater Germiston Transitional Local Council*, [2001] ZACC 2;
- *Kham and Others v. Electoral Commission and Another*, *Bulletin* 2016/1 [RSA-2016-1-004];
- *Soobramoney v. Minister of Health (KwaZulu-Natal)*, [1997] ZACC 17.

Languages:

English.

*Identification: RSA-2016-2-010*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 15.07.2016 / **e)** CCT 78/15 / **f)** Solidarity v. Department of Correctional Services / **g)** www.saflii.org/za/cases/ZACC/2016/18.pdf / **h)** [2016] ZACC 18; CODICES (English).

Keywords of the systematic thesaurus:

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.
 5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.
 5.2.3 Fundamental Rights – Equality – **Affirmative action**.

Keywords of the alphabetical index:

Employment, public, discrimination, quota / Employment, equity plan / Discrimination, prohibition / Race, affirmative action.

Headnotes:

Numerical targets in employment equity plans that are capable of flexible application do not amount to quotas and are thus not prohibited.

An employee may be denied appointment if he or she belongs to a category of persons already adequately represented in the job category also applies to African, Coloured and Indian job applicants.

The employment equity legislation requires employers to take into account regional demography in determining how many of each race to appoint.

Summary:

I. The ten individual applicants comprised one White person and nine Coloured persons. The applicants argued that the Department of Correctional Service's (Department) refusal to promote or employ them on the ground that they belonged to a race or gender group that was already overrepresented on the relevant occupational level constituted unfair discrimination. They also impugned the Department's 2010 Employment Equity Plan (hereinafter, "the Plan") as non-compliant with the Employment Equity Act (hereinafter, the "EEA") for taking only national demographics into account, and because the Plan's numerical targets amounted to quotas.

The Labour Court concluded that the 2010 Plan did not comply with the EEA because Section 42 required both regional and national demographics to be taken into account. The failure to have regard to Section 42 amounted to discrimination. The Labour Court ordered the Department to take immediate steps to ensure compliance with Section 42. The applicants appealed to the Labour Appeal Court because the decision did not to grant them specific relief and because it failed to strike down the Plan as invalid.

The Labour Appeal Court held that the deviations allowed in the Plan rendered the numerical targets flexible. For this reason the numerical targets were not quotas. Hence, the EE Plan passed the test required in terms of the EEA reading it together with the Constitution. It, accordingly, dismissed the appeal.

The applicants submitted that the plan was invalid as it failed to comply with the EEA. They argued that the basis for declining the individuals' appointment – their race and gender – was also invalid. In the absence of a lawful employment equity measure, the Department cannot rely on Section 6.2.a of the EEA to refute the allegation of unfair discrimination.

II. The majority judgment by Zondo J (Moseneke DCJ, Jafta J, Khampepe J, Nkabinde J and van der Westhuizen J concurring) rejected the applicant's contention that the targets in the Plan were quotas. It found them to be numerical targets which were applied with flexibility. It also concluded that candidates from designated groups (Blacks, Coloureds and Indians) were also subject to the *Barnard* principle – that an employee may be denied appointment if he or she belongs to a category of persons already adequately represented at relevant occupational level. But the Court held that the Department had acted in breach of Section 42 of the EEA in not taking into account the demographic profile of both the regional and national economically active population. The Department had simply used the profile of the national population in assessing representation and in setting the numerical targets for the Plan.

The Court made an order that the applicants who were Coloured people and who were denied appointment – even though they had been recommended – must be appointed to the relevant posts if those posts have not been filled or were filled but are presently vacant. The appointments should be with retrospective effect to the dates when the individual applicants should have been appointed. With regard to filled posts, the Court ordered that the affected applicants should be paid at the level at which they would have been if appointed. This should be retrospective. Three of the individual appeals were unsuccessful because: the first was a White person and the Department demonstrated that White people were overrepresented at the relevant occupational level; the second, had not been recommended for appointment; and even though the third was initially denied appointment, she was later appointed to the position.

III. A separate judgment by Nugent AJ (Cameron J concurring) agreed with the main judgment's finding that the 2010 Employment Plan was unlawful for its failure to take account of the regional profile of the population. However, it held that, even without the requirement of that section, the relevant profile of the population included its geographical distribution, not merely its racial proportions, and the failure to bring that into account was irrational and unlawful. It disagreed with the majority, concluding that the Plan imposed quotas and on that ground, too, was unlawful.

Supplementary information:

- Sections 9.2, 195.1, 195.2, 196.4.a, 196.4.d and 196.4.e of the Constitution of the Republic of South Africa, 1996;
- Sections 6.2, 13.1, 13.2, 15, 19, 20.2.a, 20.2.c, 24.1.a, 24.1.c and 42 of Employment Equity Act 55 of 1998.

Cross-references:

- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*, Bulletin 2004/1 [RSA-2004-1-004];
- *Bel Porto School Governing Body and Others v. Premier, Western Cape and Another*, Bulletin 2002/1 [RSA-2002-1-002];
- *Minister of Finance and Another v. Van Heerden*, Bulletin 2004/2 [RSA-2004-2-006];
- *South African Police Service v. Solidarity obo Barnard*, Bulletin 2014/3 [RSA-2014-3-012].

Languages:

English.



Identification: RSA-2016-2-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.07.2016 / **e)** CCT 19/11 / **f)** Pheko v. Ekurhuleni Metropolitan Municipality (no. 3) / **g)** www.saflii.org/za/cases/ZACC/2016/20.pdf / **h)** [2016] ZACC 20; CODICES (English).

Keywords of the systematic thesaurus:

- 1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Courts**.
- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
- 2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
- 4.7.1 Institutions – Judicial bodies – **Jurisdiction**.
- 5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing**.
- 5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Constitutional Court, supervisory powers / Constitutional Court, supervisory remedy, discharge / Constitutional Court, declaratory power.

Headnotes:

Constitutional Court has broad remedial powers to discharge a case under its own supervisory jurisdiction and refer matters to the High Court for oral evidence to be heard to resolve disputed facts of a technical nature.

A declaration of unlawfulness will not be discharged if doing so would endanger the effectiveness of relief granted to protect constitutional rights.

Summary:

I. On 6 December 2011, the Constitutional Court declared unlawful: the removal of some 777 people (the applicants) from their homes in Bapsfontein; the demolition of their homes; and their relocation (*Pheko I* order). The Court also ordered the Ekurhuleni Metropolitan Municipality to: identify land in the immediate vicinity of Bapsfontein for the relocation; to engage meaningfully with the applicants on the identification of land; ensure that the amenities provided were no less than those at the time of their removal; and file reports regarding the steps taken to provide access to adequate housing for the applicants. To ensure that the Municipality met these obligations, the Court decided that it would supervise the process and issued a supervisory order accordingly.

Further disputes arose after several expert reports were filed with the Court. The applicants filed an interlocutory application asking for the matter to be referred to the High Court. The Chief Justice issued directions instructing the parties to file written submissions on the terms of referral and whether it was in the interests of justice for this Court to discharge the order of supervisory jurisdiction. This matter was decided without an oral hearing.

The parties agreed that the matter should be referred to the High Court to ventilate the factual disputes, but they differed on the terms. The applicants asked the Court to appoint a fact-finding commission or referee to address the factual disputes and report back to this Court. They proposed an order discharging the structural and declaratory relief. The respondents argued that the applicants' terms of referral went beyond what they were called to answer in the interlocutory application. In light of the difficulties in

the implementation of *Pheko I*, the respondents opposed the discharge of this Court's supervisory jurisdiction. The Socio-Economic Rights Institute of South Africa (SERI), the amicus curiae, also opposed the discharge of this Court's supervisory jurisdiction. It submitted that there were no disputes of fact that warranted a referral to the High Court.

II. In a unanimous judgment, the Court held that the declaratory component of the *Pheko I* order should not be discharged. Its discharge would cause irreparable prejudice to the applicants. It would imperil the effectiveness of the relief granted to guarantee the protection of the applicants' right not to be evicted or have their homes demolished without an order of court made after considering all the relevant circumstances. The declaratory component also obliged the Municipality to comply with its constitutional obligation of providing the applicants with access to adequate housing.

The structural component of the order required the Municipality to take certain steps under the Constitutional Court's supervision: the Court held that if it were to supervise the implementation of the proposed housing scheme, while the High Court exercised oversight, the Constitutional Court would be entangled in factual disputes on technical issues that are best determined by the High Court. As a result, the Court held that the structural component of the order would be discharged so as to give the High Court full authority to consider the technical evidence in the reports submitted by the parties and to hear oral evidence.

On referral, the Constitutional Court noted that Section 172.2.1.b of the Constitution gives the Court broad remedial powers. Section 38.1 of the Superior Courts Act also affords a wide discretion. The Court held that it would be in the interests of justice to refer the matter to the High Court as the technical nature of the disputed facts required oral evidence of expert witnesses and the issues were incapable of being resolved on the papers.

Supplementary information:

Legal norms referred to:

- Sections 26 and 172.2.1.b of the Constitution of the Republic of South Africa, 1996;
- Section 38 of the Superior Courts Act 10 of 2013.

Cross-references:

Constitutional Court:

- *Director of Public Prosecutions, Cape of Good Hope v. Robinson*, Bulletin 2004/3 [RSA-2004-3-013];
- *Fose v. Minister of Safety and Security*, Bulletin 1997/2 [RSA-1997-2-005];
- *KwaZulu-Natal Joint Liaison Committee v. Member of the Executive Council, Department of Education, KwaZulu-Natal and Others*, Bulletin 2013/1 [RSA-2013-1-010];
- *Minister of Health v. Treatment Action Campaign (no. 2)*, Bulletin 2002/2 [RSA-2002-2-013];
- *Molusi and Others v. Voges N.O. and Others*, [2016] ZACC 6;
- *National Director of Public Prosecutions v. Parker*, [2005] ZASCA 124;
- *Pheko and Others v. Ekurhuleni Metropolitan Municipality*, Bulletin 2011/3 [RSA-2011-3-020];
- *Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd* 1984 (3), *South African Law Reports* 623 (A);
- *Road Accident Fund v. Mdeyide*, [2007] ZACC 7;
- *S v. Basson*, Bulletin 2005/2 [RSA-2005-2-008];
- *Tongoane and Others v. National Minister for Agriculture and Land Affairs and Others*, Bulletin 2010/2 [RSA-2010-2-004].

Languages:

English.

*Identification: RSA-2016-2-012*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 28.07.2016 / **e)** CCT 40/15 / **f)** Land Access Movement of South Africa and Others v. Chairperson of the National Council of Provinces and Others / **g)** www.constitutionalcourt.org.za/site/CCT40-15A.html / **h)** [2016] ZACC 22; CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
3.20 General Principles – **Reasonableness.**

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

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

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

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

Keywords of the alphabetical index:

Amendment, legislative, procedure / Participation, public, procedure, comprehensive / Land, right / Land, expropriation, compensation.

Headnotes:

The Constitution imposes a duty on the National Council of Provinces and the provincial legislatures to facilitate public involvement in their respective legislative processes. The extent of public involvement necessary will vary depending on the nature of the legislation, with reasonableness being a determinative factor. The public participation processes that precede the enactment of legislation giving effect to a fundamental right must be comprehensive. This includes the right to land restitution, which is paramount in restoring the dignity of those who continue to suffer from past racist practices and laws.

Summary:

I. In 2011 the Department of Rural Development and Land Reform held a national workshop evaluating the impact of the Restitution of Land Rights Act 22 of 1994 (Restitution Act). The Department then prepared a draft Restitution of Land Rights Amendment Bill providing for the re-opening of land claims, which was passed by the National Assembly (NA) in 2014. The Bill was then referred to the National Council of Provinces (hereinafter, “NCOP”), and subsequently in March 2014, to the various Provincial Legislatures (hereinafter, “PLs”). The PLs were required by the NCOP to advertise and hold public hearings, invite and consider all oral and written submissions from members of the public and provide negotiating mandates. By the end of March 2014, all but one of the PLs had approved the Bill. That same month, the NCOP passed the Bill. On 30 June 2014, the President assented to the Bill and it was enacted into law as the Restitution of Land Rights Amendment Act 15 of 2014 (Restitution Amendment Act).

The Land Access Movement of South Africa, Association for Rural Advancement (LAMOSAs) and others sought direct access to the Constitutional

Court, which is the only Court that may decide that Parliament has failed to fulfil a constitutional obligation. They challenged the constitutionality of the Amendment Act on two grounds. They submitted that the NCOP and PLs respectively failed to fulfil the constitutional obligation to “facilitate public involvement” in the passing of the Bill, thus breaching Sections 72.1.a and 118.1.a of the Constitution. Alternatively, and independently, they submitted that Section 6.1.g of the Restitution Amendment Act, which requires the Commission on Restitution of Land Rights to “ensure that priority is given” to existing restitution claims, was incurably vague.

The first to tenth respondents opposed the challenge. They argued that the public participation facilitated by the NCOP and PLs was constitutionally sufficient through, amongst other things, public hearings conducted by the PLs.

The eleventh respondent, the Speaker of the Western Cape PL, submitted that it acted reasonably within the context of the timeline imposed by the NCOP. In its view, the NCOP timeline was outside its sphere of control; hence it did not bear the burden of demonstrating that the NCOP acted reasonably and could not compel the NCOP to comply with its own standing practices.

The twelfth to fourteenth respondents, the President, the Chief Land Claims Commissioner and the Minister of Rural Development and Land Reform, respectively, opposed the alternative challenge. They argued that if interpreted purposively Section 6.1.g was clear in the context of the Restitution Amendment Act. Alternatively, they contended that, if Section 6.1.g is vague, the imprecision is constitutionally permissible in line with this Court’s jurisprudence, and thus direct access on this point should not be granted.

The fifteenth to eighteenth respondents, the Matabane Community, the Maphari Community, the Mlungisi and Ezibeleni Disadvantaged Groups and the Lady Selborne Concerned Group, respectively, limited their arguments to the alternative challenge. They submitted that direct access would not be in the interests of justice, as this Court should have the benefit of the views of the Land Claims Court. Section 6.1.g of the Restitution Amendment Act is procedural in nature and thus not vulnerable to the applicants’ alternate challenge; and further does not limit the right in Section 25.7 of the Constitution to claim restitution of dispossessed land.

II. The Court in a unanimous judgment reiterated that the right to restitution of land plays a pivotal role in South Africa’s constitutional democracy, and is a

means to achieving the guarantee of dignity for those who continue to suffer from the racist practices and laws of the past. The legislative processes that resulted in the Restitution Amendment Act, enacted to give effect to the right, had to include comprehensive public participation. The processes and truncated timeline in which the PLs had to hold public hearings was objectively unreasonable. These failures meant that NCOP failed to facilitate adequate public participation, in violation of a constitutional obligation.

As a result, the Restitution Amendment Act was declared invalid. However, the Court made the declaration prospective, as without the Restitution Amendment Act, the new claims lodged would cease to exist. This way new claims lodged by the date of the judgment, continue to exist, but none can be lodged in future under the impugned legislation. It was not necessary to reach the alternative challenge.

Supplementary information:

Legal norms referred to:

- Sections 25.7, 72.1.a and 118.1.a of the Constitution of the Republic of South Africa, 1996;
- Restitution of Land Rights Act 22 of 1994;
- Restitution of Land Rights Amendment Act 15 of 2014.

Cross-references:

Constitutional Court:

- *Cool Ideas 1186 CC v. Hubbard and Another*, *Bulletin* 2014/2 [RSA-2014-2-009];
- *Doctors for Life International v. Speaker of the National Assembly and Others*, *Bulletin* 2006/2 [RSA-2006-2-008];
- *Matatiele Municipality and Others v. President of the Republic of South Africa and Others (2)*, [2006] ZACC 12.
- *Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others*, *Bulletin* 2005/3 [RSA-2005-3-009].

Languages:

English.



Identification: RSA-2016-2-013

a) South Africa / b) Constitutional Court / c) / d) 11.08.2016 / e) CCT 151/15 / f) Raduvha and Another v. Minister of Safety and Security / g) www.saflii.org/za/cases/ZACC/2016/20.pdf / h) [2016] ZACC 20; CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Arrest, safeguard / Arrest, legal grounds / Child, authority, parental / Child, best interest, overriding nature / Child, police custody / Arrest, circumstance, consideration / Constitution, fundamental principle, protection / Detention, unlawful / Police, discretion, absence.

Headnotes:

In deciding whether to arrest a child (someone not yet 18), a police officer exercising the statutory discretion to arrest must take into account the child's best interests under Section 28.2 of the Constitution.

Section 28.1.g of the Constitution provides that a child may be detained only as a measure of last resort. This means that an officer may detain children only if there are no less restrictive means of securing their attendance in court.

This does not mean that children can never be arrested or detained. The facts of each case will be decisive.

Summary:

I. On 6 April 2008, two members of the South Africa Police Service were sent to the home of Ms Raduvha, who died before the Constitutional Court proceedings, in order to investigate a complaint of assault and the

resultant breach of a protection order. The police found the deceased in the company of her family, including her 15 year old daughter, Ms Raduvha. When the police attempted to arrest the deceased, Ms Raduvha physically intervened and interposed herself between the deceased and the police to prevent them from arresting her mother. Ms Raduvha was arrested for obstructing the police in terms of Section 40.1.j of the Criminal Procedure Act 51 of 1977 (hereinafter, "CPA"). She and her mother were detained together in a cell at Brixton Police Station for a period of 19 hours. Both were released on warning the next day and the charges were later dropped by the Public Prosecutor.

Ms Raduvha claimed damages in the South Gauteng High Court, Johannesburg against the Minister of Safety and Security arising from her alleged unlawful arrest and detention. The High Court dismissed her claim. It found her arrest and detention lawful. Her appeal to the Full Court was also unsuccessful. After her petition for a further appeal to the Supreme Court of Appeal failed, she sought leave to appeal to the Constitutional Court.

Before the Constitutional Court, Ms Raduvha mounted a two-pronged attack against her arrest and detention. In the first instance, Ms Raduvha contended that even if the police were authorised by Section 40.1 to arrest her, they exercised their statutory discretion in an unlawful and irrational manner. The discretion arises from the use of the permissive "may" in the CPA, and not "must". The contention was that the police were required to consider the prevailing circumstances in deciding whether her arrest was justified. Ms Raduvha submitted that the police failed to exercise their discretion as, had they considered the facts, they would have concluded that her arrest was neither necessary nor justified.

In the second instance, Ms Raduvha placed strong reliance on Section 28.2 of the Constitution which provides that a child's best interests are of paramount importance in all matters concerning a child. Given that Ms Raduvha was a child at the time of the arrest, she submitted that the police were obliged to consider and accord her best interests as of paramount importance. Accordingly, the police failed to give effect to the constitutional injunction in Section 28.2. The Constitutional Court was urged to interpret Section 40.1 of the CPA purposefully and to incorporate Section 28.1.g and 28.2 of the Constitution as additional requirements to Section 40.1, in line with South Africa's constitutional values.

Initially, the Minister filed written argument defending the arrest and detention as lawful. However, the evening before the hearing, the Minister appointed new counsel who abandoned the previous argument and filed a new set. New Counsel conceded that both the arrest and subsequent detention were unlawful. All the essential elements constituting unlawful arrest and detention were conceded.

This application brought into focus the duties, powers and responsibilities of police officers to arrest those who may find themselves on the wrong side of the law and the rights and interests of children in that situation.

II. In a unanimous judgment, the Constitutional Court found that in light of Section 28.1.g and 28.2 of the Constitution the circumstances did not render the arrest justifiable as a measure of last resort. Ms Raduvha was arrested at her parental home where her father was available and willing to take her into his custody. Nothing prevented the police from leaving Ms Raduvha with her father, instructing him to ensure that she appeared in court to face the charge. Accordingly, the Court held that the arrest and detention was in clear violation of Section 28.1.g and 28.2 of the Constitution respectively and therefore unlawful. The finding of the High Court was overturned.

Supplementary information:

Legal norms referred to:

- Section 28.1.g and 28.2 of the Constitution of the Republic of South Africa, 1996.

As a consequence of this decision the constitutional validity of a police officer's discretion to arrest (conferred by Section 40.1.j of the Criminal Procedure Act 51 of 1977), must be assessed through the prism of the Bill of Rights.

Cross-references:

Constitutional Court:

- *Centre for Child Law v. Minister for Justice and Constitutional Development and Others*, *Bulletin* 2009/2 [RSA-2009-2-009];
- *Duncan v. Minister of Law and Order*, [1986] ZASCA 24; 1986 (2) SA 805 (A);
- *Minister of Safety and Security v. Sekhoto and Another*, [2010] ZASCA 141; 2011 (5) SA 367 (SCA);
- *Louw and Another v. Minister of Safety and Security and Others* 2006 (2) SACR 178 (T);

- *Minister of Safety and Security v. Van Niekerk*, [2007] ZACC 15; 2007 (10) BCLR 1102 (CC); 2008 (1) SACR 56 (CC);
- *Thebus v. S*, *Bulletin* 2003/2 [RSA-2003-2-007].

Languages:

English.



Identification: RSA-2016-2-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 24.08.2016 / **e)** CCT 122/16 / **f)** Nkabinde and Another v. Judicial Service Commission and Others / **g)** www.saflii.org/za/cases/ZACC/2016/25.html / **h)** [2016] ZACC 25; CODICES (English).

Keywords of the systematic thesaurus:

1.1.1.1.5 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Rule adopted by the Court.**
 1.4.2 Constitutional Justice – Procedure – **Summary procedure.**
 1.4.11.6 Constitutional Justice – Procedure – Hearing – **Address by the parties.**
 1.5.1.1 Constitutional Justice – Decisions – Deliberation – **Composition of the bench.**
 1.5.1.3.1 Constitutional Justice – Decisions – Deliberation – Procedure – **Quorum.**
 2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**
 5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice.**
 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

Keywords of the alphabetical index:

Constitutional Court, decision-making process / Constitutional Court, quorum / Constitutional Court, summary procedure / Right to be heard.

Headnotes:

Litigants have no right to be present or represented at a Conference of Justices of the Constitutional Court during deliberations on an application for leave to appeal.

Where so many Justices of the Court are disqualified from hearing a matter that the Court becomes inquorate and unable to adjudicate it, it cannot be left pending indefinitely, and so must be dismissed.

Summary:

I. The Judicial Service Commission (hereinafter, "JSC") referred to the Chief Justice (in his capacity as the JSC's Chairperson) a complaint made in 2008 by the then Justices of the Constitutional Court against Judge President J Hlophe for allegedly attempting to unduly influence Justice BE Nkabinde and Justice CN Jafta (the applicants) – who were both members of the Court in 2008, and who are both members of the Court in 2016 – in regard to the outcome of decisions relating to a high level politician which the Court was deliberating. The Chief Justice established a Judicial Conduct Tribunal (Tribunal) under the Judicial Service Commission Act 9 of 1994 (Act) to inquire into the complaint.

The applicants were required to testify in the Tribunal. However, in 2014 they brought an application in the High Court impugning the decision of the JSC to refer the complaint to its Chairperson, and attacking the validity of Section 24 of the Act for conflicting with the constitutionally entrenched separation of powers, and with judicial independence. The High Court dismissed the application. An appeal to the Supreme Court of Appeal was similarly dismissed in March 2016. The applicants then applied the Constitutional Court for leave to appeal that decision. On 16 May 2016, the Court dismissed this application because it was unable to constitute the constitutionally prescribed quorum of eight Justices. This was due to various conflicts and disqualifications.

The applicants now applied for the rescission of the order dated 16 May 2016.

The applicants relied on Rule 42.1.a of the Uniform Rules of Court (applicable to proceedings before the Constitutional Court in terms of Rule 29 of the Court's Rules). This required them to establish:

- i. that the order was granted in their absence; and
- ii. that it was granted or sought in error. They asserted two grounds on which the order was erroneously made. First, the basis of the Court's

decision to dismiss the application – the lack of a quorum – was not raised with them, and so they were unable to make representations on it. This breached their right of access to courts under Section 34 of the Constitution. Second, although the Court stated some of its members were disqualified, those members still took part in the decision dismissing the application. This was irregular and vitiated the decision.

II. The Court set out by explaining its procedure when dealing with applications for leave to appeal. The bulk of these applications, the Court said, are dismissed summarily after being deliberated upon at a Conference or meeting of Justices. A small few are set down for hearing if they appear to have some prospects of success and raise important constitutional issues or arguable points of law of general public importance which the Court should hear. It held that when these decisions are made, a litigant has no right to be present or represented. The procedure is consistent with the Court's Rules and its inherent power to regulate its own processes contained in Section 173 of the Constitution. Relying on its prior jurisprudence, the Court reasoned that the procedure is consistent with the Constitution, is sound and practical in aiming to avoid the overburdening of court rolls and delays and expense. The decision to dismiss the original application for leave to appeal had been made summarily at a conference of Justices. Rule 42.1.a is not applicable to these decisions. This was because the Rule's first requirement – that the order was granted in a person's absence – can only apply where the litigant has a right to be present. This is not the case where applications are summarily disposed of. The Court also affirmed that the same procedure had been followed here as in any other case.

The Court also rejected the applicants' contention that it should have raised with them the issue of some Justices' disqualification before dismissing the application. This was because the applicants – having first-hand knowledge of the Court's procedure and knowing which of the Justices may have had a disqualification – had the opportunity to raise any issue in their founding papers, as permitted by the Court's Rules. They did not do so. That some disqualified Justices had taken part in the decision was permissible according to the principle established in *Hlophe*. The application for rescission of the earlier order was dismissed.

Supplementary information:

- Legal norms referred to: Sections 34 and 173 of the Constitution of the Republic of South Africa, 1996;

- Rules 19 and 29 of the Constitutional Court Rules;
- Rule 42.1.a of the Uniform Rules of Court;
- Article 6.1 ECHR.

Cross-references:

Constitutional Court:

- *Mandlakayise John Hlophe v. Premier of the Western Cape Province; Mandlakayise John Hlophe v. Freedom Under Law and Others*, *Bulletin* 2012/1 [RSA-2012-1-001];
- *MEC for Development Planning and Local Government in the Provincial Government of Gauteng v. The Democratic Party and Others*, *Bulletin* 1998/2 [RSA-1998-2-007];
- *Nkabinde and Another v. Judicial Service Commission*, [2016] ZASCA 12;
- *Mphahlele v. First National Bank of South Africa Ltd*, [1999] ZACC 1;
- *Paulsen and Another v. Slip Knot Investments 777 (Pty) Limited*, *Bulletin* 2015/1 [RSA-2015-1-002];
- *S v. Pennington and Another*, [1997] ZACC 10.

Languages:

English.



Spain Constitutional Court

Important decisions

Identification: ESP-2016-2-007

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 20.06.2016 / **e)** STC 112/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 181, 28.07.2016; www.boe.es/boe/dias/2016/07/28/pdfs/BOE-A-2016-7289.pdf / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/25026>; CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Freedom of expression, exception, protection, scope / Hate speech / Terrorism.

Headnotes:

Speeches that encourage violence and hatred by praising terrorism do not fall within the scope of freedom of expression.

Summary:

I. The applicant was the main speaker at an event held in memory of a member of the terrorist organisation “ETA” who had been murdered thirty years previously. The event was promoted by billboards upon which a statement by one of those being honoured, indicating that “armed struggle is essential to advance,” was transcribed. During the event there was also a screen where pictures of hooded members of the terrorist organisation and prisoners were displayed. In his speech, the applicant asked the public to choose “the most harmful path for the state, leading people to a new democratic stage”. The event was subsequently broadcasted by the media. As a result of his speech, the applicant was convicted of a crime of praising terrorism; it was considered that the only aim of his words was to exalt

the figure of the well-known terrorist being commemorated. Once all available legal remedies were exhausted, the applicant filed an appeal, contending that the contested decisions had violated his rights to ideological and speech freedom (Articles 16.1 and 20.1.a of the Constitution).

II. The Constitutional Court rejected the appeal, on the basis that both the promotion of the event and the applicant's speech supported the conclusion that the crime of praising terrorism had been committed. It also held that violence and hatred had been encouraged by the applicant's behaviour, as his speech was inspired by an aggressive nationalism, which could objectively generate a favourable environment for the commission of terrorist acts. Thus, in accordance with the case-law of the European Court of Human Rights, the Court concluded that the punishment imposed did not infringe the freedom of speech; incitement to violence and hatred do not fall within the scope of this right.

III. The Judgment had one dissenting opinion, to the effect that the applicant's behaviour was not sufficiently important to be considered as an incitement to commit terrorist acts, given his personal circumstances and the background against which his behaviour was developed. On the one hand, the applicant is a member of the Basque Nationalistic Left ("*izquierda abertzale*") movement and, therefore, his claims could have been deemed as a free expression of this political opinion; on the other, the dissemination of his utterances was mostly limited to people gathered at the commemorative event, as the media could only broadcast the beginning and end of his speech and so it could hardly be said that there was a public disclosure of the speech of such a scale to generate a favourable environment for the commission of terrorist acts.

Cross-references:

- Articles 16.1 and 20.1.a of the Constitution;
- Article 578 of the Criminal Code;
- Article 5.1 and 5.2 of the Council of Europe Convention on the Prevention of Terrorism;
- Article 10 ECHR.

Constitutional Court:

- no. 235/2007, 07.11.2007;
- no. 155/2009, 25.07.2009;
- no. 177/2015, 22.07.2015.

European Court of Human Rights:

- *Féret v. Belgium*, no. 15617/2007, 16.07.2009;

- *Bahceci and others v. Turkey*, no. 33340/2003, 16.06.2009;
- *Leroy v. France*, no. 36109/2003, 02.10.2008;
- *Kutlular v. Turkey*, no. 73715/2001, 29.04.2008;
- *Halis Dogan v. Turkey*, no. 75946/2001, 07.02.2006;
- *Öztürk v. Turkey*, no. 22479/1993, 28.09.1999, *Reports of Judgments and Decisions* 1999-VI;
- *Zana v. Turkey*, no. 18954/1991, 25.11.1997, *Reports* 1997-VII.

Languages:

Spanish.



Identification: ESP-2016-2-008

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 19.07.2016 / **e)** ATC 141/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 196, 15.08.2016; www.boe.es/boe/dias/2016/08/15/pdfs/BOE-A-2016-7908.pdf / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24817>; CODICES (Spanish).

Keywords of the systematic thesaurus:

- 3.1 General Principles – **Sovereignty**.
- 3.3 General Principles – **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**.
- 4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees**.
- 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**.

Keywords of the alphabetical index:

Constitution, supremacy / Judgment, execution / Submission to Constitutional Court, obligation.

Headnotes:

Parliamentary activity cannot provide continuity to resolutions formally declared void.

*Summary:*

I. The Government brought proceedings requesting the execution of the Judgment of the Constitutional Court 259/2015 of 2 December 2015 which had declared the resolution of the Catalonia Parliament 1/XI on the beginning of a political process about the creation of an independent Catalan State unconstitutional and null. The action of execution was proposed in relation to the resolution of the Catalonia Parliament 5/XI, of 20 January 2016, on the creation of parliamentary committees. The challenged resolution set up a study committee of the constituent process in order to analyse the social, political and institutional reforms to perform.

II. The Constitutional Court upheld the request for execution of Judgment 259/2015. The Order declared that Resolution 5/XI assigns to the study committee of the constituent process spheres of action that coincide with the aims of Resolution 1/XI that the Constitutional Court declared unconstitutional. Even if the parliamentary activity of a study committee can analyse the different possibilities to reform the Constitution in order to perform a specific political aim, it cannot provide continuity to acts that are already declared unconstitutional. Therefore, in order to comply with Judgment 259/2015, the Constitutional Court emphasised that the responsible public powers ensure that the activity of the study committee did not result in failure to enforce Judgment 259/2015.

Cross-references:

- Articles 1.1, 1.2, 2, 9.1, 87.2, 161.2, 166 and 168 of the Constitution;
- Articles 87.1 and 92 of the Organic Law on the Constitutional Court.

Constitutional Court:

- no. 259/2015, 02.12.2015, *Bulletin* 2015/3 [ESP-2015-3-012];
- no. 42/2014, 25.03.2014.

Languages:

Spanish.

Identification: ESP-2016-2-009

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 21.07.2016 / **e)** STC 140/2016 / **f)** Court fees / **g)** *Boletín Oficial del Estado* (Official Gazette), 196, 15.08.2016; www.boe.es/diario_boe/txt.php?id=BOE-A-2016-7905.pdf / **h)** <http://tcdshj:8080/es/Resolucion/Show/25064>; CODICES (Spanish).

Keywords of the systematic thesaurus:

- 1.4.14 Constitutional Justice – Procedure – **Costs**.
- 1.4.14.1 Constitutional Justice – Procedure – Costs – **Waiver of court fees**.
- 4.7.8.1 Institutions – Judicial bodies – Ordinary courts – **Civil courts**.
- 4.7.9 Institutions – Judicial bodies – **Administrative courts**.
- 4.7.13 Institutions – Judicial bodies – **Other courts**.
- 5.2 Fundamental Rights – **Equality**.
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Fee, amount / Fee, economic capacity.

Headnotes:

Fees that hinder access to judicial remedies are unconstitutional.

Summary:

I. Several provisions of Law 10/2012, 20 November, governing certain fees in the Judiciary, and stabilising the National Institute of Toxicology and Forensic Science, came under challenge. These provisions established a fee for the exercise of jurisdiction in the civil, administrative and labour courts. Initially, this fee had to be paid by any person who approached the courts as plaintiff, but following the amendment of the Law in 2015, only legal entities such as corporations and associations had to pay it.

II. The Court noted that according to the statements by the legislator, this provision was aimed at providing a mixed system of financing the Justice and preventing abuses in this area. Although both goals were considered legitimate, the Constitutional Court rejected the method (payment of a fee by plaintiffs), as being contrary to the Constitution. The Court pointed out that there are other less onerous ways of avoiding inconsistent lawsuits than paying fees. The fee is not proportional in view of the slim chances of going to arbitration in administrative conflicts; the chilling effect of the high amount of the fee, making it less onerous for an individual to pay the fines (even those considered unlawful) rather than approaching the courts to seek justice and finally the requirement that the fee be paid, even for minor cases.

There is no justification for the fees to be found in the Law or in the previous works of the legislator. The amount in question is also considerably higher than the fee which came before the Court in 2002, which was upheld by the Constitutional Court in Judgment 20/2012, 16 February. It is excessive for most of the entities which have to pay it, typically small organisations. The Court thus held that fees for appeal in civil, administrative and labour proceeding were unconstitutional and void; they impose an excessive economic burden on legal bodies and deny them the fundamental right to judicial review.

In line with the principles of the rule of law and certainty of the law, the Court established that amounts already paid by plaintiffs will not be returned where proceedings were ended by a final decision or the fee was not challenged. Reimbursement would harm public finances and those who have paid the fee have managed to achieve a judicial decision, which means their fundamental right to access to justice has been respected.

Cross-references:

- Articles 24.1, 10.2, 14, 31, 106.1 and 119 of the Constitution;
- Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms;
- Law 10/2012, 20.1.2012, governing certain fees in the Area of the Administration of Justice and the National Institute of Toxicology and Forensic Science;
- Law 1/1996, 10.01.1996, on Legal Aid.

Constitutional Court:

- no. 20/2012, 16.02.2012.

European Court of Human Rights:

- *Kreuz v. Poland*, no. 28249/95, 19.06.2001, *Reports of Judgments and Decisions* 2001-VI, *Bulletin* 2011/2 [NED-2011-2-007];
- *Kniat v. Poland*, no. 71731/01, 26.07.2005.

Court of Justice of the European Union:

- C-279/09, *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22.12.2010.

Languages:

Spanish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2016-2-003

a) Switzerland / **b)** Federal Court / **c)** Second Court of Public Law / **d)** 11.12.2015 / **e)** 2C_121/2015 / **f)** St Margrethen school district v. A.D. and B.D. / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 142 I 49 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

Keywords of the alphabetical index:

Schools, wearing a headscarf / State school, compulsory / Pupils / Headscarf, wearing, prohibition / Religious freedom.

Headnotes:

Article 15 of the Federal Constitution; Article 9 ECHR; Article 18 of UN Covenant II and Article 2.i of the Constitution of the canton of Saint-Gall; Article 36 of the Federal Constitution; Article 5 of the Constitution of the canton of Saint-Gall. Prohibition on wearing an Islamic headscarf for pupils at a state school; unacceptable interference in freedom of conscience and belief.

Guiding principles of the freedom of conscience and belief; content of the fundamental right (consid. 3). Brief overview of the decisions handed down in cases concerning the religious conduct of pupils attending state schools (consid. 4.2 and 4.3) and the use of religious symbols by the school itself (consid. 4.4). Reference to the case-law of the European Court of Human Rights and of a number of constitutional courts in other countries (consid. 4.5). Interference in the sphere of protection of freedom of conscience and belief; conditions of the restriction on a fundamental right (consid. 5 and 6). Legal basis (consid. 7); relevant public interests requirement (consid. 8); examination of the proportionality of the measure (consid. 9 and 10).

Summary:

I. When schools opened again for the school year 2013/2014, C.D., a girl of Muslim faith, who was at the time 12 years old, came to class at St Margrethen School wearing an Islamic headscarf (hijab). The school administration forbade C.D. to wear her headscarf during classes, pursuant to the school regulations, which forbid the wearing of any type of head-covering in class. In 2014, the Administrative Court allowed the girl's complaint and authorised her to wear a headscarf. The Federal Court rejected the appeal lodged by the St Margrethen school district.

II. Under the current understanding, the principle of freedom of conscience and belief safeguarded by Article 15 of the Federal Constitution must fulfil three functions: it must ensure religious peace, guarantee that everyone can protect, express and live out their deepest spiritual beliefs on a daily basis, and avoid the exclusion of religious minorities and facilitate integration into the community of all persons, irrespective of their religious beliefs. This freedom gives all persons the right to freely choose their religion and philosophical beliefs and to practise them alone or together with others. Each person has the right to belong to a religious community and to follow religious teachings. Conversely, nobody can be forced to belong to a religious community, to perform a religious act or to follow religious teachings. State schools must be neutral with regard to religion; it must be possible for pupils to attend state schools without their freedom of conscience and belief being jeopardised. As a result religious instruction must be prohibited in state schools. Dress codes based on religious beliefs are also protected by Article 15 of the Federal Constitution. Schools must comply with fundamental rights and the religious freedom of minors is also protected. The wearing of an Islamic headscarf by C.D., who is a member of the Muslim faith, is therefore protected by the right to religious freedom within the meaning of Article 15 of the Federal Constitution and its prohibition constitutes a violation of the pupil's right to freedom of conscience and belief.

Violations of the right to freedom of conscience and belief and to religious practices are only acceptable if they meet the conditions governing the restriction of fundamental rights set out in Article 36 of the Federal Constitution (lawfulness, public interest and proportionality). Serious violations of fundamental rights must be based on a formal, clear and explicit law. Prohibition of the right to wear an Islamic headscarf at school would oblige the pupil, C.D., to disobey either an official decree or a religious command deriving from her origins or her family. Such tensions may weigh heavily on the child

concerned and be incompatible with her interests. According to the case-law, a general prohibition on a pupil with regard to the wearing of an Islamic scarf in class therefore constitutes a serious violation of her right to freedom of conscience and belief. In the instant case, the prohibition imposed on C.D. by the school administration was based on the school regulations of the St Margrethen school district, prohibiting the wearing of any form of head-covering in class. This regulation constitutes a formal legal basis as it is the consequence of an optional referendum.

The concept of public interest varies according to the period in time and the place and includes first and foremost the role of the police (to protect public order, security, health and tranquillity, etc.) but also cultural, ecological and social values. There is a public interest in ensuring that the wearing of religious symbols by some pupils does not place pressure on their schoolmates to do likewise. Conversely, the protection of fundamental rights does not allow people to demand that they should not be confronted by other people's beliefs.

In keeping with the principle of proportionality, the breach of a fundamental right must be no more restrictive than necessary. The conflicting private and public interests must be weighed against one another and objectively evaluated while taking account of given circumstances, for example the current social context. Authorising a pupil to wear religious symbols does not mean that a state school or the state itself considers a particular religion to be more important than others. The authorities' duty of neutrality does not allow them to place an overall ban on the wearing of head-coverings. Pupils cannot be subject to a duty of religious neutrality with regard to religious symbols. The wearing of a religious symbol is in principle compatible with pupils' obligation to respect one another. Prohibiting the wearing of the Islamic headscarf is not necessary in guaranteeing pupils' freedom of belief and ensuring that they respect others' beliefs, provided there are no indications that the pupil in question is attempting to promote their religion. The wearing of a religious symbol does not mean that the pupil is exempt from attending classes on particular subjects or from taking part in school outings. From the standpoint of integration and equal opportunities, it is indeed important to ensure that very religious Muslim girls are allowed to attend school. Prohibiting the wearing of the Islamic scarf may be justified in some cases, if – unlike in the situation of the instant case – to do so is a concrete breach of public interests, the rights of children or of third parties. Having regard, however, to all of the public and private interests invoked, the pupil, C.D. cannot reasonably be required not to wear an Islamic

scarf, which she considers to be required by her religion. As ruled quite rightly by the lower court, the prohibition on Islamic scarves at state schools, which are open both to non-believers and believers of various religions, is therefore disproportionate.

Languages:

German.



Identification: SUI-2016-2-004

a) Switzerland / **b)** Federal Court / **c)** First Court of Public Law / **d)** 20.04.2016 / **e)** 1C_230/2015 / **f)** A. v. the Zurich cantonal police department / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 142 I 121 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest**.
 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.
 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Custody, lawfulness / Demonstration / Police, cordon, movement, restriction.

Headnotes:

Articles 10.2, 16.1, 16.2, 31.1, 31.4 and 36.1 and 36.2 of the Federal Constitution; Articles 5.1, 10 and 11 ECHR; potential participants prevented by the police from taking part in a forbidden demonstration.

Taken together, the applicants' containment by a police cordon for approximately two and a half hours, followed by police custody for the purposes of verification of their identity for approximately three and a half hours, constitute a deprivation of freedom within the meaning of Article 31 of the Federal

Constitution linked with a breach of personal freedom and freedom of opinion (consid. 3.1). Legal basis for the applicants' containment by the police (consid. 3.2 and 3.3). The applicants' containment was in the public interest (consid. 3.4) and considered proportionate to the circumstances (consid. 3.5). Legitimacy of the deprivation of freedom resulting from the applicants being prevented from taking part in the demonstration from the standpoint of Article 5.1.b ECHR (consid. 3.6).

Summary:

I. Following the authorised demonstration in connection with the "Labour Day" celebrations on 1 May 2011, a crowd, including A., gathered in the city of Zurich. Towards 4.30 p.m., the police formed a cordon around the persons present and allowed only those who had no connections with a non-authorised demonstration to leave the restricted area. At about 7 p.m., 542 persons (including A.) were arrested and taken to a police station for verification of their identity. At 10.30 p.m., A. was released without charge. After exhausting remedies at cantonal level, A. lodged an appeal in matters of public law with the Federal Court challenging the lawfulness of the police cordon and of his arrest. The appeal was rejected by the Federal Court for the reasons given below:

II. The containment of the applicant by the police cordon and his detention in custody taken together constitute a deprivation of freedom within the meaning of Article 31.4 of the Federal Constitution, which is only authorised in cases provided for by law (Article 31.1 of the Federal Constitution). The containment and custody constitute a breach of A's right to freedom of movement (Article 10.2 of the Federal Constitution), to freedom of assembly (Article 22 of the Federal Constitution and Article 11 ECHR) and to freedom of opinion (Article 16.1 and 16.2 of the Federal Constitution and Article 10 ECHR). These violations of fundamental rights can only be considered lawful if they meet the conditions set out in Article 36 of the Federal Constitution. Firstly, they must have a legal basis. The law of the canton of Zurich concerning the police stipulates that the latter is responsible for maintaining security and public order by means of appropriate measures. The police must, in particular, take the necessary measures to prevent offences and immediate threats. If the performance of its duties so requires, the police are authorised to detain persons, to verify their identity and determine whether they are wanted by the police. The police are authorised to take such persons to a police station if such verifications cannot be made on the spot or if there are doubts as to the accuracy of the information given or to the authenticity of their identity papers. In the present

case, on the basis of these provisions and in the light of the circumstances and of the experiences of recent years, the police could only expect the crowd on the square to present a danger for public security. It does not matter whether all the persons present intended to join the unauthorised demonstration or whether the applicant himself was behaving calmly before and after the containment, the police could not rule out the possibility of him taking part in the forthcoming unauthorised and probably violent demonstration. His detention by the police cordon and his subsequent arrest for the purposes of verifying his identity therefore served the purpose of preventing offences and immediate threats.

The applicant's detention was also proportionate. Indeed, the measures were appropriate and necessary to achieve the aim pursued. Persons who were clearly not participants in the unauthorised demonstration had been able to leave the restricted area. If the potential participants in the demonstration had also been allowed to leave the area immediately after the demonstration, the police would have had to be prepared for the possibility that they would, shortly afterwards, have taken part in a violent and unauthorised demonstration in another part of the city. Moreover, it was scarcely possible to verify the identity of the large number of people present in a timely manner. With regard to the enforceability within reason of the police measures, the Federal Court noted that the police custody had been a serious breach of both the applicant's right to freedom of movement (the breach to freedom of movement lasted some 6 hours altogether and was accompanied by other unpleasant measures), and of his right to freedom of assembly and opinion. Nevertheless, the applicant's private interest in being able to enjoy his right to freedom to move and to meet with other persons and to express his opinion unimpeded was incompatible with major public interests. Taking account of the experience of past years with regard to this particular day, the police could legitimately have expected the imminent unauthorised demonstration to lead to serious misbehaviour, which meant that there was there was a major public interest in preventing the potential demonstrators from leaving the restricted area and in verifying the identity of the potential demonstrators. When these interests are taken into account, it can be considered reasonable to have held the applicant in detention for 6 hours. However, it should be borne in mind that only a concrete threat of serious misbehaviour can justify such restrictions to fundamental rights, in particular when it is to be expected that police measures will inevitably affect persons who do not present any concrete danger. This is what happened in the instant case and, in future, law enforcement agencies must also assess

diligently whether the probability of serious misbehaviour is sufficiently great to justify such restrictions to fundamental rights, and that requires the presence of concrete indications and signs. Taking account of past experiences is not in itself sufficient.

Finally, the Federal Court considered whether the deprivation of freedom suffered by the applicant was also compatible with Article 5 ECHR, which sets out an exhaustive list of grounds for deprivation of freedom. It pointed out that the case-law of the European Court of Human Rights took account of various criteria (duration and type of measure, their effects, the manner in which they are applied, and the context) when examining such grounds and that the police had to be entitled to a certain margin of appreciation when taking operational decisions, while respecting the principle of protection against arbitrariness. The aim pursued by the measure also played a role. In the instant case, even if the applicant's containment by the police cordon was not in itself a deprivation of freedom within the meaning of Article 5 ECHR, the subsequent treatment of the applicant by the police was a serious restriction of his freedom of movement. It is consequently necessary to consider whether the deprivation of freedom pursued an aim that is acceptable under Article 5.1 ECHR. Under 5.1.b, a person may be deprived of his or her freedom in order to secure the fulfilment of any obligation prescribed by law. That requires the person to have a clearly determined and non-executed legal obligation. The obligation not to commit an offence may be sufficiently determined when the circumstances of the act are sufficiently concrete. In order for this to be so, it is sufficient that the persons concerned have taken clear steps showing that they do not intend to meet their obligation to abstain from the act. Moreover, the persons must be informed of the concrete action that they are obliged not to undertake and not to have shown any intention of acting in consequence. In the instant case, the applicant was not in the area by chance but had responded to a call to gather in that particular place. He admittedly claims that he did not intend to take part in an unauthorised demonstration, but the general public, including the applicant, were aware of the fact that violent unauthorised demonstrations had taken place in the same place in past years. He could therefore have expected a further unauthorised and violent demonstration to take place and that the police would not tolerate it but would take measures to maintain law and order. By following the call to demonstrate and remaining with the crowd, the applicant had actively led the police to consider him a potential demonstrator. His deprivation of freedom was therefore justified under Article 5.1.b ECHR.

In any case, the police custody was also justified under Article 5.1.c ECHR, i.e. because the aim of depriving persons of their freedom is to bring them before a judicial authority, for example when there are reasonable grounds for believing that it is necessary to prevent them from committing an offence. By responding to the call to assemble, the applicant was, through his own actions, suspected of being likely to take a wrongful part in an unauthorised demonstration. There were objective reasons for thinking that he might take part in violent misconduct and that was why his detention was deemed necessary to prevent him from committing such offences.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2016-2-002

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 25.05.2016 / e) U.br. 104/2016 / f) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 104/2016, 31.05.2016 / g) / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members**.

Keywords of the alphabetical index:

Parliament, dissolution / Normative act.

Headnotes:

Disputed decisions of Parliament for its dissolution are normative acts with universal effect and accordingly subject to constitutional review by the Constitutional Court.

Disputed decisions are unconstitutional because of their suspensive legal effect. The term of the office of the members of the Parliament can be extended only during states of war or emergency, and not in case of dissolution of Parliament.

The constitutional principle of the rule of law is violated when Parliament itself does not act within the Constitution.

Summary:

I. The applicant in this case requested the Constitutional Court to consider the constitutionality of two decisions on dissolution of the Assembly, adopted by the Assembly itself: the Decision on dissolution of the Assembly, no. 08-362/1, 18 January 2016 (“Official Gazette” no. 9/2016) and the Decision on amending the Decision on dissolution

of the Assembly, no. 08-1320/1, 23 February 2016 (“Official Gazette” no. 33/2016).

The decision of 18 January 2016 envisaged that the Assembly would be dissolved and that the decision on dissolution of the Assembly would enter into force on the date of its publication in the “Official Gazette”, and would apply as of 24 February 2016.

On 23 February 2016, the Assembly adopted the Decision on amending the Decision on dissolution of the Assembly, in which the date of implementation of the decision “24 February 2016” was replaced with a new date “7 April 2016”.

According to the applicant, the contested decision and its amendment were incompatible with Articles 8.1.1, 8.1.3, 51 and 63.3 of the Constitution. The applicant contended that the Constitution did not envisage suspensive effect of the decision on dissolution; the dissolution always takes effect on the date the decision on dissolution is adopted. The decision to dissolve the Assembly could not be changed afterwards because the Assembly had already been dissolved, which meant that the Assembly itself could not extend its jurisdiction and decide beyond what was enshrined in the Constitution in terms of its dissolution and work.

II. The Court noted that the exercise of power through democratically elected Representatives is a constitutional principle upon which rests the organisation of state powers by virtue of the rules contained in Part III of the Constitution.

The Court also noted that the Constitutional Court is the body that decides which act submitted to it for review will be considered as a normative act susceptible for constitutional review.

The Court found that the decision to dissolve the Assembly is by its legal nature a normative act because it has a universal effect and indirectly refers to all citizens who in direct elections cast their votes for the representatives in the Assembly, thus transferring the mandate to decide on their behalf.

The Court further noted that the Constitution does not explicitly provide for the possibility of suspensive effect of the dissolution of the Assembly. The absence of a specific regulation in this regard cannot be interpreted that such resolution is allowed by decision of the Assembly, as in this case, especially taking into account the significance of the possible consequences.

The Constitution does not set out that the mandate of the representatives continues in the event of dissolution of the Assembly, nor is it provided that in such case they resume their office. Accordingly, there cannot be any delay in the dissolution of the Assembly, and thus suspensive loss of the mandate of the representatives.

Contrary to the aforementioned, the Assembly continued to work at its full capacity in the period from 19 January 2016, when the first decision for dissolution with suspensive effect was adopted, until 7 April 2016, when the Assembly actually dissolved.

The Court recalled that under Article 63.3 of the Constitution the shortened deadline for early parliamentary elections (60 days) cannot be postponed, and the mandate of the representatives cannot continue in the event of self-dissolution of the Assembly, apart from the conditions set out in Article 63.4 of the Constitution, and therefore it found the contested decision to be in breach of Article 63.3.4 of the Constitution. The Court also found that this situation leads to legal uncertainty and violation of the rule of law as a fundamental value of the constitutional order laid down in Articles 8.1.3 and 51 of the Constitution, because the Assembly is obliged to observe the Constitution and laws, which here was not the case.

The Constitutional Court accordingly held that the decision on dissolution of the Assembly and its amendment were unconstitutional and annulled them.

Languages:

Macedonian, English (translation by the Court).



Identification: MKD-2016-2-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 29.06.2016 / **e)** U.br. 114/2016 / **f)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 134/2016, 21.07.2016 / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Employment, termination, age, gender, discrimination / Employment, contract, termination, retirement / Employment, contract, extension.

Headnotes:

Termination of employment of a female employee under different conditions than a male employee violates the constitutional principle of equality.

Summary:

I. The applicants in this case (two non-governmental organisations and several individuals – women) requested the Constitutional Court to consider the constitutionality of the provision in the Labour Law which relates to the possibility of continuing employment after reaching retirement age.

The disputed provision of Article 104.1 of the Labour Law allows employers to terminate the employment contracts of employees when they reach "64 years of age and 15 years of service". Article 104.2 of the Law allows an employee, by means of a written statement to the employer, to request to have his or her employment contract extended to a maximum age of 67 for men and 65 for women, unless otherwise defined by law.

The applicants considered that the impugned provision violated the constitutionally guaranteed equality of citizens on grounds of gender and introduced gender discrimination in the field of labour relations in terms of the possibility of extending the contract of employment. Namely, the legal possibility provided by the legislator for men to have their employment contract extended up to 67 years of age for men and 65 years of age for women is in direct contradiction with gender equality as a constitutionally guaranteed principle.

II. The Court started from the premise of Article 9 of the Constitution (principle of equality of citizens) and Article 32 of the Constitution (right to work), noting that the constitutional obligation of the legislator in the

regulation of employment relationships, including extensions of contracts of employment, is to place citizens in the same legal position on grounds of sex.

The Court further noted that the disputed legal provisions are mandatory and impose termination of employment of the female employee under different conditions from male employees (her employment and the right to work will terminate at the age of 65 while the employment of a male employee will terminate at the age of 67).

The Court distinguished between the right of a female employee to seek extension of her employment contract and the right of an insured woman to acquire an old-age pension earlier than an insured man, if she herself chooses so, given that that right has justification in the principle of affirmative action and the principle of positive discrimination of women. However, that right of women in the sphere of pension and disability insurance may not automatically be applied in other areas, especially if it leads to restriction of rights on the basis of sex.

The Court accordingly found that the contested provisions of the Labour Law were out of line with the established constitutional principle of equality of citizens on the grounds of sex defined in Article 9 of the Constitution and partially repealed them.

Languages:

Macedonian, English (translation by the Court).



Turkey Constitutional Court

Important decisions

Identification: TUR-2016-2-005

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 03.02.2016 / **e)** 2013/2229 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 05.04.2016, 29675 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation**.

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

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

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

Keywords of the alphabetical index:

Treatment, discriminatory / Principle of equality / Trade union, equal treatment / Trade union, freedom / Trade union, membership, discrimination / Trade, union, activity, protect.

Headnotes:

Democracy flourishes in a society where differences are perceived not as a threat, but as a source of richness. Freedom of association and freedom of unions are among the essential elements of the right to work. Discrimination among the workers in a workplace on the basis of their labour union affiliation is unacceptable in modern democratic societies.

Summary:

I. In the incident giving rise to the present application, the applicants' employment contracts as workers were suspended by the municipal employer on the grounds that they assumed managerial positions at a

certain labour union. The applicants, upon termination of their duties at the union, demanded reinstatement to their posts. The municipality decided to terminate their employment contract by paying their severance pay. The applicants filed a suit alleging that the termination of contracts was unlawful, that their employment contracts were terminated for union-related reasons and that other union members of the same status had been reinstated to their posts. In the municipality's submission to the relevant court, it was stated that two (other) persons with a similar status had been reinstated to their posts after termination of their managerial duties at the union in 2011. The Court of First Instance dismissed the applicants' requests. The Court of Cassation upheld the decision of the court.

The applicants alleged that, despite their request to be reinstated to their posts after termination of their union duties, their contracts were terminated for union-related reasons. They claimed that, first, despite the presence of notification for termination of labour contract, their cases were dismissed by the Court of First Instance on the grounds that the labour contracts were not terminated by the employer. Second, they claimed that, although similar persons who were members of the union were reinstated to their posts, the rejection of the applicants' claims for reinstatement by the Court of First Instance violates the principle of equality and infringes their right to a fair trial and the right to work.

II. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it makes the legal definition of the facts itself. Therefore, the claims of the applicants were considered to be related to Article 10 of the Constitution (concerning equality before the law) and were evaluated under the principle of equality and prohibition of discrimination within the scope of freedom of association and freedom of union.

The Constitutional Court made the following assessments in brief on the allegations of the applicant: Democracy flourishes in a society where differences are perceived not as a threat, but as a source of richness. Assessment of requests for reinstatement to work on the basis of the labour union to which the applicants were members is unacceptable in modern democratic societies. If an employer assesses the demands for reinstatement to work on the basis of non-union related grounds and makes a decision not to reinstate, such a decision may not constitute discrimination. However, assessments based on such requests must be based on objective criteria and concrete reasons. In the present case, the applicants' requests for reinstatement to their posts were rejected and their employment

contracts were terminated while some other union members of the same status were reinstated. There are no explanations or assessments as to the fact that such preferences of the employer are based on objective criteria and reasons other than being members of different unions. Although the applicants' allegations of discrimination were asserted during the proceedings, the case was concluded without discussing this issue.

Consequently, the Court concluded that the differential treatment of the applicants in assessing their requests for reinstatement to their posts on the basis of their membership in certain unions "does not pursue a legitimate aim". For the reasons explained, it has been ruled that the principle of equality (prohibition of discrimination) guaranteed under Article 10 of the Constitution was violated.

Languages:

Turkish.



Identification: TUR-2016-2-006

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 03.03.2016 / **e)** 2013/5653 / **f)** / **g)** *Resmî Gazete* (Official Gazette), 24.08.2016, 29811 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.21 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:

Right to be forgotten / Internet, content, removal.

Headnotes:

The “right to be forgotten” becomes a matter of concern when an individual's dignity and reputation is harmed when a news article in the internet medium remains easily accessible for a long period of time. The *raison d'être* of this right is to ensure that a fair balance is struck between the freedom of expression and free press and the individual's right to protect and improve his or her moral existence as the internet becomes widespread and it provides novel means and facilities of communication.

Such means and facilities provided by the internet must be utilised in a manner avoiding any damage to the essence of the freedom of the press and the public's freedom to access news and opinions through protecting the news archive in the medium of the internet; but it must also protect the individual's right to protection of dignity and reputation secured under the Constitution.

Summary:

I. In the incident giving rise to the present application, the applicant sent a notification to the relevant media institution on 2 April 2013 for the removal from the internet archive of three news articles published on the website of a national newspaper in 1998 and 1999 about the judicial fines imposed on the applicant for using drugs. Upon non-removal of the said news contents in the two days period, the applicant filed a case at Istanbul 36th Criminal Court of Peace (closed) on 18 April 2013 against the relevant media institution for the removal of the news contents and the Court accepted the applicant's request on the grounds that “the news article subject to request has lost its relevance, it longer bears newsworthiness, there is no public interest in keeping it on the agenda and that it has the nature of an offending and destructive information about the private life of the applicant”. Upon objection, Istanbul 2nd Criminal Court of First Instance repealed the previous decision of the relevant court on 28 May 2013 and this decision for repeal was notified to the attorney of the applicant on 21 June 2013.

II. The Constitutional Court made the following assessments in brief on the allegations of the applicant: a fair balance must be struck between the right to dignity and reputation interfered by the said news on the internet, and the freedom of expression and press to be interfered if the said contents is removed from publication. An important aspect of the present case to be taken into account in striking such a balance is that not only the freedom of expression and press, but also the individuals' right to access the news and opinions stands against the right to

protection of dignity and reputation and the right to be forgotten. In conducting its assessment on whether a fair balance has been struck between the said rights and freedoms, the Constitutional Court carries out an examination on the basis of the grounds provided by the competent judicial authorities.

In the present case, the news items that were the subject of the applicant's complaint were published in 1998 and 1999 and they are archival news. Such archival news is maintained not only in the digital medium, but also on the internet by the content provider. When assessed on the basis of the principle of proportionality, considering such methods as deletion of the personal data leading to access to the news on the internet, the pursued aim could be achieved without deleting the archived news completely from the internet. This method will prevent serious interferences with the freedom of press, which would be caused by a complete removal of the digital news archive and rewriting of the past events for the purposes of scientific research.

The news items about the applicant, which are stored in an archive on the internet, and which can be accessed easily, are related to the criminal proceedings in 1998 and 1999. It was not argued that these news items were contrary to real facts. The news items are about the arrest of the applicant while taking drugs and the proceedings after the applicant's arrest. As such, these news items cannot be deemed worthy, for the public or future interest, to make it necessary to keep them easily accessible in the archive.

The impugned news is related to an incident which took place approximately fourteen years ago as of the date of application and, therefore, has lost its actuality. For the purposes of statistical and scientific studies, the grounds and justifications explained above indicate that there is no reason to require ease of access to these news items in the internet medium. In this context, it is evident that ease of access to the news published on the internet about the applicant, who does not have a political or famed personality in terms of public interest, harms the applicant's reputation.

Consequently, the news about the applicant must be considered within the scope of the right to be forgotten. Taking the means and facilities provided by the internet medium into account, access to the news about the applicant must be blocked for the purposes of protecting the applicant's dignity and reputation. In this context, it cannot be said that dismissal of the request for blocking of access strikes a fair balance between the freedom of expression and press and the right to protection of moral integrity.

For the reasons explained, it has been ruled that the applicant's right to protection of dignity and reputation guaranteed under Article 17 of the Constitution was violated.

Languages:

Turkish.



Identification: TUR-2016-2-007

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 14.04.2016 / **e)** 2013/6829 / **f)** K.2015/112 / **g)** *Resmi Gazete* (Official Gazette), 14.06.2016, 29742 / **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.**
 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**
 5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions.**

Keywords of the alphabetical index:

Reputation, respect, right / Rights of workers, protection.

Headnotes:

The State has not only a negative obligation to not engage in unlawful interference with the individual's freedom of expression, but it also has a positive obligation to prevent such interferences.

When the conflicting rights and interests of parties are at stake, regard must be had to the fair balance that has to be struck between such rights. A court judgment must provide relevant and sufficient justifications on the issue of whether a fair balance was struck among the interests of the parties.

Summary:

I. In the incident giving rise to the present application, the applicant, a worker employed by a sub-contracted company under TEİAŞ (Turkish Electricity Transmission Company), filed a complaint to BİMER (Prime Ministry Communication Centre) about the working conditions, inequality among the workers, and inefficiency of inspectors' controls in the workplace, and his employment contract was terminated upon his complaint. The applicant filed a case requesting the invalidation of "termination of employment contract" and his reinstatement to work. The 2nd Labour Court of Samsun declared the "termination of employment contract" invalid and decided for his reinstatement to work. Upon appeal of the judgment, the Court of Cassation found the "termination of contract" justified on the grounds that the employee exercised his right to legal remedies (i.e., to complain about the alleged misconduct) by resorting to expressions of insult and verbal teasing. The Court of Cassation quashed the judgment of First Instance Court and, by reviewing the case on merits, decided for dismissal of the case.

The applicant claimed that, although he won the case that he filed before the Court of First Instance, the Court of Cassation quashed the judgment and dismissed his case. The applicant alleged that his right to legal remedies and right to a fair trial were violated and requested a retrial of the case.

II. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it makes the legal definition of the facts and incidents itself. Therefore, the claims of the applicants were considered to be related to Articles 26 of the Constitution and were evaluated within the scope of the freedom of expression.

The Constitutional Court made the following assessments in brief on the allegations of the applicant: The interference to the applicant's freedom of expression is not caused by public authorities, however, it must be assessed within the scope of State's positive obligations. It must be accepted that the interference, caused by dismissal of the applicant's case by characterising certain expressions in his petition as insult and teasing, also falls within the scope of "the protection of others reputation and rights" and, therefore, such interference is legitimate.

In principle, an employee's notification and warning to public authorities of the illegalities at the workplace and the injustices caused by the employer falls within the scope of protection of the freedom of expression. The applicant's petition, when considered as a whole, contains expressions calling for help and

emphasising his desperation rather than an offensive tone. The applicant tried to explain that he is wronged when compared to other employees of the same line of work. He also stated that the employer did not pay the full amount of his insurance and that the official documents misrepresented their working hours despite their working shifts. In order to emphasise that his complaints were not investigated seriously, the applicant used such expressions as “the inspectors are coming and they leave after wining and dining at the company, they do not care about us, they threaten us when we complain, they take us for slaves”. The justifications of the judgment do not explain whether those expressions, alleged to be insult and teasing in nature, in the entirety of applicant’s petition, were the applicant’s efforts to ensure that his complaints are taken seriously. The judgment also does not consider whether the said expressions were aiming to convey that not only the employers but also the inspectors do not perform their duties.

In addition, the judgment did not discuss whether the complaint petition would cause a negative effect on the employer’s reputation considering that it was not publicly disclosed outside the public authorities and the company. The judgment also did not discuss whether the application of provisions on rightful termination were justified, taking into account the weakness of the complaint petition’s effects on the employer compared to the negative effects of termination of the contract on the applicant. Therefore, the Constitutional Court concluded that the court judgment on the termination of applicant’s labour contract for justified reasons did not provide relevant and sufficient justifications on the issue of whether a fair balance was struck among the applicant’s freedom of expression, the reputation of the employer and maintaining peace at workplace.

Consequently, the Constitutional Court ruled that the applicant’s freedom of expression guaranteed under Article 26 of the Constitution had been violated.

Languages:

Turkish.



Ukraine Constitutional Court

Important decisions

Identification: UKR-2016-2-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 01.06.2016 / **e)** 2-rp/2015 / **f)** Conformity with the Constitution of the provision of the third sentence of Article 13.1 of the Law “On Psychiatric Care” (case on judicial control over hospitalisation of disabled persons to psychiatric institution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Care, psychiatric / Incapable person / Hospitalisation, voluntary, consent / Restriction, rights, freedoms.

Headnotes:

Recognition of a person as being incapable cannot deprive him or her of other constitutional rights and freedoms or restrict them in a manner that undermines their essence. Hospitalisation of a legally incapable person to a psychiatric institution at the request or with the consent of his or her guardian upon the decision of a psychiatrist (which does not provide for judicial control of such hospitalisation, since the legislator has considered it as voluntary despite the fact that it happens without the conscious consent of the person concerned) is a disproportionate restriction of the constitutional right of incapable persons to freedom and personal inviolability. Therefore, it should be carried out in compliance with the constitutional guarantees of the protection of human and citizens’ rights and freedoms, with account of the mentioned international legal standards, legal positions of the Constitutional Court and exclusively upon the court’s decision pursuant to Article 55 of the Constitution.

Judicial control over the hospitalisation of an incapable person to a psychiatric institution in the manner provided for in Article 13 of the Law on Psychiatric Care (hereinafter, the "Law") is a necessary guarantee of the protection of his or her rights and freedoms enshrined, in particular, in Articles 29 and 55 of the Constitution. Following independent and impartial consideration of hospitalisation of incapable person to a psychiatric institution, a court must adopt a decision about the legitimacy of restricting the constitutional right to freedom and personal inviolability of such person.

Summary:

I. Under the Constitution, all people are free and equal in their dignity and rights; human rights and freedoms are inalienable and inviolable; constitutional rights and freedoms are guaranteed and shall not be abolished; everyone has the right to respect of his or her dignity; every person has the right to freedom and personal inviolability; human and citizens' rights and freedoms are protected by the Court; everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Articles 21, 22.2, 28.1, 29.1, 55.1 and 55.2 of the Constitution).

Restrictions of the realisation of constitutional rights and freedoms may not be arbitrary and unfair, they have to be established exclusively by the Constitution and laws, pursue a legitimate aim, and be conditioned by public need to achieve this aim, proportionate and reasonable. Where restrictions have to be imposed, the legislator must introduce legal regulation which will allow the legitimate aim to be achieved with minimal interference in the implementation of this right or freedom and which will not infringe the essential content of such right.

The Constitution stipulates that citizens deemed by a court to be incompetent, do not have the right to vote (Article 70 of the Constitution). In this regard, the said persons are subject to restrictions provided for in Articles 72, 76, 81 and 103 of the Constitution. In the Constitutional Court's opinion, recognition of a person to be incapable cannot deprive him or her of other constitutional rights and freedoms or restrict them in a manner that undermines their essence.

According to the Civil Code, a natural person may be recognised by the Court as legally incapable if he or she is not capable to perceive and (or) control his or her actions due to chronic and stable mental disorder. A natural person shall be recognised as legally incapable from the effective date of the court decision thereon; they will be placed in wardship and not

entitled to take any legal actions; the guardian shall take legal actions on their behalf and in their favour and will bear liability for any damage inflicted by a legally incapable natural person (Articles 39.1, 40.1 and 41). The procedure for recognition of a natural person as legally incapable is established in Articles 236-241 of the Code of Civil Procedure.

Systematic analysis of the legislation gives grounds to state that legally incapable persons are a special category of individuals (natural persons) who temporarily or permanently are not capable at their own discretion to implement property and personal non-property rights, perform duties and bear legal responsibility for their actions due to chronic, stable mental disorder. Incapable persons should be provided with legal possibilities to satisfy individual needs, implementation and protection of their rights and freedoms. Although, due to health reasons disabled persons are not able personally to implement certain constitutional rights and freedoms, including the right to freedom and personal integrity, they may not be completely deprived of these rights and freedoms, therefore the state is obliged to create effective legal mechanisms and guarantees for their maximum implementation.

The Constitutional Court proceeds from the fact that the fundamental values of effective constitutional democracy include freedom, the availability of which is a prerequisite of development and socialisation of an individual. The right to freedom is an integral and inalienable constitutional human right and provides for a possibility to select one's own behaviour with the purpose of free and comprehensive development, act independently according to their own decisions and plans, prioritise, do whatever is not prohibited by law, freely and at one's own discretion move throughout the state, choose a place of residence etc. The right to freedom means that a person is free in his or her activity from outside interference, except for restrictions established by the Constitution and laws.

The Constitutional Court noted the requirements of the effective international treaties ratified by Parliament and the practice of interpretation and application of these treaties by international bodies the jurisdiction of which is recognised by Ukraine, including the European Court of Human Rights. Since Article 29 of the Constitution corresponds to Article 5 ECHR, according to the principle of friendly attitude to international law, the practice of interpretation and application of the said article of the Convention by the European Court of Human Rights should be taken into account when considering this case.

Analysis of the above international documents leads to the conclusion on the need for judicial review of the interference with the right to freedom and personal inviolability of persons with mental disorder during hospitalisation to psychiatric institutions without their consent.

According to the first and third sentences of Article 13.1 and 13.2 of the Law on Psychiatric Care no. 1489-III, dated 22 February 2000 with subsequent amendments (hereinafter, the "Law"), a person is hospitalised to a psychiatric institution voluntarily – at his or her request or upon his or her conscious consent; a person recognised as legally incapable in the manner prescribed by law is hospitalised to psychiatric institution at the request or upon the consent of his or her guardian; hospitalisation of a person in cases stipulated by paragraph one of this article, is carried out upon the decision of the psychiatrist.

Under Article 1.9 of the Law, conscious consent of a person is a consent freely expressed by a person able to understand information provided in accessible way, about the nature of his or her mental disorder and forecast of its possible development, objective, procedures and duration of psychiatric care, diagnostic methods, treatment and medicines that can be used during psychiatric care, their side effects and alternative methods of treatment.

Hospitalisation of a legally incapable person to a psychiatric institution at the request or with consent of his or her guardian upon the decision of a psychiatrist means long-term psychiatric care is provided in the hospital. A legally incapable person hospitalised to a psychiatric institution in the manner provided for in Article 13 of the Law will stay in such an institution around the clock with no possibility of leaving it voluntarily. His or her actions are constantly monitored by medical personnel.

It therefore appears that hospitalisation of an incapable person to a psychiatric institution under Article 13 of the Law is a restriction of the right to freedom and personal inviolability enshrined in Article 29 of the Constitution, and should therefore meet the criteria set out in this decision.

II. The Constitutional Court found that the State, in performing its main duty – promoting and ensuring human rights and freedoms (Article 3.2 of the Constitution) – must not only refrain from violations or disproportionate restrictions of human rights and freedoms, but also take appropriate measures to ensure their full implementation by everyone under its jurisdiction. To this end, the legislator and other public authorities should ensure effective regulation that

meets the constitutional norms and principles, and should create mechanisms necessary to meet human needs and interests. At the same time, particular attention should be focused on especially vulnerable categories of individuals, including those with mental disorders.

The Constitutional Court, the sole body of constitutional jurisdiction in Ukraine, whose task it is to guarantee the supremacy of the Constitution as the Fundamental Law of the State throughout the territory of Ukraine, considers that legal regulation of hospitalisation of incapable person to a psychiatric institution established in Article 13 of the Law, does not comply with the requirements of Article 3 of the Constitution regarding the duty to establish a proper legal mechanism for the protection of the constitutional rights and freedoms of individuals, including those legally incapable, from arbitrary restrictions of his or her constitutional right to freedom and judicial protection.

III. Judges M. Zaporozhets, I. Slidenko and N. Shaptala attached dissenting opinions.

Supplementary information:

- Resolution of the General Assembly of the United Nation Organisation "Principles for the protection of person with mental illness and the improvement of mental health care", no. 46/119, 18 February 1992;
- Recommendation of the Parliamentary Assembly of the Council of Europe on psychiatry and human rights, no. 1235, 1 January 1994;
- Convention on the Rights of Persons with Disabilities, 13 December 2006;
- Recommendation of the Committee of Ministers concerning the Legal Protection of Persons Suffering from Mental Disorders Placed as Involuntary Patients, no. R (83)2, 22 February 1983.

Cross-references:

Constitutional Court:

- no. 3-rp/2003, 30.01.2003;
- no. 15-rp/2004, 02.11.2004.

European Court of Human Rights:

- *Winterwerp v. Netherlands*, no. 6301/73, 24.10.1979, Series A, no. 33;
- *Storck v. Germany*, no. 61603/00, 16.06.2005, *Reports of Judgments and Decisions 2005-V*;
- *Gorshkov v. Ukraine*, no. 67531/01, 08.11.2005;

- *McKay v. United Kingdom*, no. 543/03, 03.10.2006, *Reports of Judgments and Decisions* 2006-X;
- *Stanev v. Bulgaria*, no. 36760/06, 17.01.2012, *Reports of Judgments and Decisions* 2012.

Languages:

Ukrainian.



Identification: UKR-2016-2-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.06.2016 / **e)** 3-rp/2016 / **f)** Conformity of Article 11.9.7 of the Law on State Assistance to Families with Children with the Constitution (case on the termination of childbirth allowance) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.6.2 Institutions – Executive bodies – **Powers**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

State, assistance, birth, child / Allowances, payment, termination.

Headnotes:

The list of grounds for termination of childbirth allowance is enshrined in the law in order to prevent inappropriate use of State Budget funds allocated for such assistance, and prevent arbitrary interference of public authorities with the right of a person to receive it. Since this list is not exhaustive and the right to determine an additional list of grounds is not delegated to another public authority, the possibility arises of arbitrary interference by public authorities with a person's right to receive state childbirth assistance.

The discretionary powers of a public authority to terminate childbirth allowance should be clearly defined in the law. The existence of an unclearly defined list of grounds for termination of childbirth

allowance and the fact that the bodies of social protection of population have discretionary powers without specifying their scope in the law could lead to a violation of the right of a person to receive childbirth assistance.

Summary:

I. The Ukrainian Parliament Commissioner for Human Rights presented the Constitutional Court with a petition to recognise Article 11.9.7 of the Law on State Assistance to Families with Children dated 21 November 1992, no. 2811-XII with subsequent amendments (hereinafter, the "Law"), whereby childbirth allowance shall be terminated "in case of other circumstances", as being unconstitutional.

Article 11.9 of the Law sets out the instances where childbirth allowance will be terminated. These include the recipient being deprived of parental rights, the child being removed from the recipient without deprivation of parental rights; temporary placement of the child under full state funding; termination of guardianship or guardian exemption from the duties on the individual child; misuse of funds and failure by the recipient to provide appropriate conditions for proper maintenance and upbringing of the child and "in case of other circumstances".

The applicant argued that the existence of grounds for termination of the allowance "in case of other circumstances" means that people are deprived of the possibility of predicting the circumstances which may result in the allowance being removed from them and gives public authorities unlimited discretion in deciding on the termination of such allowances. Protection of persons against arbitrary interference with their right to receive childbirth assistance is not therefore guaranteed. The applicant also contended that Article 11.9.7 of the Law does not comply with Articles 46.1 and 57.1 of the Constitution in conjunction with Article 8.1 of the Constitution.

Under the Constitution, Ukraine is a democratic, law-based state (Article 1); a human being, his or her life and health, honour and dignity, inviolability and security is recognised as the highest social value; human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State; the State is answerable to the individual for its activity; to affirm and ensure human rights and freedoms is the main duty of the State (Article 3); family, childhood, motherhood and fatherhood are protected by the state (Article 51.3). The fundamentals of social protection, the principles of the regulation of marriage, family, and protection of childhood, motherhood and fatherhood are determined exclusively by the laws (Article 92.1.b of the Constitution).

The Law on Protection of Childhood requires the state to provide appropriate conditions for the upbringing, physical, mental, social, spiritual and intellectual development of children, their social and psychological adaptation and active life, growth in a family environment in an atmosphere of peace, dignity, respect, freedom and equality (Article 4). The priority in the legal regulation of family relations is to ensure appropriate upbringing of every child in a family and the possibility of spiritual and physical development (Article 1.2 of the Family Code).

II. The rationale behind the Law is to ensure priority of state assistance to families with children within the general system of social protection of the population. In line with the Constitution, it establishes a state-guaranteed level of material support to families with children by granting state pecuniary assistance taking account of family composition, income and age of children (Preamble of the Law). Under Article 1.1 of the Law, Ukrainian citizens, whose families bring up and have minors, are entitled to state assistance in cases and under conditions stipulated by the Law and other laws of Ukraine.

Under Article 3.1.2 of the Law, childbirth allowance is a form of state assistance to families with children. Such assistance shall be granted and paid by bodies of social protection of the population; it shall be assigned to one of the parents or guardians residing with the child; coverage of expenses for its disbursement shall be effected on account of funds of the State Budget as subventions to local budgets (Articles 4, 5.1 and 10.1 of the Law), following the conditions set out in Article 11 of the Law. Thus, childbirth allowance is a form of state assistance within the general system of social protection of population. It is granted to ensure the appropriate level of financial support for families with children and to create proper conditions for the maintenance and upbringing of children.

Article 11.9 of the Law lists the grounds for termination of childbirth allowance. One of the grounds is "in case of other circumstances". However, the Law does not establish criteria for bodies of social protection of population to determine those "other circumstances".

In Ukraine, the principle of the rule of law is recognised and effective (Article 8.1 of the Constitution), and one of its elements is the legal certainty of laws and other normative legal acts. The Constitutional Court noted that the principle of legal certainty does not rule out the recognition of some discretion of public authorities in decision-making. Nevertheless, in this case there should be a mechanism to prevent abuse. This mechanism

should ensure the protection of a person against arbitrary interference by public authorities with his or her rights and freedoms, and also ensure that the person has the possibility to foresee actions by these bodies.

Analysis of the content of Article 11.9 of the Law indicates that the legislation has allowed for a level of discretion on the part of public authorities in deciding on the termination of such allowance, but there is no clearly defined scope for the exercise of this discretion.

Legal regulation of the grounds for termination of childbirth allowance provided for in Article 11.9.7 of the Law shows non-compliance of the principle of legal certainty as an element of the rule of law, guaranteed by Article 8.1 of the Constitution. Thus, Article 11.9.7 of the Law, which provides for the termination of childbirth allowance "in the case of other circumstances," is in conflict with Article 8.1 of the Constitution.

The Court decided to recognise Article 11.9.7 of the Law on State Assistance to Families with Children dated 21 November 1992 no.2811-XII with subsequent amendments, whereby the childbirth allowance is terminated "in case of other circumstances", as being unconstitutional.

The above provision will lose its legal force on the day of the adoption of the Decision by the Constitutional Court.

III. Judge I. Slidenko attached a dissenting opinion.

Supplementary information:

- Convention on the Rights of the Child, 20 November 1989, ratified by the *Verkhovna Rada* of the Ukrainian SSR, no. 789-XII, 27 February 1991.

Cross-references:

Constitutional Court:

- no. 5-rp/2005, 22.09.2005.

Languages:

Ukrainian.



Identification: UKR-2016-2-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.06.2016 / **e)** 4-rp/2016 / **f)** Conformity of the provisions of Article 141.3, 141.5.1, 141.5.2, 141.5.4 and 141.6 of the Law on the Judicial System and Status of Judges and provisions of item 5 of Chapter III “Final provisions” of the Law on Introducing Amendments to Certain Legislative Acts on Pensions with the Constitution (the case of lifelong monthly monetary allowance of retired judges) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.4.1.5 Institutions – Judicial bodies – Organisation – Members – **End of office**.
 4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status**.
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

Keywords of the alphabetical index:

Independence, judge / Monetary allowance, lifelong / Pension, judge.

Headnotes:

Financial support for judges after retirement as part of their legal status is not a personal privilege, but a means of ensuring, on a constitutional basis, the independence of judges. It is provided to guarantee the rule of law and in the interests of parties who approach the Court for fair, impartial and independent justice. The constitutional status of judges and former judges entails their proper financial support, which should guarantee the implementation of fair, independent and impartial justice.

The legislator may provide for cases of termination of assignment and payment (or partial payment) of lifelong monthly monetary allowances for judges, but only on grounds that directly affect the status of judges, such as the entry into legal force of a guilty verdict against a judge or termination or resignation in connection with the re-election of judges.

Judges availing themselves of the constitutional right to work following retirement, established by Article 43 of the Constitution, cannot be deprived of the guarantees of independence of judges, in particular adequate financial security. Legislation providing for a cessation of payment of lifelong monthly monetary allowance of former judges working in certain positions is contrary to the purpose of the establishment of constitutional guarantees for the material security of judges as an element of their independence. Furthermore, it does not satisfy the principle of a single status for all judges as it imposes a difference between those former judges that work and those that do not work.

Summary:

I. Under the Constitution, state power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power; bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws (Articles 6 and 19.2 of the Constitution). Also under the Constitution, human and citizens' rights and freedoms are protected by the court; justice is administered by professional judges and, in cases determined by law, people's assessors and jurors; the status of judges is determined exclusively by the laws (Articles 55.1, 92.1.14 and 127.1 of the Constitution).

Under Article 126.1 of the Constitution, the independence and immunity of judges is guaranteed by the Constitution and the laws. Independence as part of the constitutional status of judges is guaranteed by the Constitution and ensured in particular by special procedures for their election or appointment to office and dismissal from office; prohibition on influencing them in any way; protection of the professional interests of judges; judges are subject only to the law in the administration of justice; guarantees by the state of the funding and proper conditions for the operation of courts and the activity of judges by determining the expenditures for the maintenance of courts separately in the State Budget; bringing perpetrators to legal liability for contempt of court and judges and implementation of judges' self-government (Articles 85.1.27, 126.2, 126.4, 126.5, 127.3, 127.4, 127.6, 128, 129.1, 129.5, 130 and 131.1.1 of the Constitution). Professional judges may not belong to political parties and trade unions, participate in any political activity, hold a representative mandate, occupy any other paid positions or perform other remunerated work besides scholarly, teaching and creative activity (Article 127.2 of the Constitution).

II. The Constitutional Court has repeatedly stated that the constitutional principle of judicial independence ensures the important role of the judiciary in the mechanism of the protection of human and citizens' rights and freedoms and is a guarantee of the realisation of the right to judicial protection under Article 55.1 of the Constitution. The constitutional provisions on the independence of judges, which are an integral part of the status of judges and their professional activity, are related to the principle of the separation of powers and were brought about by the need to protect the constitutional order and human rights, to guarantee the autonomy and independence of the judiciary. The guarantees of judicial independence, as a necessary condition of administration of justice by an unbiased, impartial and fair court, established by the fundamental laws on the judiciary, form, together with the Constitution, the unified system of guarantees of the independence of judges. The constitutional status of a judge gives reasons to put forward high standards for judges and maintains public confidence in his or her competence and impartiality. It also provides for him or her to be granted the status of former judge in the future, another guarantee of the proper administration of justice.

Since the declaration of independence, the right to a fair trial in Ukraine has been provided by way of development of the principle of the independence of judges in the laws "On the Status of Judges" no. 2862-XII, dated 15 December 1992, "On the Judicial System" no. 3018-III, dated 7 February 2002 and "On the Judicial System and Status of Judges" no. 2453-VI, dated 7 July 2010 (hereinafter, "Law no. 2453").

This legislation consistently affirmed the independence of judges, freedom of impartial resolution of cases under the domestic beliefs of judges and their proper financial support. Guarantees of independence of judges are set out in Articles 48 and 52 of Chapter III, Article 117 of Chapter VII, Chapters IX and X of Law no. 2453 in the wording of the Law no. 192, and from the content of this legislation it appears that one of the guarantees of independence of judges is their proper material and social security, in particular providing remuneration to judges at the expense of the state and to former judges a lifelong monthly monetary allowance or pension at their choice. The content and the scope of guarantees of independence of judges defined by the Constitution are not to be diminished when adopting new laws or amending existing laws.

III. The Constitutional Court found that the provisions of Law no. 2453 on the proper material and social security of judges should reflect the provisions of the

Constitution and international acts concerning the independence of judges, aimed at ensuring the implementation of fair justice and stability of the achieved level of guarantees of independence of judges.

The Constitutional Court proceeded from the assumption that a lifelong monthly monetary allowance is a special form of material support of a judge and is a guaranteed monthly monetary payment guaranteed by the state ensuring the proper material maintenance of a judge once he or she has left office and a standard of living in accordance with his or her status. Under Article 141.1 of Law no. 2453, a judge who has retired shall receive a pension or lifelong monthly monetary allowance at his or her choice.

Article 141 of Law no. 2453, before the amendments by Law no. 213 (i.e. in the wording of Law no. 192), provided for payment of a lifelong monthly monetary allowance to the judge in the amount of 80 percent of the remuneration of judges holding the position in question. For each full year of service as a judge over 20 years, the amount of lifelong monthly monetary allowance would be increased by two percent of the salary, but cannot exceed 90 percent of the salary of a judge, without limitation of the maximum amount of lifelong monthly monetary allowance" (first paragraph of Article 141.3), and established that "in case of change to remuneration of judges holding the respective position, the amount of the previously designated lifelong monthly monetary allowance shall be recalculated" (second paragraph of Article 141.3).

It would seem, from the above, that Law no. 2453 changed the specified order of calculation of the lifelong monthly monetary allowance, which reduced lifelong monthly monetary allowance for judges and ruled out the possibility of its recalculation.

The Constitutional Court concluded that a decrease in the size of lifelong monthly monetary allowance of judges from 80 to 60 percent of the allowance of a judge holding the appropriate position, and the exclusion of the provision whereby for each full year of service as a judge for over 20 years, the amount of lifelong monthly monetary allowance would be increased by two percent of the salary, but could not exceed 90 percent of the salary of a judge, without limitation of the maximum amount of lifelong monthly monetary allowance, resulted in a decline in the level of financial support for retired judges and, as a result, a decline in the guarantee of judicial independence of a judge which could affect the realisation of fair justice and implementation of the right to protection by the court. The exclusion of the provision on the possibility of recalculation of the lifelong monthly monetary allowance for retired judges due to the

increase of monetary allowance of a judge, who works at the respective position, also reduces the guarantee of independence of judges.

Thus, the provisions of Article 141.3 of Law no. 2453 in the wording of the Law no. 213 narrowed the content and the scope of the guarantees of independence of judge, and therefore ran counter to Articles 55.1 and 126.1 of the Constitution.

Thus, according to the first and second sentences of the sixth paragraph of Article 141.5 of Law no. 2453 in the wording of Law no. 213, the Law on Introducing Amendments to Certain Legislative Acts no. 911-VIII, dated 24 December 2015 (hereinafter, "Law no. 911") the maximum amount of lifelong monthly monetary allowance for a retired judge (including bonuses, promotions, additional pension, target monetary benefits, pensions for special merits before Ukraine, indexation and other additional payments to pensions established by law, apart from additions to allowances to certain categories of persons having special merits to the country) cannot exceed ten living wages established for disabled persons; temporarily, for the period from 1 January 2016 to 31 December 2016, the maximum amount of lifelong monthly monetary allowance for retired judges (including bonuses, promotions, additional pension, the target monetary benefits, pensions for special merits before Ukraine, indexation and other supplements to pensions established by law, apart from additions to allowances to certain categories of persons having special merits to the country) cannot exceed 10 740 hryvnias.

In its analysis of the constitutional compliance of these provisions, the Constitutional Court started from the premise that it had already examined the inadmissibility of definition in the law of the maximum amount of the lifelong monthly monetary allowance of judges.

The Constitutional Court found that the provisions of the first and second sentences of the sixth paragraph of Article 141.5 of Law no. 2453 in the wording of Law no. 213 and Law no. 911 concerning the maximum amount of lifelong monthly monetary allowance of retired judge are inconsistent with Article 126.1 of the Constitution.

Article 141.5 of the Law no. 2453 in the wordings of Law nos. 213 and 911 establish the following: temporarily, for the period from 1 January 2016 till 31 December 2016, persons (except invalids of the I and II groups, disabled veterans of the III groups and participants of combat actions, persons covered by Article 10.1 of the Law on Status of War Veterans, Guarantees of Their Social Protection) who work in

the positions and under conditions stipulated by Law no. 2453, the Law on the Prosecutor's Office, shall not be paid the assigned pensions / lifelong monthly monetary allowance (first and second paragraphs); from 1 January 2017 payment of lifelong monthly monetary allowance assigned according to this Article, for the period of work on the positions that give the right to its assignment or the right to pensions in the manner and under conditions stipulated by the laws on the Prosecutor's Office" and on Scientific and Scientific-Technical Activity and on Status of People's Deputy shall be terminated; during this period a pension will be granted and paid in accordance with the Law on Mandatory State Pension Insurance (paragraph four). The provisions mentioned above determine the categories of posts, the holding which deprives former judges of the right to simultaneously obtain remuneration and lifelong monthly monetary allowance.

Such guarantees for judges are dependent on the conditions related to the status of the judge and his or her professional activity in the administration of justice; they cannot depend on other conditions, including social security, which is granted and paid on the general principles and provided by other laws apart from Law no. 2453. The receipt by a former judge of the lifelong monthly monetary allowance cannot depend on the performance by him or her of other work, particularly remunerated work.

In considering the case, the Constitutional Court found the same indications of non-conformity to the Constitution of the provisions of the third paragraph of Article 141.5 of Law no. 2453 in the wording of Law no. 213, namely: in the period of work of the person (except disabled people of I and II groups, invalids of war of the III group and participants of combat actions, persons referred to in Article 10.1 of the Law on Status of War Veterans, Guarantees of Their Social Protection) on other positions/jobs lifelong monthly monetary allowance, the amount of which exceeds 150 percent of the cost of minimum living standard, established for persons that lost ability to work, is paid in the amount of 85 percent of the assigned size, but not less than 150 percent of the minimum living standard established for persons who lost their ability to work". This was the basis for declaring them unconstitutional. Thus, the provisions of the first, second, third and fourth paragraphs of Article 141.5 of Law no. 2453 concerning the reduction in size or termination of payment to former judges of lifelong monthly monetary allowance for the period of their work at certain positions in connection with the carrying out of other work are not consistent with the constitutional guarantees of independence of judges, and therefore run contrary to Article 126.1 of the Constitution.

The Supreme Court had also raised the issue with the Constitutional Court on the conformity to the Constitution of the provisions of item 5 of Chapter III "Final Provisions" of Law no. 213, according to which in case of failure to adopt the law on the assignment of all pensions, including special ones until 1 June 2015, on a general basis from 1 June 2015 rules regarding the assignment of lifelong monthly monetary allowance shall be abolished in accordance with Law no. 2453.

The Supreme Court considered that these provisions "virtually eliminated the constitutional institute of the resignation of a judge that serves to guarantee the independence of acting judges and is an integral part of his or her legal status as an acting judge". In its assessment of this issue, the Constitutional Court took into account Chapter IX "Support of Judges", Chapter X "Status of Judges" of Law no. 2453, which stipulates that the status of judges provides for them being granted in the future the status of judges and guarantees material and social security, including the payment of lifelong monthly monetary allowance. The result of the judge's retirement is the termination of his or her powers with preserving the title of judge and guarantees of independence and immunity including receiving lifelong monthly monetary allowance of a judge. Abolition of lifelong monthly monetary allowance provided in item 5 of Chapter III "Final Provisions" of Law no. 213 negates the essential content of the right of judges to resign and is contrary to Article 126.5.9 of the Constitution.

Parliament adopted Law nos. 213 and 911, the separate provisions of which narrowed the scope of guarantees of judicial independence. The Constitutional Court noted that laws, other legal acts or their separate provisions once declared unconstitutional cannot be adopted in the same wording since decisions of the Constitutional Court "are mandatory for execution throughout the territory of Ukraine, final and shall not be appealed" (Article 150.2 of the Constitution). The reintroduction of a legal regulation that the Constitutional Court declared unconstitutional gives grounds for an assertion as to the violation of the constitutional regulations according to which laws and other normative legal acts are adopted on the basis of the Constitution and shall conform to it (Article 8.2 of the Constitution). Therefore, by adopting Law nos. 213 and 911 and introducing amendments by them to Law no. 2453, violated Articles 8.2 and 150.2 of the Constitution.

Having analysed the constitutional petition of the Supreme Court dated 22 January 2016, the Constitutional Court concluded that it lacked legal substantiation of unconstitutionality of the third sentence of the indicated paragraph, namely:

"Lifelong monetary allowance of judges is paid by the Pension Fund at the expense of the State budget". This is the ground for termination of constitutional proceedings in this part pursuant to Article 45.2 of the Law on the Constitutional Court, i.e. the constitutional petition or constitutional appeal does not meet the requirements envisaged by the Constitution and this Law.

Laws and other legal acts or their separate provisions, once declared unconstitutional, lose their legal force from the day the Constitutional Court adopts the decision on their unconstitutionality (Article 152.2 of the Constitution). According to the Constitutional Court, declaring unconstitutional the provisions of paragraphs three, the first, second, third, fourth paragraphs and the first, second sentences of the sixth paragraph of Article 141.5 of Law no. 2453 could lead to a gap in the field of legislative regulation of lifelong monthly monetary allowance of judges. The Constitutional Court specified that the provisions of Article 141.3 and 141.5 of the Law no. 2453 as amended by Law no. 192 are subject to application, i.e. the provisions of Law no. 2453 before its amendment by Law nos. 213 and 911.

The Decision of the Constitutional Court shall have a prejudicial meaning when considering claims by the courts of general jurisdiction in connection with legal relations arising from the provisions of the laws declared unconstitutional.

III. Judges O. Kaminin and I. Slidenko expressed dissenting opinions.

Supplementary information:

- The European Charter on the Statute for Judges, 10 July 1998;
- Recommendations of the Committee of Ministers of the Council of Europe, no. (94)12, 13 October 1994 and no. (2010)12, 17.11.2010.

Cross-references:

Constitutional Court:

- no. 5-rp/2002, 20.03.2002 in the case upon the constitutional petition of 55 People's Deputies regarding the conformity of the provisions contained in Articles 58 and 60 of the Law On the state budget for 2001; the Supreme Court on conformity with the Constitution of items 2, 3, 4, 5, 8 and 9 of Article 58.1 of the Law on some measures for the budget funds saving with the Constitution (case on benefits, compensation and guarantees);

- no. 19-rp/2004, 01.12.2004 in the case upon the petition of the Supreme Court regarding the official interpretation of the provisions of Article 126.1, 126.2 of the Constitution and Article 13.2 of the Law on the Status of judges (the case on the independence of judges as part of their status);
- no. 8-rp/2005, 11.10.2005 in the case upon constitutional petition of the Supreme Court and 50 People's Deputies on conformity with the Constitution of paragraphs 3 and 4, item 13 of Section XV "Final Provisions" of the Law on General Mandatory State Pension Insurance and the official interpretation of the provisions of Article 11.3 of the Law on Status of Judges (case on the pension level and lifelong monthly monetary allowance);
- no. 4-rp/2007, 18.06.2007 in the case upon the conformity with the Constitution of separate provisions of Article 36, items 20, 33, 49, 50 of Article 71, Articles 97, 98, 104 and 105 of the Law on the 2007 State Budget (case on guarantees of independence of judges);
- no. 10-rp/2008, 22.05.2008 in the case upon the constitutional petition of the Supreme Court concerning compliance with the Constitution of individual provisions of Article 65, Section I, sub-paragraphs 61, 62, 63 and 66, Section II, sub-paragraph 3, Section III of the Law "On the State Budget for financial year 2008 and on Amending Some Legislative Acts" and of 101 People's Deputies concerning compliance with the Constitution of provisions of Article 67, Section I, sub-paragraphs 1-4, 6-22, 24-100, Section II of the Law on the State Budget for financial year 2008 and on Amending Some Legislative Acts (case on the subjects and contents of the law on the State Budget);
- no. 3-rp/2013, 03.06.2013 in the case upon the constitutional petition of the Supreme Court concerning conformity with the Constitution of separate provisions of Article 2.2.2 of Chapter II, Final and Transitional Provisions" of the Law on Measures Concerning Legislative Provision of the Reformation of the Pension System, Article 138 of the Law on the Judicial System and Status of Judges (case on changing conditions of pension payment and lifelong monthly monetary allowance of retired judges);
- no. 3-rp/2013, 08.04.2015 in the case upon the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights

concerning the conformity with the Constitution of the provisions of paragraph two Article 171.2 of the Code of Administrative Proceedings.

Languages:

Ukrainian.



Identification: UKR-2016-2-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.07.2016 / **e)** 5-rp/2016 / **f)** Concerning the conformity to the Constitution of individual provisions of item 11 of the Final Provisions of the Law On the State Budget for 2016 / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.6.2 Institutions – Executive bodies – **Powers.**
 4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**
 4.7.4.6 Institutions – Judicial bodies – Organisation – **Budget.**
 4.10.2 Institutions – Public finances – **Budget.**

Keywords of the alphabetical index:

Judge, independence / State budget, courts, finance.

Headnotes:

Legislative provisions which allow the Cabinet of Ministers to define, at its own discretion, the expenditure of the State in terms of the financing of courts and judges, violate the principle of the separation of powers and pose a threat to judicial independence and thus run counter to the Constitution.

Summary:

I. The Supreme Court applied to the Constitutional Court with a petition to recognise the provision of item 11 of the Final Provisions of the Law on the State Budget for 2016 dated 25 December 2015 no. 928-VIII (hereinafter, "Law no. 928") in the part

which provides that the rules and provisions of the Law on the Judicial System and Status of Judges shall be applied in the manner and amount established by the Cabinet of Ministers, based on the existing financial resources of state and local budgets and the budget of the Social Insurance Fund, as non-conforming to Articles 1, 3, 6, 8.1 and 129.1 of the Constitution.

The Supreme Court substantiated its petition by the fact that the Cabinet of Ministers' empowerment to apply the rules and provisions of the Law on the Judicial System and Status of Judges dated 7 July 2010 no. 2453-VI as amended (hereinafter, "Law no. 2453") on the procedure and amounts of funding of the judiciary on the basis of available financial resources from state and local budgets and the budget of the Social Insurance Fund violates the principle of the separation of powers and did not conform to the principle of legal certainty as an element of the rule of law and to guarantees of judicial independence. It also posed a threat to the functioning of the judicial system in general.

II. The Constitution stipulates that the judicial system, judicial proceedings and the status of judges are determined exclusively by the laws (Article 92.1.14). A similar requirement is enshrined in Article 4 of Law no. 2453, under which the judicial system and status of judges are determined by the Constitution, this Law and other laws.

Under Article 75 of the Constitution, the sole body of legislative power in Ukraine is Parliament – the *Verkhovna Rada*. The exclusive power of parliament is, in particular, to adopt laws (Article 85.1.3 of the Constitution).

The Cabinet of Ministers is the highest body of the executive power, which is guided by the Constitution and laws as well as by the decrees of the President and resolutions of Parliament adopted in accordance with the Constitution and laws, and issues resolutions and orders within the limits of its competence (Articles 113.1, 113.3 and 117.1 of the Constitution).

Under item 11 of the Final Provisions of Law no. 928, Parliament empowered the Cabinet of Ministers to apply the rules and provisions of Law no. 2453 in the manner and amounts established by the Cabinet of Ministers, based on available financial resources of state and local budgets and the budget of the Social Insurance Fund; in other words, to resolve funding of the judiciary by their own acts.

The above provisions of Law no. 2453 refer to ensuring state funding and proper conditions for functioning of courts and judges by the state, which in accordance with Articles 92.1.14 and 130.1 of the Constitution shall be regulated only by laws, not by acts of the Cabinet of Ministers, as provided for in item 11 of the Final Provisions of Law no. 928.

The principle of judges' independence in administering justice, established in Article 129.1 of the Constitution, is one of the key elements of the judiciary. Independence of judges is a means of ensuring the constitutional human and citizen's right to judicial protection enshrined in Article 55.1 of the Constitution.

The Constitutional Court has repeatedly emphasised that one of the constitutional guarantees of judicial independence is a special procedure for courts' and judges' funding aimed at ensuring proper conditions for administering justice; an important mechanism for providing such guarantee is the State's duty established in Article 130.1 of the Constitution to ensure funding and proper conditions for functioning of courts and judges by determining separate funding for the courts in the State Budget.

The Constitutional Court considered that the empowerment of the Cabinet of Ministers by item 11 of the Final Provisions of Law no. 928 to apply the rules and provisions of Law no. 2453 in the manner and amounts based on available financial resources of state and local budgets and budget of the Social Insurance Fund represented a narrowing of guarantees of judges' independence, including as to funding, which runs counter to Article 129.1 of the Constitution.

The Constitutional Court concluded that the contested provision of item 11 of the Final Provisions of Law no. 928 in the part which provides that the rules and provisions of Law no. 2453 are applied in the manner and amounts established by the Cabinet of Ministers, based on available financial resources of state and local budgets and the budget of Social Insurance Fund, empowers the Cabinet of Ministers to define in its own discretion the expenditures of the State budget to finance courts and judges, which violates the constitutional principle of the separation of powers and poses a threat to judges' independence, guaranteeing which provides for the constitutional right to judicial protection.

III. Judge of the Constitutional Court I. Slidenko expressed a dissenting opinion.

Supplementary information:

- Opinion of the European Commission for Democracy through Law (Venice Commission), 24 July 2015, no. 803/2015 on the Proposed Constitutional Amendments regarding the Judiciary;
- Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly resolutions, no. 40/32, 29 November 1985 and no. 40/146, 13 December 1985;
- Resolution of the UN Economic and Social Council, 24 May 1989, no. 1989/60 on Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary;
- The European Charter on the Statute for Judges, 10 July 1998;
- Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010, no. (2010)12 and the annex thereto.

Cross-references:

Constitutional Court:

- no. 6-rp/99, 24.06.1999, in the case upon the constitutional petition of the Supreme Court on the conformity of the provisions of Articles 19 and 42 of the Law "On the State Budget for 1999" with the Constitution (case on court funding);
- no. 15-rp/2000, 14.12.2000, in the case upon the constitutional petition of the President on the conformity with the Constitution of the Resolution of Parliament on the validity of the Law on the Accounting Chamber; official interpretation of the provisions of Article 150.2 of the Constitution and of Article 70.2 of the Law on the Constitutional Court on the procedure of execution of the decisions of the Constitutional Court (case on the procedure of execution of the decisions of the Constitutional Court);
- no. 17-rp/2002, 17.10.2002, in the case upon the constitutional petition of 50 People's Deputies concerning official interpretation of Articles 75, 82, 84, 91 and 104 of the Constitution (case on the authority of Parliament);
- no. 19-rp/2004, 01.12.2004, in the case upon the constitutional petition of the Supreme Court on the official interpretation of the provisions of Article 126.1 and 126.2 of the Constitution and Article 13.2 of the Law on the Status of Judges (case on independence of judges as a component of their status);
- no. 4-rp/2007, 18.06.2007, upon the constitutional petition of the Supreme Court on the conformity of individual provisions of Article 36, items 20, 33, 49, 50 of Article 71, Articles 97, 98, 104 and 105 of the Law on the State Budget for 2007 with the Constitution (case on guarantees of independence of judges);
- no. 10-rp/2008, 22.05.2008, in the case upon the constitutional petition of the Supreme Court concerning conformity with the Constitution of individual provisions of Article 65 of Section I, items 61, 62, 63 and 66 of Section II, item 3 of Section III of the Law on the State Budget for 2008 and on Amending Some Legislative Acts and of 101 People's Deputies concerning the conformity with the Constitution of the provisions of Article 67 of Section I, items 1-4, 6-22, 24-100 of Section II of the Law on the State Budget for 2008 and on Amending Some Legislative Acts (case on the subject matter and content of the Law On the State Budget);
- no. 7-rp/2010, 11.03.2010, in the case upon the constitutional petition of the Supreme Economic Court concerning official interpretation of the provisions of Article 130.1 of the Constitution (case on the financial support of the courts);
- no. 3-rp/2013, 03.06.2013, in the case upon the constitutional petition of the Supreme Court concerning the conformity with the Constitution of individual provisions of Article 2, second paragraph of item 2 of Section II "Final and Transitional Provisions" of the Law on Measures Concerning Legislative Provision of the Reform of the Pension System", Article 138 of the Law on Judicial System and Status of Judges (case on changing conditions of pension payment and lifelong monthly monetary allowance of retired judges);
- no. 4-rp/2016. 08.06.2016, in the case upon the constitutional petition of the Supreme Court concerning the conformity of the provisions of Article 141.3, 141.5.1, 141.5.2, 141.5.4, 141.6 of the Law on the Judicial System and Status of Judges" and provisions of item 5 of Section III "Final provisions" of the Law on Introducing Amendments to Certain Legislative Acts on Pensions" with the Constitution (the case on lifelong monthly monetary allowance of retired judges).

Languages:

Ukrainian.



United States of America Supreme Court

Important decisions

Identification: USA-2016-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 09.06.2016 / **e)** 15-108 / **f)** Commonwealth of Puerto Rico v. Sanchez Valle *et al.* / **g)** 136 *Supreme Court Reporter* 1863 (2016) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.
5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem**.

Keywords of the alphabetical index:

Double jeopardy / Sovereignty, dual.

Headnotes:

There is a constitutional prohibition against more than one prosecution against a person for the same offense; however, if a single act violates the laws of separate sovereigns, it gives rise to distinct offenses and therefore may subject a person to successive prosecutions.

To determine if two political entities are separate sovereigns for purposes of the dual sovereignty exception to the constitutional prohibition against more than one prosecution against a person for the same offense, the test is narrow, and historically focused: it does not focus on the degree of self-rule, but on whether prosecutorial powers of the two jurisdictions derive from the same ultimate source or have independent origins.

Summary:

I. Respondents Luis Sanchez Valle and Jaime Gomez Vazquez on separate occasions each sold a gun to an undercover police officer in the Commonwealth of Puerto Rico. Commonwealth

prosecutors indicted them for, among other things, selling a firearm without a permit in violation of the Puerto Rico Arms Act of 2000. While those charges were pending, federal grand juries indicted the two men, based on the same transactions, for violations of analogous U. S. gun trafficking statutes.

Both defendants pleaded guilty to the federal charges. Following their pleas, they moved to dismiss the pending Commonwealth charges, claiming that they were barred under the Double Jeopardy Clause in the Fifth Amendment to the U.S. Constitution. The trial courts in both cases granted the defendants' motions and dismissed the charges. The Puerto Rico Court of Appeals consolidated the cases and reversed. The Supreme Court of Puerto Rico reversed the Court of Appeals, agreeing with the trial courts that Puerto Rico's gun sale prosecutions violated the Double Jeopardy Clause.

II. The U.S. Supreme Court affirmed the decision of the Supreme Court of Puerto Rico, ruling that the Double Jeopardy Clause barred Puerto Rico and the United States from successively prosecuting a person for the same conduct under equivalent criminal laws. Therefore, Puerto Rico could not proceed with its prosecution of Sanchez Valle and Gomez Vazquez.

The Double Jeopardy Clause dictates that a person normally cannot be prosecuted twice for the same offense. However, under the so-called "dual-sovereignty" doctrine, a single act gives rise to distinct offenses, and therefore may subject a person to successive prosecutions, if it violates the laws of separate sovereigns.

The question in the instant case was the meaning of sovereignty. For purposes of the Double Jeopardy Clause, the Court asks a narrow, historically focused question. It does not examine the extent of control that one prosecuting entity wields over the other, the degree to which an entity exercises self-governance, or a government's more particular ability to enact and enforce its own criminal laws. Instead, the single issue is whether the prosecutorial powers of the two jurisdictions derive from the same ultimate source or whether they have independent origins. If the two entities derive their power to punish from independent sources, they then may bring successive prosecutions.

In this regard, the fifty States in the United States are separate sovereigns from the Federal Government and from one another. The States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment to the U.S. Constitution. Therefore, State prosecutions have their roots in an inherent

sovereignty that is not connected to the U. S. Congress. For similar reasons, Indian tribes also are separate sovereigns. A tribe's power to punish pre-existed the Union, and so a tribal prosecution, like a State's, is not attributable to any delegation of federal authority. On the other hand, municipalities are not sovereigns distinct the States, because they receive their power from their respective States.

The Commonwealth of Puerto Rico is a political entity that exercises self-rule through a popularly-ratified Constitution adopted in 1952. In 1950, the U.S. Congress had enacted legislation that authorised the people of Puerto Rico, which had held varying degrees of semi-autonomous territorial status since the United States acquired it in 1898, to organise a government pursuant to a constitution of their own adoption. The people of Puerto Rico called a constitutional convention and approved the charter it drafted. After the U.S. Congress made several changes in the draft charter that the constitutional convention then adopted, the autonomous Commonwealth of Puerto Rico came into being.

However, the Double Jeopardy Clause's dual-sovereignty test does not focus on the fact of self-rule, but on the ultimate source of a political entity's authority. Therefore, Puerto Rico cannot benefit from the dual-sovereignty doctrine. Indeed, the Commonwealth's power to enact and enforce criminal law proceeds from the Constitution of Puerto Rico. But the ultimate source of that prosecutorial power remains the U. S. Congress. The Congress authorised Puerto Rico's constitution-making process in the first instance, and in later legislation, both amended the draft charter and gave it the necessary approval. In other words, Congress conferred the authority to create the Constitution of Puerto Rico, which in turn confers the authority to bring criminal charges.

III. Five Justices signed the Court's opinion. Three Justices filed separate opinions. Justice Ginsburg authored a separate concurring opinion, which Justice Thomas joined. Justice Thomas authored a separate opinion concurring in part in the Court's opinion and concurring in the Court's judgment. Justice Breyer filed a dissenting opinion, in which Justice Sotomayor joined.

Supplementary information:

The Double Jeopardy Clause in the Fifth Amendment to the U.S. Constitution states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The Tenth Amendment to the U.S. Constitution states in full:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Languages:

English.



Identification: USA-2016-2-006

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.06.2016 / **e)** 14-981 / **f)** Fisher v. University of Texas at Austin, *et al.* / **g)** 136 *Supreme Court Reporter* 2198 (2016) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Admissions, university / Deference, judicial / Diversity, student body / Protection, equal / Scrutiny, strict.

Headnotes:

A university may not consider race as a factor in selection of its student body unless the admissions process can withstand strict scrutiny: it must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to accomplish that purpose.

A university's decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.

When determining whether the use of race is narrowly tailored to achieve a university's permissible goals, that institution bears the burden of demonstrating that available and workable race-neutral alternatives are not sufficient.

The compelling interest that justifies consideration of race in higher education admissions is not an interest in enrolling a certain number of students from different racial groups; instead, it is an interest in obtaining the educational benefits that flow from student body diversity.

Because a university is prohibited under the federal Constitution from seeking a particular number or quota of members of racial groups in its student body, it cannot at the same time be faulted for failing to specify the particular levels of enrolment at which it believes the educational benefits of diversity will be obtained.

A university's assertion of a general interest in the educational benefits of diversity is insufficient. Its goals cannot be elusory or amorphous, but instead must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

Summary:

I. The petitioner, Abigail Fisher, applied to the University of Texas at Austin for admission to its 2008 entering class. Her application was rejected. The petitioner, who is Caucasian, sued the University and University officials in federal court, claiming that the University's affirmative action policy of considering an applicant's race as a factor in its undergraduate admissions process violated the Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution. The University's policy did not assign race as a numerical value for each applicant, but did include it as one consideration in advancing its goal of increasing racial diversity in the student body.

The District Court granted the University's pre-trial motion for summary judgment, dismissing the petitioner's claim. The Court of Appeals for the Fifth Circuit affirmed. In a decision dated 24 June 2013, the U.S. Supreme Court concluded that the Court of Appeals had applied an incorrect standard in its review of the University's policies. The Court vacated the judgment of the Court of Appeals and remanded the case to it for evaluation court of the University's program under the proper standard.

On remand, the Court of Appeals for the Fifth Circuit again affirmed the entry of summary judgment for the University. The U.S. Supreme Court affirmed the decision of the Court of Appeals.

II. The Supreme Court reiterated three controlling principles from its 24 June 2013 decision that are relevant to an assessment of the constitutionality of a public university's affirmative action program. First, a university may not consider race unless the admissions process can withstand strict scrutiny. In other words, it must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to accomplish that purpose. Second, a university's decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper. Third, when determining whether the use of race is narrowly tailored to achieve the university's permissible goals, that institution bears the burden of demonstrating that available and workable race-neutral alternatives are not sufficient.

In adjudicating a motion for summary judgment in a civil proceeding, the Court is required to draw all reasonable factual inferences in favour of the party opposing summary judgment. In the instant case, the Supreme Court concluded that, despite this requirement, the petitioner had not shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

The Court rejected the petitioner's claim that the University had not articulated its compelling interest with sufficient clarity because it had failed to state more precisely what level of minority enrolment would constitute a "critical mass". However, the compelling interest that justifies consideration of race in higher education admissions is not an interest in enrolling a certain number of students from different racial groups; instead, it is an interest in obtaining the educational benefits that flow from student body diversity. Because a university is prohibited from seeking a particular number or quota of members of racial groups in its student body, the Court said the university cannot be faulted for failing to specify the particular levels of enrolment at which it believes the educational benefits of diversity will be obtained.

On the other hand, the Court stated, a university's assertion of a general interest in the educational benefits of diversity is insufficient. A university's goals cannot be elusory or amorphous; instead, they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them. The Court

determined that the record in the instant case showed that the University had articulated concrete and precise goals that mirror the compelling interest that the Court has approved in prior cases. It also concluded that the University had presented a reasoned, principled explanation for its policy in a detailed proposal based on a study revealing that its race-neutral policies and programs had not met its goals.

The Court also rejected the petitioner's claim that it was unnecessary to consider race because such consideration had only a minor impact on the number of admitted students who were members of minority racial groups. The record showed that the consideration of race has had a meaningful, if still limited, effect on diversity in the entering first-year classes. That race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring and not evidence of unconstitutionality.

The Court also concluded that the record did not support petitioner's claim that other race-neutral measures were available and workable means to achieve the University's goals.

III. The Court's decision was adopted by a 4-3 vote among the Justices. Justice Thomas wrote a separate dissenting opinion, and Justice Alito wrote a separate dissenting opinion that Chief Justice Roberts and Justice Thomas joined.

Supplementary information:

The Equal Protection Clause in Section One of the Fourteenth Amendment to the U.S. Constitution states that no State shall "deny to any person within its jurisdiction the equal protection of the laws".

Cross-references:

Supreme Court:

- *Fisher v. University of Texas at Austin, et al.*, no. 11-345, 24.06.2013, *Bulletin* 2013/2 [USA-2013-2-004].

Languages:

English.



Identification: USA-2016-2-007

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.06.2016 / **e)** 14-1468, 14-1507 / **f)** Birchfield v. North Dakota / **g)** 136 *Supreme Court Reporter* 2160 (2016) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Blood alcohol concentration / Driving while intoxicated / Search, law enforcement / Testing, blood and breath / Warrant, judicial.

Headnotes:

The constitutional guarantee against unreasonable searches generally requires that law enforcement officers obtain a warrant before undertaking a search to discover evidence of criminal wrongdoing.

The taking of blood samples and administration of breath tests from motorists suspected of driving at an illegal level of alcohol intoxication are searches of the person under the constitutional protection against unreasonable searches.

In the absence of a warrant, a search will be reasonable only if it falls within a specific judicially-recognised exception to the constitutional warrant requirement.

Searches conducted incident to a lawful arrest are a categorical exception to the constitutional requirement of a warrant for searches of the person. Whether a particular type of search qualifies for the exception will depend on the degree to which the search intrudes upon an individual's privacy and the degree to which it is needed for the advancement of legitimate governmental interests.

The taking of a blood sample from a motorist suspected of driving at an illegal level of blood alcohol concentration requires a search warrant.

The administration of a breath test to a motorist suspected of driving at an illegal level of blood alcohol concentration does not require a search warrant.

Because a taking of a blood sample for testing blood alcohol concentration requires a warrant, it is constitutionally impermissible to impose criminal penalties on a person who refuses the test.

Summary:

I. All States in the United States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level. Police usually determine BAC by analysing a blood sample or by using a machine to measure the amount of alcohol in a driver's breath. All States have enacted laws that penalise motorists who refuse to undergo such testing. Typically, these laws impose civil or administrative penalties, but some States also have adopted laws that make it a crime for a motorist to refuse.

In this case, and two others with which it was consolidated at the U.S. Supreme Court, the three petitioners were charged with operating motor vehicles with illegally high BACs. The cases arose in the States of Minnesota and North Dakota, which make it a crime to refuse to undergo BAC testing. In all three cases, police officers informed the petitioners that it is a crime to refuse testing.

Two of the petitioners, Danny Birchfield and William Bernard, refused to undergo BAC testing. Birchfield, arrested in North Dakota, refused a blood test. Bernard, arrested in Minnesota, refused a breath test. The third petitioner, Steve Beylund, agreed to a blood test but later claimed that his consent was coerced by the police officer's warning about the criminal consequences of refusal. Birchfield and Bernard were convicted of crimes for their refusals. Beylund's test results revealed a very high BAC level and his driver's license was suspended in an administrative proceeding.

The three petitioners claimed that the actions taken against them were unconstitutional under the prohibition against unreasonable searches and seizures in the Fourth Amendment to the U.S. Constitution. They argued that criminal laws may not compel BAC tests without issuance of a search warrant by a neutral judicial official. In all three cases, the State Supreme Courts rejected the petitioners' Fourth Amendment claims.

II. On review, the U.S. Supreme Court concluded that the Fourth Amendment requires a warrant for the taking of a blood test. Therefore, a State may not make refusal to submit to a blood test a crime. On the other hand, the Fourth Amendment does not require a warrant for administration of a breath test.

The taking of a blood sample or the administration of a breath test is a “search” subject to the Fourth Amendment. Therefore, the question in the instant cases was whether the warrantless searches at issue were reasonable. Generally, a search warrant must be obtained. However, this usual requirement is subject to certain exceptions, one of which is the “search incident to arrest” exception. For situations that could not have been foreseen when the Fourth Amendment was adopted in 1791, the Court in its 2014 decision in *Riley v. California* explained that the applicability of this exception to a particular type of search will depend on the degree to which the search intrudes upon an individual’s privacy, and the degree to which it is needed for the promotion of legitimate governmental interests.

Applying these criteria, the Court concluded that blood tests require a warrant because they implicate significant privacy concerns: the act of piercing the skin is significantly intrusive and the tests place a sample in the hands of law enforcement authorities that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Therefore, criminal sanctions may not be imposed for refusal to submit to a blood test.

Breath tests do not require a warrant because they do not implicate significant privacy concerns. For example, the physical intrusion is almost negligible and breath tests are capable of revealing only one bit of information. Meanwhile, government has a paramount interest in preserving the safety of public highways.

As a result of its determinations on these questions, the Court concluded that petitioner Birchfield was threatened with an unlawful search and therefore reversed the North Dakota Supreme Court’s judgment affirming his conviction. On the other hand, because petitioner Bernard was criminally prosecuted for refusing a breath test that was a permissible search incident to arrest for drunk driving, the Court affirmed the Minnesota Supreme Court decision upholding his conviction. In the case of petitioner Beylund, the North Dakota Supreme Court held that his consent to a blood test was voluntary on the erroneous assumption that the State could permissibly compel such a test. Because the question of voluntariness of consent to a search must be determined by examining the totality of all the factual circumstances, the Court remanded Beylund’s case to the North Dakota courts to re-evaluate his consent.

III. Five Justices signed the Court’s opinion. Justice Sotomayor authored a separate opinion concurring in part and dissenting in part, in which Justice Ginsburg joined. Justice Thomas authored an opinion concurring in the judgment in part and dissenting in part.

Supplementary information:

The Fourth Amendment to the U.S. Constitution states in full that:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Cross-references:

Supreme Court:

- *Riley v. California*, nos. 13-132 and 13-212, 25.06.2014, *Bulletin* 2014/2 [USA-2014-2-006].

Languages:

English.



Identification: USA-2016-2-008

a) United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2016 / **e)** 15-274 / **f)** *Hole Woman’s Health, et al. v. Hellerstedt, et al.* / **g)** 136 *Supreme Court Reporter* 2292 (2016) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Abortion / Burden, undue / Due process / Health, protection of women’s / Standard of review.

Headnotes:

A woman has a qualified constitutional right to choose to have an abortion.

The State has a legitimate interest in protecting the health of the woman and the life of the foetus and may regulate the exercise of a woman's right to choose to have an abortion; however, in the case of a foetus incapable of surviving independently outside the womb, the State may not unduly interfere with the woman's right to choose.

A law imposes an undue burden on a woman's right to have an abortion if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the foetus attains viability.

A court reviewing legislation that, in the interest of protecting the health of the woman, implicates the right to an abortion must balance the weight of the burden on the constitutional right against the law's medical benefits.

When a court examines legislation that regulates the right to an abortion, the undue burden standard of review is proper, and it is stricter than the rational basis standard used, for example, when economic legislation is at issue.

Where constitutional rights are at issue, a court reviewing legislation must give deference to legislative factual findings, but should not place dispositive weight on those findings. The judiciary has an independent constitutional duty to review legislative factual findings.

Summary:

I. Beginning with its 1973 decision in *Roe v. Wade*, the U.S. Supreme Court has recognised that the right of privacy, encompassed within the protection of liberty guaranteed in the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution, includes a woman's qualified right to choose to have an abortion. The State, in advancing its legitimate interest in protecting the health of the woman and the life of the foetus, may regulate the exercise of this right. However, in the case of a pre-viable foetus (one incapable of surviving independently outside the womb), the State may not unduly interfere with the right to choose. In its 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court ruled that a law imposes an undue burden on a woman's right to have an abortion if its purpose or effect "is to place a substantial obstacle in the path of a woman seeking an abortion before the foetus

attains viability". Unnecessary health regulations that present a substantial obstacle impose such an unconstitutional burden.

In 2013, the Legislature of the State of Texas enacted a law regulating abortion procedures, providers, and facilities. The law's proponents asserted that its goal was the protection of women's health. A group of abortion service providers filed suit in Federal District Court, challenging the constitutionality of two of the law's provisions. One of the provisions (the so-called "admitting privileges requirement") required a physician performing an abortion to have admitting privileges at a hospital located no more than thirty miles from the place where the abortion was performed. An admitting privilege represents a hospital's acceptance of a physician as a member of its staff who is permitted to perform medical procedures at the hospital. The other challenged provision (the so-called "surgical-centre requirement") stipulated that the minimum standards for an abortion facility must be equivalent to the minimum standards under the Texas law for "ambulatory surgical centres". Those standards include among other things, detailed specifications relating to the size of a centre's nursing staff, building dimensions, and other building requirements.

The plaintiffs claimed that both provisions were inconsistent with the *Casey* decision. The District Court made detailed factual findings, including the number and locations of abortion clinics in Texas, and concluded on the basis of those findings that the two provisions would result in the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013, thereby restricting access to previously available legal facilities. The Court found that the admitting privileges requirement would impose an undue burden on the right of women in certain parts of the State to seek a pre-viability abortion, and the surgical-centre requirement would impose an undue burden on the right of women throughout Texas to seek a pre-viability abortion. The Court enjoined the enforcement of both provisions.

The U.S. Court of Appeals for the Fifth Circuit reversed the decision of the District Court. With minor exceptions, it found both provisions constitutional and allowed them to take effect. The U.S. Supreme Court accepted review of the Court of Appeals decision and reversed that decision.

II. The Supreme Court found the standards of review applied by the Court of Appeals to be erroneous. The Court of Appeals apparently had determined that a court of first instance should not consider the existence or nonexistence of medical benefits when deciding the undue burden question. However, the

Supreme Court noted that *Casey* requires courts to balance the burdens a law imposes on abortion access against the benefits that the law confers. The Court of Appeals also erroneously faulted the District Court for applying an incorrect level of review. The District Court had applied an undue burden standard, which is proper for assessment of a regulation implicating a constitutionally protected personal liberty, but the Court of Appeals incorrectly applied the less strict rational basis standard used, for example, when economic legislation is at issue.

The Court of Appeals also ruled that legislatures, not courts, should resolve factual questions of medical uncertainty. This position was inconsistent with the Supreme Court's case-law. A court must give deference to legislative factual findings, but it must not place dispositive weight on those findings. Instead, the judiciary has an independent constitutional duty to review legislative factual findings where constitutional rights are at issue.

Having determined that the Court of first instance had applied the proper standards of review, the Court then examined the District Court's evaluation of the factual record. The Court concluded that the District Court had arrived at the correct legal conclusions on the basis of the facts.

III. The Court's decision was adopted by a 5-3 vote among the Justices. Justice Ginsburg wrote a separate concurring opinion. Justice Thomas wrote a separate dissenting opinion, and Justice Alito wrote a separate dissenting opinion that Chief Justice Roberts and Justice Thomas joined.

Supplementary information:

The Due Process Clause of the Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or property, without due process of law".

Cross-references:

Supreme Court:

- *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973);
- *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2016-2-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 26.02.2016 / **e)** C 310 / **f)** Duque v. Colombia / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Homosexual, access to pension.

Headnotes:

The sexual orientation and the gender identity of persons are protected categories under the Inter American Convention on Human Rights (hereinafter, “ACHR”). Therefore, the Inter American Convention on Human Rights prohibits any discriminatory norm, act or practice based on sexual orientation of persons. Consequently, no norm, decision or practice of domestic law, whether by state authorities or private individuals, may diminish or restrict, in any way, the rights of a person based on their sexual orientation.

A difference of treatment is discriminatory if it has no objective and reasonable justification, that is, when it does not pursue a legitimate aim and there is no reasonable relationship of proportionality between the means used and the aim pursued. Furthermore, this Court established that in the case of the prohibition of discrimination by one of the protected classes referred to in Article 1.1 ACHR, any restriction of a right requires a rigorous foundation, which implies that the reasons used by the State for the

differentiation of treatment should be particularly serious and be grounded in a comprehensive argument.

A law that does not allow same-sex couples to access their partners’ pensions violates their rights to equality and non-discrimination.

Summary:

The applicant, Mr Ángel Alberto Duque, lived with his same-sex partner until the latter died on 15 September 2001 from Acquired Immune Deficiency Syndrome (AIDS). Mr Duque’s partner was affiliated with the Colombian Fund Management Company of Pensions and Severance (COLFONDOS S.A.). On 19 March 2002, Mr Duque presented a written request to be informed about the requirements to obtain the survivor’s pension of his partner. COLFONDOS indicated that Mr Duque did not hold a beneficiary status according with the applicable law. On 26 April 2002, given the negative response of COLFONDOS, Mr Duque filed a “*tutela*” action (procedural action for the protection of fundamental rights in Colombia), requesting that the pension be recognised and paid in his favour. The Tenth Municipal Civil Court of Bogotá denied the “*tutela*” action filed. It found that “the petitioner [did] not meet the qualifications required by law to be recognised as the beneficiary of the pension and that no provision or judgment has recognised [...] any right to same-sex couples”. Mr Duque appealed the decision, but it was upheld on 19 July 2002 by the Twelfth Municipal Civil Court of Bogotá.

The Colombian regulations in force at the time provided that the beneficiaries of the survivor’s pension were “for life, the spouse or the surviving permanent companion” and that “[f]or all civil effects, a *de facto* partnership is that formed between a man and a woman, that without being married, form a singular and permanent community of life”. The regulatory Decree of Act 100 indicated that for the “effects of the survivor pension affiliate, the attribute of permanent companion will be held by the last person of a different sex to the deceased, which has made marital life with him, for a period not less than two (2) years”. However, in 2007 the Constitutional Court of Colombia recognised, through its jurisprudence, pension benefits, social security and property rights to same-sex couples. The Constitutional Court of Colombia established that Law no. 54 also applied to same-sex couples. Subsequently, it determined that the coverage of the social security system health contributory regime also covered same-sex couples. In 2008, the Constitutional Court of Colombia concluded, in Judgment C-336, that the permanent partners of

same-sex couples have the right to the survivor's pension. Also, since 2010, the Constitutional Court of Colombia ruled that the fact that one of the partners of a same-sex couple had passed away prior to the issuance of Judgment C-336 did not justify denying the survivor's pension.

On 21 October 2014, the Inter American Commission on Human Rights submitted the case, alleging violations of Articles 5.1, 8.1 and 25 ACHR in relation to Article 1.1 ACHR and to Article 24 ACHR in relation to Articles 1.1 and 2 ACHR.

The State submitted two preliminary objections regarding the non-exhaustion of domestic remedies. The objections were rejected on the grounds that the State had not disclosed the necessary information to the Inter-American Commission at the time when the latter decided on the admissibility of the case. Another preliminary objection was submitted regarding the facts invoked to substantiate the violation of the rights to life and personal integrity. This objection was also rejected on the grounds that this argument could not be analysed as a preliminary objection as it related to the probative weight of the evidence for the determination of the facts.

The Court found the State internationally responsible for the violation of the rights to equal protection established in Article 24 ACHR, in relation to Articles 1.1 and 2 ACHR, and did not find the State responsible for the violation to Articles 5.1, 8.1 and 25 ACHR, in relation to Articles 1.1 and 2 ACHR.

During the proceedings, the State recognised the existence of a "continued international wrongful act, during at least part of the period of time in which the provisions that did not allow for the recognition of pension benefits to same-sex couples were in force." Accordingly, it argued that the internationally wrongful act had ceased with the issuance of the Constitutional Court of Colombia Judgment C-366, which amended the rules that were the cause of Mr Duque's human rights violations. Further, it stated that as of 2010 there was an appropriate and effective remedy available for the recognition of pension benefits to same-sex couples. However, the Inter-American Court held that the law had to be analysed at the time when the violations occurred.

Thus, the Court determined:

- a. whether Colombian law at the time established a difference in treatment;
- b. whether the difference in treatment was based on categories protected by Article 1.1 ACHR; and

- c. whether the difference in treatment was of a discriminatory nature.

The Court found that the Colombian legislation regulating *de facto* marital unions and the property regime between permanent companions, as well as the regulatory decree that created the social security system, established a difference in treatment between heterosexual couples who could form a marital union and same-sex couples who could not form such a union.

Furthermore, the Court recalled that sexual orientation and gender identity are protected categories under the Inter American Convention on Human Rights. Therefore, the Inter American Convention on Human Rights prohibits any discriminatory law, act, or practice based on the sexual orientation of a person. Also, the Court decided that any potential restriction of a right based on one of the protected categories contemplated in Article 1.1 ACHR would need to be based on rigorous and weighty grounds.

In the instant case, the Court found that the State had not provided any explanation of pressing social need or purpose for the difference in treatment, nor indicated why recourse to such differentiation was the only way to achieve such purpose. The Court referred to regulations and the jurisprudence of some of the countries in the region – Mexico, Uruguay, Argentina, Brazil, Chile and United States of America – that have recognised access to survivor pensions to same-sex couples. Moreover, the Court recalled that in the case of *Atala Riffo and daughters v. Chile*, it had ruled that "the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered." Accordingly, the Court found that the distinction set out in Colombian law, on the basis of sexual orientation for access to survival pensions, was discriminatory. On this basis, the Court found that Colombia was responsible for the violation of the rights to equality and non-discrimination as recognised in Article 24 ACHR, in relation to Article 1.1 thereof, to the detriment of Mr Duque, for not allowing him to access to the survivor's pension in equal conditions.

In addressing the State's allegations that the internationally wrongful act had ceased and had been remedied or repaired, the Court noted that, even if it was true that Mr Duque could apply for a survivor's pension without being discriminated against as of 2010, it is also true that there is no certainty as to whether the pension would have been granted with retroactive effects to 2002, when Mr Duque submitted

his initial request. In this regard, the Court concluded that the internationally wrongful act to the detriment of Mr Duque had not yet been fully remedied.

With regard to the alleged violation of Article 2 ACHR, the Court held that, in light of normative and jurisprudential developments in Colombia concerning the recognition and protection of same-sex couples, it did not have the elements to conclude that there exists a violation to the obligation to adopt domestic legal provisions.

In relation to the right to judicial protection, established in Article 25 ACHR, the Court indicated that it had no elements to assume that there was not, in Colombia, a suitable and effective remedy to request payment of survivor's pension to same-sex couples. That conclusion was based on the fact that it was not possible to perform an analysis, in abstract terms, regarding the suitability and effectiveness of existent remedies in the contentious administrative jurisdiction, and the reposition and appeal against the provision issued by COLFONDOS, since these remedies were not filed. Consequently, the Court considered the State did not violate this right.

As for the alleged violation of the right to judicial guarantees contained in Article 8.1 ACHR due to the alleged application of discriminatory stereotypes in judicial decisions, the Court held that the State was not responsible, since it was not possible to verify that authorities had acted on the basis of anything other than the express provisions of Colombian law.

Additionally, the Court found that the State was not responsible for the violation of Mr Duque's rights to personal integrity and life because:

- a. no evidence of damage to Mr Duque's psychological or moral integrity derived from the resolutions issued was provided;
- b. no evidence was submitted to infer that Mr Duque had been affected in his health or that the State had failed to provide medical care; and
- c. no information was provided that could lead to the conclusion that in Mr Duque's case, the alternative social security system would have provided lower quality health protection than the contributory system.

The Court established that the judgment constituted *per se* a form of reparation and ordered that the State:

- i. publish the Judgment and its official summary;
- ii. guarantee Mr Duque priority, regarding the processing of a possible application for a survivor's pension; and

- iii. pay non-pecuniary damages, as well as costs and expenses.

Languages:

Spanish, English.



Identification: IAC-2016-2-002

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 30.05.2016 / **e)** C 311 / **f)** Maldonado Ordoñez v. Guatemala / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

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.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
- 5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings.**
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
- 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning.**
- 5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**

Keywords of the alphabetical index:

Defence, right / Judicial protection, right / Accusation, right to know the grounds.

Headnotes:

As part of the minimum guarantees established in Article 8.2 ACHR, the right of the accused to prior

notification in detail of the charges against him or her is applicable both to criminal matters and to those of a different nature as stated in Article 8.1 ACHR, though the scope of this right may differ with respect to the latter. Regarding punitive disciplinary procedures, the scope of this guarantee can be understood in different ways, but in any case it implicates that the accused is made aware of the conduct that allegedly infringed disciplinary rules.

The duty to state the grounds of all decisions is a guarantee linked to the proper administration of justice, which protects the right of citizens to be tried for the reasons established in the law and gives credibility to such decisions in the context of a democratic society. Therefore, decisions adopted by domestic bodies must be properly substantiated; otherwise they will be arbitrary decisions. In order to rule out arbitrariness, the arguments that underlie judicial decisions and certain administrative acts should clearly state the facts, reasons, and rules on which the authorities relied in order to form their judgments. The duty of the State to specify the grounds of all decisions is one of the guarantees contained in Article 8.1 ACHR in order to safeguard the right to due process of law.

The principle of legality is applicable to disciplinary matters; however, its scope depends heavily on the matter at hand. The precision of a punitive rule of a disciplinary nature may be different from that required by the principle of legality in criminal matters, because of the nature of the conflicts that each one is intended to solve.

Remedies must be suitable to correct a given violation, and their application by authorities must be effective. Remedies that turn out to be illusory due to a country's overall conditions or to the particular circumstances of a certain case cannot be considered effective. This may occur, for example, when their uselessness has been demonstrated in practice, either because there are no means to enforce the decisions or because of any other situation that constitutes a denial of justice. Thus, the process should lead to the effective protection of the right recognised in the judicial ruling, through the proper application of said ruling.

Summary:

Olga Yolanda Maldonado Ordóñez began working at the Office of the Human Rights Ombudsman of Guatemala in 1992. Initially, Ms Maldonado worked as a technician in the Department of Education; subsequently, she became a tenured educator in the Department of Quetzaltenango and, finally, interim

assistant of the Attorney for Human Rights in the Department of Quiché.

On 21 February 2000, three brothers of Ms Maldonado filed a complaint before the Director of the Office of the Human Rights Ombudsman, in which they presented allegations against her related to the alleged falsification of a public document and requested that a "moral sanction" be imposed upon her.

On 5 April 2000, the Human Rights Ombudsman informed Ms Maldonado of the complaint filed by her brothers and notified her of the "grounds for dismissal," as stated in Article 74.4 and 74.15 of the Staff Rules of Procedure of the Office of the Human Rights Ombudsman. He also informed her that she was entitled to submit documents or exculpatory evidence within two days. Ms Maldonado presented documentary evidence on the same day, arguing that the allegations against her were false. On 16 May 2000, the Human Rights Ombudsman issued the Agreement no. 81-2000, dismissing Ms Maldonado from her job as an interim assistant, which "was also extended to the position of educator".

On 2 June 2000, Ms Maldonado filed an appeal before the Office of the Human Rights Ombudsman, requesting that Agreement no. 81-2000, which had terminated her labour contract, be revoked and, consequently, that she be immediately reinstated to her previous positions. In the grounds of the appeal, Ms Maldonado argued that she had been dismissed due to family issues, unrelated to any professional misconduct in the course of her work as an employee of the Office of the Human Rights Ombudsman. On 16 June 2000, the appeal was denied. The Attorney for Human Rights considered that the reasons for her dismissal had indeed been family-related, "leading to the application of Article 74.4 and 74.15 of the Staff Rules of Procedure," and added that the mere fact that complaints had been filed against her already indicated an "unwanted conduct for human rights defenders".

Based on Article 80 of the Staff Rules of Procedure, on 20 June 2000, Ms Maldonado filed an appeal before the Second Chamber of the Court of Appeals for Labour and Social Welfare Matters against the decision that had denied her attempt to overturn the Human Rights Ombudsman's decision. In the appeal, Ms Maldonado stressed that the record of the proceedings that had led to her dismissal did not contemplate any acts mentioned in Article 74.4 and 74.15 of the Staff Rules of Procedure. On 26 June 2000, the Second Chamber of the Court of Appeals declined to hear the case, considering it had no jurisdiction to rule thereon.

On 23 August 2000, Ms Maldonado filed a constitutional challenge before the Second Chamber of the Court of Appeals, acting on behalf of the Constitutional Court, against the decision of the Second Chamber of the Court of Appeals in which it declared that it had no jurisdiction to hear the appeal. On 6 September 2000, the Second Chamber of the Court of Appeals rejected the constitutional challenge and stated that it had found no violation of a constitutional provision.

On 8 September 2000, Ms Maldonado filed an appeal before the Second Chamber of the Court of Appeals, constituted as a Constitutional Court, against the decision that had rejected the constitutional challenge. That appeal was admitted by the Second Chamber of the Court of Appeals and referred to the Constitutional Court. On 9 October 2001, the Constitutional Court denied the appeal.

On 3 December 2014, the Inter-American Commission on Human Rights submitted the case to the Court, in accordance with Articles 51 and 61 ACHR and Article 35 of the Court's Rules of Procedure. In Merits Report no. 42/14, the Commission requested that the Court hold Guatemala internationally responsible for violations of the rights stated in Articles 8.1, 8.2, 9 and 25 ACHR, in conjunction with Article 1.1 ACHR, all this to the detriment of Ms Maldonado Ordoñez.

The State submitted a preliminary objection regarding the alleged lack of exhaustion of domestic remedies. The Court held that the State's argument on the appropriate remedies that Ms Maldonado should have exhausted changed over the course of the proceedings before the Inter-American system; they named multiple courses of action as suitable for her claim, without actually clarifying which domestic remedies she should have exhausted. Additionally, the arguments concerning the exhaustion of the ordinary labour remedies were considered untimely because they had been submitted by the State for the first time before the Court. Thus, the Court dismissed the objection of lack of exhaustion of domestic remedies.

On the merits, addressing the punitive nature of the dismissal proceedings and the outcome thereof, the Court held that the procedural guarantees stated in Article 8 ACHR are part of a list of minimum guarantees that should have been respected in order for the decisions in question not to be arbitrary and to abide by due process of law.

Regarding the right of the accused to prior notification in detail of the charges against her and the right to a defence, the Court held that Ms Maldonado should

have been informed, at a minimum, about the grounds of her dismissal, as well as made minimally aware of the relation between the facts that underlay the application of a disciplinary sanction to her case and the rule allegedly infringed.

Similarly, the Court established that the notification of Ms Maldonado's dismissal was not clear about the specific reason why she had been subjected to a disciplinary proceeding; consequently, it did not contain detailed information on the reasons why she could eventually lose her job. This lack of information constituted a violation of the accused's guarantee to being previously notified in detail of the process initiated against her, as stated in Article 8.2.b ACHR. Furthermore, Ms Maldonado's defence was compromised due to the lack of clarity regarding the specific reasons why a dismissal proceeding was being initiated against her. This constituted an additional violation of her right to a defence, as stated in Article 8.2.c ACHR.

Regarding the obligation to state the grounds that underlie judicial decisions, the Court found that the grounds of Ms Maldonado's dismissal were not properly justified and reasoned. It was not clearly indicated how Ms Maldonado's behaviour conformed to the provisions that served as a basis for her dismissal, and the content of these provisions were not analysed at all. This was a violation of the duty to state the reasons that underlie judicial decisions under Article 8.1 ACHR, in conjunction with Article 1.1 ACHR, to the detriment of Ms Maldonado.

With reference to the principle of legality, the Court concluded that Ms Maldonado had been dismissed for a conduct that was not defined in the Staff Rules of Procedure of the Office of the Human Rights Ombudsman as a disciplinary offense and, in addition, that did not conform to the conduct described in Article 74.4 and 74.15 of that regulation, or in Article 77.d of the Labour Code of Guatemala, provisions that had been invoked to justify the sanction imposed. Therefore, the Court determined that there was a violation of Article 9 ACHR, in conjunction with Article 1.1 ACHR, to the detriment of Ms Maldonado.

Finally, regarding the right to judicial protection, the Court held that the confusion and contradiction in internal regulations placed Ms Maldonado in a situation of vulnerability, since she was unable to rely upon a simple and effective remedy as a consequence of these contradictory regulations. Ms Maldonado filed the appeals indicated by the Staff Rules of Procedure, and the courts denied them because of a contradiction between different regulatory bodies governing the matter. Due to the

foregoing, the Court concluded that Ms Maldonado had no effective and simple access to judicial protection, as a result of the lack of certainty and clarity concerning the appropriate remedies that she had to pursue in order to dispute her dismissal. This was a violation of the right to judicial protection and to the obligation of the State to adopt legislative or other measures in its domestic law, under Articles 25 and 2 ACHR, in conjunction with Article 1.1 ACHR.

Accordingly, the Court held that its judgment constitutes *per se* a form of reparation, and additionally ordered that the State:

- i. publish the Court's judgment and its summary;
- ii. eliminate Ms Maldonado's dismissal from her "work record" or any other form of background check;
- iii. clearly specify or regulate, through legislative or other measures, the procedure for the judicial review of any sanction or measure of an administrative-disciplinary nature of the Office of Human Rights; and
- iv. pay the amount established in the judgment regarding pecuniary and non-pecuniary damage and reimbursement of costs and expenses.

Languages:

Spanish, English.



Identification: IAC-2016-2-003

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 22.06.2016 / **e)** Series C 314 / **f)** Tenorio Roca *et al.* v. Peru / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

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

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

5.3.13.3.1 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:

State, responsibility, international / Disappearance, enforced, generalised pattern / Family member as victim / Due diligence, absence / Investigation, absence / Military, jurisdiction / Truth commission, finding, probative value / Amnesty law, failure to implement international obligation.

Headnotes:

A national context that includes the existence of a generalised pattern of enforced disappearances can be used to prove the existence of a specific human rights violation. The reports of truth or historical clarifications commissions have a special probative value as relevant evidence.

The acts involved in a disappearance bear no relationship to the military discipline or mission. The standard that human rights violations should be investigated and prosecuted under the ordinary jurisdiction does not arise from the gravity of the violations, but rather from their very nature and from the rights protected.

The incompatibility of amnesty laws with the Convention in cases of forced disappearances has already been established by the Court. During the period in which the amnesty laws were applied, the State failed to comply with its obligation to adapt its domestic law to the Convention.

States have a general obligation to adapt their domestic laws to the American Convention. While domestic law is not adapted correctly to international standards, the State continues to fail to comply with Article 2 ACHR and Article III of the Inter-American Convention on Forced Disappearance of Persons.

Summary:

On 7 July 1984, Mr Rigoberto Tenorio Roca and his wife were traveling in a bus from Huanta to the city of Ayacucho when he was deprived of his liberty, in front of his wife and several witnesses, by Peruvian military officers, including members of the navy and the investigative police. Mr Tenorio Roca was traveling to military base no. 51, “*Los Cabitos*,” in Ayacucho, in order to learn the start date of his job as a military recruitment officer. Military officers entered the bus requesting passengers to identify themselves and,

upon reviewing Mr Tenorio Roca's identification card, they detained him, asked him to descend from the bus, and introduced him to a small tank (*tanqueta*), with his face covered by his own coat. As of that moment, no information about his whereabouts has been available.

Mr Tenorio Roca was deprived of his liberty in the context of a state of emergency applicable to the region, which allowed armed forces, in particular navy forces, to control internal security in the provinces of Huanta and La Mar, located in the department of Ayacucho. Navy forces established their counter-subversive military base in the Municipal Stadium of Huanta, where detainees were submitted to acts of torture. Also, Mr Tenorio Roca was detained in a generalised context of enforced disappearances, when the largest number of enforced disappearances reported by Peru's Truth and Reconciliation Commission (hereinafter, "CVR" for its initials in Spanish) occurred, between 1983 and 1984. The CVR documented Mr Tenorio Roca's case in its Final Report along with the detention of 57 other persons from the province of Huanta.

On 1 September 2014, the Inter American Commission on Human Rights filed a claim against the Republic of Peru alleging violations of Articles 3, 4, 5.1, 5.2, 7, 8.1 and 25.1 ACHR, in relation to Articles 1.1 and 2 ACHR, and of Articles I and III of the Inter American Convention on Forced Disappearances of Persons. Likewise, the Commission requested that the Court order the State to adopt measures of reparation.

On the merits, the Court found that Peru violated Articles 7, 5.1, 5.2, 4.1 and 3 ACHR, in relation to Article 1.1 of that treaty, as well as Article I.a of the Inter American Convention on Forced Disappearances of Persons, given that the Court understood, after analysing the elements, that Mr Tenorio Roca had been forcefully disappeared by state agents who refused to acknowledge his detention and to reveal his fate or whereabouts.

The Court determined that Mr Tenorio's enforced disappearance started on 7 July 1984, when he was deprived of his liberty by navy officers. It used the Truth and Reconciliation Commission's report to assert that his disappearance was related to a generalised State practice during the armed conflict existent in Peru, applicable to the place of Mr Tenorio's disappearance, and consistent with the *modus operandi* of other enforced disappearances. The Court found that Mr Tenorio Roca was selectively detained after verification of his identity document. His detention and transfer to the counter-subversive base located at the Municipal Stadium of Huanta was

not registered and he was not brought before the authority with jurisdiction. The Court held that the purpose of the State was not to bring him before a judge or other authority with jurisdiction, but to execute him or make him disappear. Thus, his detention was the step prior to his disappearance.

The Court found that navy officers were responsible for safeguarding the rights of Mr Tenorio Roca but they instead placed him in a serious situation of vulnerability and risk of suffering irreparable harm to his personal integrity and life. Thirty-two years after his arrest, his family still does not know his whereabouts, despite the efforts to access the truth.

Additionally, Mr Tenorio Roca's enforced disappearance prevented him from enjoying and exercising other rights and removed him from the protection of the law. The Court concluded that the sort of legal limbo or indeterminate legal situation before society and the State that occurs with an enforced disappearance cannot be amended by the enactment of a law whose objective is to regulate an administrative mechanism for obtaining a certificate of absence equivalent to a judicial declaration of presumed death, as this legal fiction is created for the benefit or to facilitate the recognition of the rights of the relatives of the victim or third parties.

Furthermore, Peru was held responsible for violating Articles 8.1 and 25.1 ACHR, in relation to Articles 1.1 and 2 of that treaty, as well as Articles I.b and III of the Inter-American Convention on Forced Disappearances of Persons.

Mr Tenorio's enforced disappearance was investigated through three different processes:

- i. before the regular jurisdiction and the military jurisdiction in relation to a broader investigation regarding the discovery of the Pucayacu mass graves, since his body could have been among the 50 bodies found in those graves;
- ii. before the regular jurisdiction and the military jurisdiction in relation to investigations specifically focused on his disappearance, and
- iii. before the regular jurisdiction as part of a broader investigation related to several human rights violations brought to the courts through the CVR Final Report. The Court asserted that the investigations carried out in the military jurisdiction violated the right to be tried in the appropriate jurisdiction and the guarantee of a natural judge, since investigations concerning human rights violations should be investigated in the ordinary jurisdiction.

Moreover, the Court determined that the investigations carried out before the ordinary courts were not diligent or effective for determining Mr Tenorio's whereabouts, establishing the facts, or identifying and punishing those responsible, and they did not respect the guarantee that proceedings be concluded within a reasonable time. Accordingly, the Court concluded that the State was responsible for the violation of the rights to judicial guarantees and judicial protection, recognised in Articles 8.1 and 25.1 ACHR, in relation to Articles 1.1 and I.b of the Inter-American Convention on Forced Disappearances of Persons, to the detriment of Rigoberto Tenorio Roca and his family. The Court further declared Peru's international responsibility for violating Mr Tenorio Roca's family members' right to the truth regarding his whereabouts.

The Court further indicated that as long as Article 320 of the Peruvian criminal code does not adequately define enforced disappearances, it continues to violate Article 2 ACHR and Article III of the Inter-American Convention on Forced Disappearances of Persons.

Finally, in relation to the existing regulatory framework, the Court concluded that during the period in which amnesty laws were applied, the State breached its obligation to adapt its domestic law to the Convention, under Article 2 ACHR, in relation to Articles 8.1 and 25.1 ACHR, to the detriment of Rigoberto Tenorio Roca and his family.

The Court finally held Peru responsible for the violation of Mr Tenorio Roca's family's right to personal integrity, established in Article 5 ACHR, for the extreme pain and suffering caused by the State derived from Mr Tenorio Roca's disappearance and the lack of information about his fate.

Accordingly, the Court ordered that the State:

- i. continue with utmost due diligence and in an effective manner with the on-going investigations and criminal proceedings, and open and conduct any other necessary investigations and proceedings within a reasonable time, in order to establish the truth, as well as to identify and punish, as appropriate, those responsible for Mr Tenorio's enforced disappearance;
- ii. adopt an exhaustive search, through adequate judicial or administrative means, to discover Mr Tenorio's whereabouts as soon as possible;
- iii. immediately provide free, prompt, adequate, and effective medical and psychological or psychiatric treatment to the victims that request it, through the State's specialised health institutions;

- iv. issue publications of the judgment;
- v. organise a public act acknowledging international responsibility;
- vi. grant several of the victims a scholarship in a Peruvian public establishment mutually agreed upon between each of Mr Tenorio Roca's children and the State;
- vii. reform its criminal laws as soon as possible in order to define the offense of enforced disappearances of persons in a way compatible with international parameters; and
- viii. pay the amounts indicated in the decision as pecuniary and non-pecuniary damages.

Languages:

Spanish, English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2016-2-007

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 01.06.2016 / **e)** C-241/15 / **f)** District Court, Mátészalka, Hungary v. Mr Niculaie Aurel Bob-Dogi / **g)** ECLI:EU:C:2016:385 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

European Arrest Warrant, surrender procedures between Member States / European Arrest Warrant, non-execution, limitations.

Headnotes:

Article 8.1.c of the Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States, as amended by the Framework Decision 2009/299, is to be interpreted as meaning that the term ‘arrest warrant’, as used in that provision, must be understood as referring to a national arrest warrant that is distinct from the European arrest warrant.

Indeed, the issue of a European arrest warrant in accordance with the ‘simplified procedure’ – thus not entailing the issue of any prior national judicial decision, such as a national arrest warrant, which forms the basis of the European arrest warrant – may interfere with the principles of mutual recognition and confidence on which the European arrest warrant system is based.

Those principles are based on the premise that the European arrest warrant concerned has been issued in conformity with the minimum requirements necessary for it to be valid, which include the requirement laid down in Article 8.1.c of the Framework Decision.

Where the executing judicial authority is faced with a European arrest warrant issued under a ‘simplified’ procedure, which is based on the existence of an arrest warrant within the meaning of Article 8.1.c of the Framework Decision, but the European arrest warrant does not refer to a national arrest warrant that is distinct from the European warrant, it is not in a position to verify whether the European arrest warrant concerned complies with the requirement laid down in Article 8.1.c of the Framework Decision.

Moreover, Article 8.1.c mentioned above is to be interpreted as meaning that, where a European arrest warrant based on the existence of an ‘arrest warrant’ within the meaning of that provision does not contain any reference to the existence of a national arrest warrant, the executing judicial authority must refuse to give effect to it if, in the light of the information provided pursuant to Article 15.2 of the Framework Decision 2002/584, as modified, and any other information available to it, that authority concludes that the European arrest warrant is not valid because it was in fact issued in the absence of any national warrant separate from the European arrest warrant.

Summary:

I. The reference was made in connection with the execution in Romania of a European arrest warrant issued on 23 March 2015 by the *District Court, Mátészalka, Hungary (Mátészalkai járásbíróság) v. Mr Niculaie Aurel Bob-Dogi* in respect of offences committed in Hungary, which may be classified as ‘serious bodily harm’.

Mr Bob-Dogi was arrested in Romania and, after being placed in detention, appeared before the *Curtea de Apel Cluj* (Appeal Court, Cluj, Romania) so that that court could decide whether he was to be remanded in custody and surrendered to the Hungarian judicial authorities. That court rejected the proposal of the public prosecutor’s office that Mr Bob-Dogi should be remanded in custody and ordered his immediate release.

The referring court states that, with regard to a situation in which a European arrest warrant is based on itself and not on a prior, separate national warrant, the Romanian courts take divergent views on the appropriate course of action to be taken in response to such a European arrest warrant.

In that regard, the referring court considers that, in the procedure for the execution of a European arrest warrant, the decision that must be recognised by the executing judicial authority must be a national judicial decision issued by the competent authority

in accordance with the rules of criminal procedure of the Member State issuing the European arrest warrant.

II. The Court recalled that the principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter of Fundamental Rights of the European Union.

In its judgment, the Court also specified that the interpretation of Article 8.1.c of the Framework Decision to the effect that the European arrest warrant must necessarily be based on a national judicial decision that is distinct from that warrant, taking the form of a national arrest warrant, follows not only from the wording of that provision but also its context and the objectives pursued by the Framework Decision, which must be taken into account in interpreting that decision.

The Court stated that the European arrest warrant system entails, in view of the requirement laid down in Article 8.1.c of the Framework Decision, a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision. That dual level of judicial protection is lacking, in principle, in a situation in which a 'simplified' European arrest warrant procedure is applied, since, under that procedure, no decision, such as a decision to issue a national arrest warrant on which the European arrest warrant will be based, has been taken by a national judicial authority before the European arrest warrant is issued.

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-2016-2-008

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 07.06.2016 / **e)** C-47/15 / **f)** Affum / **g)** ECLI:EU:C:2016:408 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**

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

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

Keywords of the alphabetical index:

Removal, foreigner, procedure / Foreigner, detention / Liberty, deprivation, legality / Directive, effectiveness.

Headnotes:

Articles 2.1 and 3.2 of Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as meaning that a third-country national is staying illegally on the territory of a Member State and therefore falls within the scope of that directive when, without fulfilling the conditions for entry, stay or residence, he passes in transit through that Member State as a passenger on a bus from another Member State forming part of the Schengen area and bound for a third Member State outside that area.

Directive 2008/115 must be interpreted as precluding legislation of a Member State which permits for the sole fact of illegal entry across an internal border, leading to illegal residence imprisonment of a third country national in respect of whom the return procedure established by that directive has not yet been completed, as such imprisonment is liable to thwart the application of that procedure and delay return, and thereby to undermine the directive's effectiveness. The Court makes clear that this does not, however, prevent the Member States from being able to impose a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal entry, including in situations where the return procedure has not yet been completed.

That interpretation also applies where the national concerned may be taken back by another Member State pursuant to an agreement or arrangement within the meaning of Article 6.3 of the directive.

Summary:

I. On 22 March 2013, Ms Sélina Affum, a Ghanaian national, was intercepted by the French police at the point of entry to the Channel Tunnel when she was on a bus from Ghent (Belgium) to London (UK). After presenting a Belgian passport with the name and photograph of another person, and lacking any other identity or travel document in her name, she was initially placed in police custody on the ground of illegal entry into French territory. The French authorities then requested Belgium to readmit her into its territory.

As Ms Affum disputes that it was lawful to place her in police custody, the French Court of Cassation has asked the Court of Justice whether, in the light of the Return Directive, illegal entry of a national of a non - EU country into national territory may be punished by a sentence of imprisonment.

II. In its judgment, the Court of Justice established first of all that it follows from that definition that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory. Furthermore, the fact that such presence is merely temporary or by way of transit among the grounds, listed in Article 2.2 of Directive 2008/115, on which Member States may decide to exclude an illegally staying third-country national from the directive's scope.

The Court then points out that since third-country nationals who, have entered the territory of a Member State illegally and who, on that basis, are regarded as staying there illegally therefore fall, under Article 2.1 of Directive 2008/115, and without prejudice to Article 2.2, within the directive's scope, must be subject to the common standards and procedures laid down by the directive for the purpose of their removal, as long as their stay has not, as the case may be, been regularised.

The Court also noted that Article 2.2.a of Directive 2008/115 does not permit the Member States to exclude third-country nationals from the directive's scope on the ground that they have illegally crossed an internal border of the Schengen area or have been arrested when trying to leave that territory or Schengen area.

According to the Court, the fact that such national is likely to be taken by another Member State within the meaning of Article 6.3 of the Directive does not render the directive inapplicable to his or her case.

Languages:

Bulgarian, Czech, Danish, German, Greek, English, Spanish, Estonian, Finnish, French, Hungarian, Italian, Lithuanian, Latvian, Maltese, Dutch, Polish, Portuguese, Romanian, Slovakian, Slovenian, Swedish.



Identification: ECJ-2016-2-009

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 21.06.2016 / **e)** C-15/15 / **f)** New Valmar BVBA v. Global Pharmacies Partner Health Srl / **g)** ECLI:EU:C:2016:464 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
 3.16 General Principles – **Proportionality.**
 3.26 General Principles – **Fundamental principles of the Internal Market.**
 4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**

Keywords of the alphabetical index:

Free movement of goods, obstacle.

Headnotes:

I. In the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even where those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts.

Consequently, even if, formally, the referring court has limited its question to the interpretation of Article 45 TFEU alone, that does not prevent the Court from providing the referring court with all the elements of interpretation of European Union law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of European Union law which require interpretation in view of the subject matter of the dispute in the main proceedings.

II. Article 35 TFEU must be interpreted as precluding legislation of a federated entity of a Member State, such as the Flemish Community of the Kingdom of Belgium, which requires every undertaking that has its place of establishment within the territory of that entity to draw up all the details on invoices relating to cross-border transactions exclusively in the official language of that entity, failing which those invoices are to be declared null and void by the national courts of their own motion.

In that regard, it must be recalled that the objective of promoting and encouraging the use of one of the official languages of a Member State constitutes a legitimate objective which, in principle, justifies a restriction on the obligations imposed by EU Law. Moreover, the Court has previously recognised that the need to protect the effectiveness of fiscal supervision constitutes an objective of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty.

In the light of all the foregoing, it must be held that legislation such as that at issue in the main proceedings goes beyond what is necessary to attain the objectives referred and cannot therefore be regarded as proportionate.

Summary:

I. The Ghent Commercial Court, Belgium (*Rechtbank van Koophandel te Gent*) submitted a question to the Court of Justice for a preliminary ruling in proceedings relating to a dispute concerning the non-payment of invoices between New Valmar, a company established in the Dutch speaking region of Belgium, and Global Pharmacies Partner Health (hereinafter, "GPPH"), a company established in Italy. GPPH argued that those invoices were null and void on the ground that they infringed language rules falling, in its view, within the scope of Belgian public policy.

Under Flemish legislation, undertakings established in the region in question must use Dutch to draw up, inter alia, acts and documents required by law. All the standard details and general conditions in the invoices concerned were worded in Italian and not in Dutch. In the course of the proceedings, New Valmar supplied to GPPH a translation into Dutch of the invoices. The Belgian court hearing the case states that the contested invoices are, and remain, null and void.

II. The Court has held that a national measure applicable to all traders active in the national territory whose actual effect is greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State is covered by the prohibition laid down by Article 35 TFEU.

In depriving the traders concerned of the possibility of choosing freely a language which they are both able to understand for the drawing-up of their invoices and in imposing on them to that end a language which does not necessarily correspond to the one they agreed to use in their contractual relations, legislation such as that at issue in the main proceedings is likely to increase the risk of disputes and non-payment of invoices, since the recipients of those invoices could be encouraged to rely on their actual or alleged inability to understand the invoices' content in order to refuse to pay them.

Furthermore, the recipient of an invoice drawn up in a language other than Dutch could, given that such an invoice is null and void, be encouraged to dispute its validity for that reason alone, even if it were drawn up in a language he understands. Such nullity could, moreover, be the source of significant disadvantages for the issuer of the invoice, including the loss of default interest, since it is apparent from the file submitted to the Court that, in the absence of a contractual term to the contrary, interest will begin to run, in principle, only from the issue of a new invoice drawn up in Dutch.

It follows that such legislation produces, because of the legal uncertainty it creates, restrictive effects on trade which are likely to deter the initiation or continuation of contractual relationships with an undertaking established in the Dutch-speaking region of the Kingdom of Belgium.

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-2016-2-010

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 29.06.2016 / **e)** C-486/14 / **f)** Piotr Kossowski / **g)** ECLI:EU:C:2016:483 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Law of the European Union/EU Law.**

4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**

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

Keywords of the alphabetical index:

Schengen, Convention / Criminal procedure, principles.

Headnotes:

The principle of *ne bis in idem* laid down in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 (hereinafter, “CISA”), read in the light of Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, cannot be characterised as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place. In view of the foregoing considerations, a decision terminating criminal proceedings, such as the decision in issue before the referring court – which was adopted in a situation in which the prosecuting authority, without a more detailed investigation having been undertaken for the purpose of gathering and examining evidence, did not proceed with the prosecution solely because the accused had refused to give a statement and the victim and a hearsay witness were living in another

Member state, so that it had not been possible to interview them in the course of the investigation and had therefore not been possible to verify statements made by the victim – does not constitute a decision given after a determination has been made as to the merits of the case.

In this respect, however, whilst Article 54 of the CISA aims to ensure that a person, once he has been found guilty and served his sentence, or, as the case may be, been acquitted by a final judgment in a Contracting State, may travel within the Schengen area without fear of being prosecuted in another Contracting State for the same acts, it is not intended to protect a suspect from having to submit to investigations that may be undertaken successively, in respect of the same acts, in several Contracting States. Therefore, the interpretation of the final nature, for the purposes of Article 54 of the CISA, of a decision in criminal proceedings in a Member State must be undertaken in the light not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice.

The consequence of applying Article 54 of the CISA to such a decision would be to undermined the mutual trust between the Member States That mutual trust can prosper only if the second Contracting State is in a position to satisfy itself, on the basis of the documents provided by the first Contracting State, that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case.

Summary:

I. The public prosecutor’s office, Hamburg (Germany), accused Mr Piotr Kossowski of having committed, in Hamburg on 2 October 2005, acts classified as extortion with aggravating factors.

However, the Hamburg Regional Court (*Landgericht*) refused to open trial proceedings on the ground that it is prevented from doing so by the *ne bis in idem* principle, as it applies in the Schengen area. By virtue of that principle, a person cannot be tried or punished twice in criminal proceedings for the same offence. In the present case, the public prosecutor’s office in Kołobrzeg (Poland), where Mr Kossowski had been arrested for another criminal offence, had already opened a criminal investigation procedure against him in respect of the same facts and had definitively closed it in the absence of sufficient evidence. The specific reasons for the decision of the Kołobrzeg public prosecutor to close the investigation were that Mr Kossowski had refused to give a statement and

that the victim and a hearsay witness were living in Germany, so that it had not been possible to interview them during the investigation and had therefore not been possible to verify statements made by the victim. No other more detailed investigation had been carried out in Poland.

The Higher Regional Court, Hamburg (*Hanseatisches Oberlandesgericht*) asked the Court of Justice for guidance on the scope of the *ne bis in idem* principle.

II. The Court noted that for a person to be regarded as someone whose trial has been 'finally disposed of' within the meaning of Article 54 of the CISA, in relation to the acts which he is alleged to have committed, it is necessary, in the first place, that further prosecution has been definitively barred. That first condition must be assessed on the basis of the law of the Contracting State in which the criminal-law decision in question has been taken. A decision which does not, under the law of the Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State.

Furthermore, as regards the fact that (i) the decision at issue in the main proceedings was taken by the Public Prosecutor's Office and (ii) no penalty was enforced, neither of those factors is decisive for the purpose of ascertaining whether that decision definitively bars prosecution. Indeed, first, Article 54 of the CISA is also applicable where an authority responsible for administering criminal justice in the national legal system concerned, such as the Public Prosecutor's Office, issues decisions definitively discontinuing criminal proceedings in a Member State, although such decisions are adopted without the involvement of a court and do not take the form of a judicial decision. Second, as regards the absence of a penalty, the Court observes that it is only where a penalty has been imposed that Article 54 of the CISA lays down the condition that the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the Contracting State of origin. The reference to a penalty cannot therefore be interpreted in such a way that the application of Article 54 of the CISA is – other than in a case in which a penalty has been imposed – subject to an additional condition.

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-2016-2-005

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 26.04.2016 / e) 10511/10 / f) Murray v. the Netherlands / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Imprisonment, life, *de facto* irreducibility / Prison, medical treatment, detention, review / Prison, sentence, without any prospect of regaining freedom.

Headnotes:

For a State to comply with its obligations under Article 3 ECHR in respect of life prisoners with mental-health problems, an assessment must be made of the prisoners' needs for treatment with a view to facilitating their rehabilitation and reducing the risk of their reoffending. The assessment should be conducted regardless of whether any request for treatment has been made. Where the assessment leads to the conclusion that a particular treatment or therapy may help rehabilitation the life prisoner should be enabled to receive that treatment to the extent possible within the constraints of the prison context, particularly where treatment in effect constitutes a precondition for the prisoner's possible, future eligibility for release and is thus a crucial aspect of *de facto* reducibility of the life sentence (see paragraph 108 of the judgment).

Summary:

I. The applicant, who suffered from a mental illness, was convicted of murder and sentenced to life imprisonment in the Netherlands Antilles in 1980. His repeated requests for a pardon were refused. He complained under Article 3 ECHR about the imposition on him of a life sentence with no possibility of a review and of the conditions of his detention.

II. Article 3 ECHR: At the outset, the Court resumed and further developed the general principles applicable to the present case.

- a. Life sentences – The imposition of a sentence of life imprisonment on an adult offender is not incompatible with Article 3 ECHR, provided it is not grossly disproportionate and, from the date of imposition of the sentence, there is both a prospect of release and possibility of review. In line with existing comparative and international standards, the review should be guaranteed no later than twenty-five years after the imposition of the life sentence, with further periodic reviews thereafter, and should allow the domestic authorities to consider whether, in the course of the sentence, any changes in the life prisoner and progress towards his or her rehabilitation are of such significance that continued detention is no longer justified on legitimate penological grounds. This assessment must be based on rules having a sufficient degree of clarity and certainty and be based on objective, pre-established criteria, surrounded by sufficient procedural guarantees.
- b. Rehabilitation and prospect of release for life prisoners – As noted above, the review should permit the authorities to assess any changes in the life prisoner and any progress towards rehabilitation. In European and international law there is clear support, also endorsed by the Court, towards the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if rehabilitation is achieved. The State's positive obligation is one of means and can be achieved, for example, by setting up and periodically reviewing an individualised programme that encourages the prisoner to develop so as to be able to lead a responsible and crime-free life.
- c. Health care for prisoners with mental-health problems – A lack of appropriate medical care for persons in custody can engage the State's responsibility under Article 3 ECHR. Obligations under that provision may go so far as to impose

an obligation on the State to transfer prisoners to special facilities where they can receive adequate treatment. In the case of mentally ill prisoners, the assessment of whether particular conditions of detention are incompatible with the standards of Article 3 ECHR has to take into consideration the prisoners' vulnerability and, in some cases, their inability to complain coherently or at all about how they are being affected by any particular treatment. It is not enough for them to be examined and a diagnosis made; proper treatment for the problem diagnosed and suitable medical supervision should also be provided.

- d. Life prisoners with mental disabilities and/or mental-health problems – Life prisoners who have been held criminally responsible may nevertheless have certain mental-health problems which could impact on the risk of their reoffending. States are required to assess such prisoners' needs for treatment with a view to facilitating their rehabilitation and reducing the risk of their reoffending and to enable them to receive suitable treatment – to the extent possible within the constraints of the prison context – especially where it constitutes a precondition for the life prisoner's possible, future eligibility for release. However, States also have a duty to take measures to protect the public from violent crime and the ECHR does not prohibit them from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary to protect the public.

As to the specific circumstances of the instant case, when the applicant lodged his application to the Court he had already been imprisoned for some thirty years. His repeated requests for a pardon were rejected, inter alia, because of the continued existence of a risk of recidivism. However, although at his trial the applicant was diagnosed with various mental-health problems, he was never provided with any treatment in prison. On the contrary, in the absence of concrete and feasible alternatives, he was eventually given a sentence of life imprisonment.

Nevertheless, the applicant's detention in prison rather than in a custodial clinic could not obviate the need for the recommended treatment. The mere fact that the punishment imposed on him did not stipulate that he undergo treatment and that he had never made a request for treatment did not relieve the respondent State from its obligations concerning the duration of the applicant's incarceration and the provision of appropriate medical care for his rehabilitation. Although the principle of rehabilitation of prisoners was explicitly recognised in the domestic

law at least from 1999 onwards, the applicant's risk of reoffending was deemed too great for him to be considered eligible for a pardon or conditional release. Treatment constituted, in practice, a precondition for the applicant to have the possibility of progressing towards rehabilitation. The lack of treatment or of an assessment of his treatment needs therefore meant that, when the applicant lodged his application with the Court, any request for a pardon was in practice incapable of leading to the conclusion that he had made such significant progress towards rehabilitation that his continued detention would no longer serve any penological purpose. It followed that the applicant's life sentence was not de facto reducible as required by Article 3 ECHR.

The Court therefore found a violation of Article 3 ECHR.

Cross-references:

European Court of Human Rights:

- *A. and Others v. the United Kingdom* [GC], no. 3455/05, 19.02.2009, ECHR 2009;
- *Aerts v. Belgium*, no. 25357/94, 30.07.1998, *Reports of Judgments and Decisions* 1998-V;
- *Bodein v. France*, no. 40014/10, 13.11.2014;
- *Creangă v. Romania* [GC], no. 29226/03, 23.02.2012;
- *Dickson v. the United Kingdom* [GC], no. 44362/04, 04.12.2007, ECHR 2007-V;
- *Gäfgen v. Germany* [GC], no. 22978/05, 01.06.2010, ECHR 2010;
- *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, 08.07.2014, ECHR 2014 (extracts);
- *Herczegfalvy v. Austria*, no. 10533/83, 24.09.1992, Series A, no. 244;
- *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, 18.09.2012;
- *Kafkaris v. Cyprus* [GC], no. 21906/04, 12.02.2008, ECHR 2008;
- *Khoroshenko v. Russia* [GC], no. 41418/04, 30.06.2015, ECHR 2015;
- *Kudła v. Poland* [GC], no. 30210/96, 26.10.2000, ECHR 2000-XI;
- *László Magyar v. Hungary*, no. 73593/10, 20.05.2014;
- *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21.01.2011, ECHR 2011;
- *Maiorano and Others v. Italy*, no. 28634/06, 15.12.2009;
- *Mastromatteo v. Italy* [GC], no. 37703/97, 24.10.2002, ECHR 2002-VIII;
- *Naumeko v. Ukraine*, no. 42023/98, 10.02.2004;
- *Öcalan v. Turkey* (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, 18.03.2014;

- *Raffray Taddei v. France*, no. 36435/07, 21.12.2010;
- *Sławomir Musiał v. Poland*, no. 28300/06, 20.01.2009;
- *Trabelsi v. Belgium*, no. 140/10, 04.09.2014, ECHR 2014 (extracts);
- *Vinter and Others v. the United Kingdom*, [GC], nos. 66069/09, 130/10 and 3896/10, 09.07.2013, ECHR 2013 (extracts).

Languages:

English, French.



Identification: ECH-2016-2-006

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 24.05.2016 / e) 38590/10 / f) *Biao v. Denmark* / g) *Reports of Judgments and Decisions* / 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**.
 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Discrimination, indirect / Discrimination, justification / Family reunification, right.

Headnotes:

More favourable conditions of family reunification granted to individuals having Danish nationality for at least 28 years.

Measures of immigration control which may be regarded as compatible with Article 8 ECHR, passing the legitimate aim test, may nevertheless constitute indirect discrimination in breach of Article 14 ECHR, taken together with Article 8 ECHR, if, even though formulated neutrally and without discriminatory intent,

they in practice have a disproportionate prejudicial effect in respect of individuals of foreign ethnic origin, save where the respondent State is able to prove the existence of compelling or very weighty reasons, unrelated to ethnic origin, to justify the difference in treatment (paragraphs 103-104, 114 and 118 of the judgment).

Summary:

I. The applicants are husband and wife. The first applicant is a naturalised Danish citizen of Togolese origin who lived in Ghana from the age of 6 to 21, entered Denmark in 1993 aged 22 and acquired Danish citizenship in 2002. He married the second applicant in 2003 in Ghana. She is a Ghanaian national who was born and raised in Ghana and who at the time of the marriage had never visited Denmark and did not speak Danish. After the marriage, the second applicant requested a residence permit for Denmark, which was refused by the Aliens Authority on the grounds that the applicants did not comply with the requirement under the Aliens Act (known as the “attachment requirement”) that a couple applying for family reunification must not have stronger ties with another country – Ghana in the applicants’ case – than with Denmark. The “attachment requirement” was lifted for persons who had held Danish citizenship for at least 28 years, as well as for non-Danish nationals who were born in Denmark or had lawfully resided there for at least 28 years (the so-called 28-year rule under the Aliens Act). The applicants unsuccessfully challenged the refusal to grant them family reunification before the Danish courts. They submitted that the 28-year rule resulted in a difference in treatment between two groups of Danish nationals, namely those who were born Danish nationals and those who acquired Danish nationality later in life. Under that rule, the first applicant could not be exempted from the attachment requirement until 2030 when he would reach the age of 59.

In the meantime, the second applicant entered Denmark on a tourist visa. Some months later, the couple moved to Sweden where they had a son, born in 2004. Their son has Danish nationality through his father.

II. Article 14 ECHR taken together with Article 8 ECHR: In order to determine whether the present case revealed any “indirect discrimination” based on race or ethnic origin, it was necessary to examine whether the application of the 28-year rule had in practice given rise to a disproportionate prejudicial effect on persons who, like the first applicant, had acquired Danish nationality after birth and were not of Danish ethnic origin.

The possibility that persons who had obtained Danish nationality after birth might not have to wait for 28 years thereafter but only, as the Government claimed, three years or more, before benefiting from family reunification, did not negate the fact that the 28-year rule had a prejudicial effect on Danish citizens in the same situation as the first applicant.

Moreover, the Court found that it could reasonably be assumed that at least the vast majority of Danish expatriates and Danish nationals born and resident in Denmark (who could benefit from the 28-year rule) would usually be of Danish ethnic origin, whereas persons acquiring Danish citizenship at a later point in life, like the first applicant (who would not benefit from the 28-year rule at the same age), would generally be of foreign ethnic origin.

The possibility that persons of foreign ethnic origin who were born in Denmark or arrived there at an early age could also benefit from the 28-year rule did not alter the fact that the rule had the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage, or having a disproportionately prejudicial effect on, persons of foreign ethnic origin who, like the first applicant, acquired Danish nationality later in life.

In those circumstances, the burden of proof shifted to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin.

One of the aims of introducing the 28-year rule was that the previous amendment of the Aliens Act, extending the attachment requirement to apply also to Danish nationals, had been found to have unintended consequences for persons such as Danish nationals who had opted to live abroad for a lengthy period and who had started a family while away from Denmark and subsequently had difficulties fulfilling the attachment requirement upon return.

The justification advanced by the Government for introducing the 28-year rule was, to a large extent, based on rather speculative arguments. In the Court's view, the answer to the question as to when it could be said that a Danish national had created such strong ties with Denmark that family reunification with a foreign spouse had a prospect of being successful from an integration point of view could not depend solely on length of nationality, whether it was 28 years or less. In order to obtain Danish nationality Mr Biao had already been required, among other things, to have spent 9 years in Denmark and to demonstrate his knowledge of Danish language and culture; in addition, he had previously been married to

a Danish citizen for about four years, had participated in various courses and worked in Denmark for more than six years, and had a son who was a Danish national by virtue of his father's nationality. None of these elements had been, or even could have been, taken into account in the application of the 28-year rule to the first applicant, although they were indeed relevant when assessing whether his wife had any prospect of successful integration.

The preparatory work relating to the legislation which amended the Act in question reflected negatively on the lifestyle of Danish nationals of non-Danish ethnic origin, for example describing their "marriage pattern", consisting of "marry[ing] a person from one's own country of origin", as contributing to problems of isolation and to "hampering the integration of aliens newly arrived in Denmark". The Court, referring to its case-law to the effect that general biased assumptions or prevailing social prejudice in a particular country did not provide sufficient justification for a difference in treatment on the ground of sex, found that similar reasoning should apply to discrimination against naturalised nationals.

The Danish Supreme Court, taking the view that the factual circumstances of the present case were identical to those of Mrs Balkandali in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, found that the criterion of 28 years of Danish nationality "had the same aim as the requirement of birth in the United Kingdom, which was accepted by the Court ... as not being contrary to the Convention: to distinguish a group of nationals who, seen from a general perspective, had lasting and strong ties with the country". The Supreme Court considered that the alleged discrimination was based solely on the length of citizenship, a matter falling within the ambit of "other status" within the meaning of Article 14 ECHR. Accordingly, the proportionality test applied by the Supreme Court was different from the test to be applied by the European Court of Human Rights, which required compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule.

In the field of indirect discrimination between a State's own nationals based on ethnic origin, it was very difficult to reconcile the grant of special treatment with current international standards and developments:

- a. Article 5.2 of the European Convention on Nationality, aimed at eliminating the discriminatory application of rules in matters of nationality between nationals from birth and other nationals, including naturalised persons, suggested a certain trend towards a European standard which had to be seen as a relevant consideration in the present case.

- b. Neither in the 29 Council of Europe members studied by the Court, nor in EU law, was any distinction made between different individuals depending on how they acquired nationality when it came to determining the conditions for granting family reunification.
- c. Various independent bodies had expressed concern about the 28-year rule: the Committee on the Elimination of Racial Discrimination (CERD), the European Commission against Racism and Intolerance (ECRI) and the Council of Europe's Commissioner for Human Rights.

In conclusion, having regard to the respondent State's very narrow margin of appreciation in the present case, the Government had failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule.

The Court therefore found a violation of Article 14 ECHR taken together with Article 8 ECHR.

Cross-references:

European Court of Human Rights:

- *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, no. 9474/81, 28.05.1985, Series A, no. 94;
- *Andrejeva v. Latvia* [GC], no. 55707/00, 18.02.2009, § 87, ECHR 2009;
- *Burden v. the United Kingdom* [GC], no. 13378/05, 29.04.2008, § 60, ECHR 2008;
- *C. v. Belgium*, no. 21794/93, 07.08.1996, § 38, *Reports of Judgments and Decisions* 1996-III;
- *Carson and Others v. the United Kingdom* [GC], no. 42184/05, 16.03.2010, ECHR 2010;
- *Clift v. the United Kingdom*, no. 7205/07, §§ 56-58, 13.07.2010;
- *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13.11.2007, ECHR 2007-IV;
- *Dhahbi v. Italy*, no. 17120/09, 08.04.2014, § 47;
- *E.B. v. France* [GC], no. 43546/02, 22.01.2008, §§ 47-48;
- *Engel and Others v. the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 08.06.1976, § 72, Series A, no. 22;
- *F.N. v. the United Kingdom* (dec.), no. 3202/09, 17.09.2013, § 37;
- *Fabris v. France* [GC], no. 16574/08, 07.02.2013, § 56, ECHR 2013 (extracts);
- *Gaygusuz v. Austria*, no. 17371/90, 16.09.1996, § 42, *Reports of Judgments and Decisions* 1996-IV;
- *Hämäläinen v. Finland* [GC], no. 37359/09, 16.07.2014, § 108, ECHR 2014;
- *Hode and Abdi v. the United Kingdom*, no. 22341/09, 06.11.2012;
- *Hugh Jordan v. the United Kingdom*, no. 24746/94, 04.05.2001, § 154;
- *J.M. v. Sweden* (dec.), no. 47509/13, 08.04.2014, § 40;
- *Jeunesse v. the Netherlands* [GC], no. 12738/10, 03.10.2014, § 107;
- *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, nos. 5095/71, 5920/72, 5926/72, 5095/71, 5920/72 and 5926/72, 07.12.1976, § 56, Series A, no. 23;
- *Konstantin Markin v. Russia* [GC] no. 30078/06, 22.03.2012, ECHR 2012 (extracts);
- *Koua Poirrez v. France*, no. 40892/98, 30.09.2003, § 46, ECHR 2003-X;
- *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 427, ECHR 2012 (extracts);
- *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, 06.07.2005, § 145, ECHR 2005-VII;
- *Osman v. Denmark*, no. 38058/09, 14.06.2011, § 58;
- *Ponomaryovi v. Bulgaria*, no. 5335/05, 21.06.2011, ECHR 2011;
- *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, 15.05.2007, § 376, ECHR 2007-II;
- *S.A.S. v. France* [GC], no. 43835/11, 01.07.2014, § 161, ECHR 2014 (extracts);
- *Şerife Yiğit v. Turkey* [GC], no. 3976/05, 02.11.2010, § 70;
- *Söderman v. Sweden* [GC], no. 5786/08, 12.11.2013, § 125, ECHR 2013;
- *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, 12.04.2006, §§ 39-40, ECHR 2005-X;
- *Stummer v. Austria* [GC], no. 37452/02, 07.07.2011, § 89, ECHR 2011;
- *Timishev v. Russia*, nos. 55762/00 and 55974/00, 13.12.2005, § 56, ECHR 2005-XII;
- *Valentin v. Denmark*, no. 26461/06, 26.03.2009, § 82;
- *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, 07.11.2013, ECHR 2013;
- *Vasileva v. Denmark*, no. 52792/99, 25.09.2003, § 50;
- *X and Others v. Austria* [GC], no. 19010/07, 19.02.2013, ECHR 2013;
- *Zakayev and Safanova v. Russia*, no. 11870/03, 11.02.2010, § 40.

Languages:

English, French.



Identification: ECH-2016-2-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 21.06.2016 / **e)** 5809/08 / **f)** Al-Dulimi and Montana Management Inc. v. Switzerland / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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:

United Nations, Security Council, resolution, sanction, judicial security / United Nations, Security Council, resolution, implementation / International human rights law, harmonisation systemic.

Headnotes:

Unless a resolution of the United Nations Security Council clearly and explicitly showed that States were expected to disregard international human rights law, the Court would always presume that the measures taken thereunder were compatible with the Convention. In other words, in a spirit of systemic harmonisation, it would find that there was no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. Accordingly, where Article 6.1 ECHR was at stake, it was for the respondent State to persuade the Court that it had taken all possible steps to ensure respect for fundamental principles of human rights protection such as, at least, a guarantee of appropriate protection against arbitrariness (see paragraphs 140 and 149 of the judgment).

Summary:

I. The first applicant is an Iraqi national who lives in Jordan and is the managing director of a company incorporated under the laws of Panama with its registered office in Panama (the second applicant).

After the invasion of Kuwait by Iraq in August 1990, the United Nations Security Council adopted a number of resolutions calling upon member and non-member States to impose an embargo on Iraq, on Kuwaiti resources confiscated by Iraq and on air transport. In August 1990 the Swiss Federal Council adopted an Ordinance introducing economic measures in respect of Iraq. According to the applicants, their assets in Switzerland had been frozen since August 1990. In September 2002 Switzerland became a member of the United Nations. In May 2003, following the fall of Saddam Hussein's Government, the UN Security Council adopted Resolution 1483, imposing on States an obligation to freeze assets and economic resources located outside Iraq which belonged to the former Iraqi regime, to senior officials of that regime and to entities under their control or management. In November 2003 a Sanctions Committee was given the task of listing the individuals and entities targeted by the measures. The applicants' names were added to the relevant list in May 2004.

In May 2004 the applicants' names were also added to the list of individuals and organisations appended to the Swiss Iraq Ordinance as amended. That same month the Federal Council adopted another Ordinance, valid until 30 June 2010, providing for the confiscation of the frozen Iraqi assets and economic resources and their transfer to the Development Fund for Iraq.

In December 2006 the UN Security Council adopted a resolution providing for a delisting procedure.

The applicants asked the competent Swiss authority, in a letter of August 2004, to suspend the confiscation procedure in respect of their assets. But as their application to the UN Sanctions Committee for delisting remained without effect, they then requested in a letter of September 2005 that the confiscation procedure be continued in Switzerland. In spite of their objections, the Federal Department of Economic Affairs then ordered the confiscation of their assets and stated that the sums would be transferred to the bank account of the Development Fund for Iraq within ninety days from the entry into force of the decision. In support of its decision, the Department noted that the applicants' names appeared on the lists of individuals and entities established by the Sanctions Committee, that Switzerland was obliged to implement Security Council resolutions, and that names could be removed from the annex to the Iraq Ordinance only if the relevant decision had been taken by the UN Sanctions Committee. The applicants appealed to the Federal Court to have the decision set aside. Their appeals were dismissed in three almost identical judgments.

The applicants lodged a fresh delisting application with the UN but it was rejected on 6 January 2009.

II. Article 6.1 ECHR: As the Swiss Federal Court, in its January 2008 judgments, had refused to examine the applicants' allegations that the decision to confiscate their assets was not compatible with the fundamental safeguards of a fair trial, their right of access to a court under Article 6.1 ECHR had thus been restricted.

That refusal, stemming from a concern to ensure the effective domestic implementation of the obligations under UN Security Council Resolution 1483 (2003), which was the basis of the confiscation decision, pursued the legitimate aim of maintaining international peace and security.

In spite of their importance, the Court did not consider the guarantees of a fair trial, and in particular the right of access to a court under Article 6.1 ECHR, to be *jus cogens* norms in the current state of international law.

Where a resolution such as Resolution 1483 (2003) did not contain any clear or explicit wording excluding the possibility of judicial scrutiny of the measures taken for its enforcement, it always had to be construed as authorising the courts of the respondent State to apply a sufficient degree of oversight such as to avoid any arbitrariness. The Court thus took account of the nature and aim of the measures required by Resolution 1483 in verifying whether a fair balance had been struck between the need to ensure respect for human rights and the imperatives of the protection of international peace and security.

In the event of a dispute over a decision to add a person to the list or to refuse delisting, it was necessary for the domestic courts to be able to obtain sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing was arbitrary. Any inability to access such information was therefore capable of constituting a strong indication that the impugned measure was arbitrary, especially if the lack of access was prolonged, thus continuing to hinder judicial scrutiny. Accordingly, any State Party whose authorities gave legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing was not arbitrary would engage its responsibility under Article 6 ECHR.

The Court was of the view that paragraph 23 of Resolution 1483 (2003) could not be understood as precluding any judicial scrutiny of the measures taken to implement it.

In those circumstances, and to the extent that Article 6.1 ECHR was at stake, Switzerland was not faced in the present case with a real conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. Consequently, the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but had to persuade the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the individual situation of the applicants, at least guaranteeing them adequate protection against arbitrariness.

The Federal Court had been unable to rule on the merits or appropriateness of the measures entailed by the listing of the applicants. As regards the substance of the sanctions – the freezing of the assets and property of senior officials of the former Iraqi regime, as imposed by paragraph 23 of Resolution 1483 (2003) – the choice had fallen within the eminent role of the UN Security Council as the ultimate political decision-maker in this field. However, before taking the above-mentioned measures, the Swiss authorities had had a duty to ensure that the listing was not arbitrary. In its judgments of January 2008 the Federal Court had merely confined itself to verifying that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them, but that was insufficient to ensure that the applicants had not been listed arbitrarily.

The applicants should, on the contrary, have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. Consequently, the very essence of the applicants' right of access to a court had been impaired.

Moreover, the applicants had been, and continued to be, subjected to major restrictions. The confiscation of their assets had been ordered in November 2006. They had thus already been deprived of access to their assets for a long period of time, even though the confiscation decision had not yet been enforced. The fact that it had remained totally impossible for them to challenge the confiscation measure for many years was hardly conceivable in a democratic society.

The UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests were handled, had received very serious, reiterated and consistent criticisms from Special Rapporteurs of the UN, also shared by sources outside that organisation. The respondent Government themselves had admitted

that the system applicable in the present case, enabling applicants to apply to a “focal point” for the deletion of their names from the Security Council lists, did not afford satisfactory protection. Access to these procedures could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for the lack of such scrutiny.

The Swiss authorities had taken certain practical measures with a view to improving the applicants’ situation, thus showing that Resolution 1483 (2003) could be applied with a degree of flexibility. However, all those measures had been insufficient in the light of the above-mentioned obligations on Switzerland under Article 6.1 ECHR.

The Court therefore found a violation of Article 6 ECHR.

Cross-references:

European Court of Human Rights:

- *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, 21.11.2001, ECHR 2001-XI;
- *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, 07.07.2011, § 76, ECHR 2011;
- *Al Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 02.03.2010, § 128, ECHR 2010;
- *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 07.07.2011, § 141, ECHR 2011;
- *Artico v. Italy*, no. 6694/74, 13.05.1980, § 33, Series A, no. 37;
- *Azinas v. Cyprus* [GC], no. 56679/00, 28.04.2004, § 32, ECHR 2004-III;
- *Balmer-Schafroth and Others v. Switzerland*, no. 22110/93, 26.08.1997, §§ 37-38, Reports of Judgments and Decisions 1997-IV;
- *Běleš and Others v. the Czech Republic*, no. 47273/99, 12.11.2002, § 49, ECHR 2002-IX;
- *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, 30.06.2005, ECHR 2005 VI);
- *Boulois v. Luxembourg* [GC], no. 37575/04, 03.04.2012, § 90, ECHR 2012;
- *Bryan v. the United Kingdom*, 19178/91, 22.11.1995, § 45, Series A, no. 335-A;
- *Chaudet v. France*, no. 49037/06, § 37, 29.10.2009;
- *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, 12.05.2014, § 23, ECHR 2014;
- *Cudak v. Lithuania* [GC], no. 15869/02, 23.03.2010, ECHR 2010;
- *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13.11.2007, § 109, ECHR 2007-IV;
- *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12.11.2008, § 67, ECHR 2008;
- *Fayed v. the United Kingdom*, no. 17101/90, 21.09.1994, § 65, Series A, no. 294-B;
- *García Ruiz v. Spain* [GC], no. 30544/96, 21.01.1999, §§ 28-29, ECHR 1999-I;
- *Gillberg v. Sweden* [GC], no. 41723/06, 03.04.2012, § 54;
- *Golder v. the United Kingdom*, no. 4451/70, 21.02.1975, § 36, Series A, no. 18;
- *Gross v. Switzerland* [GC], no. 67810/10, 30.09.2014, § 37, ECHR 2014;
- *Kurić and Others v. Slovenia* [GC], no. 26828/06, 12.03.2014, §§ 234-235, ECHR 2012;
- *Liepājnīeks v. Latvia* (dec.), no. 37586/06, 02.11.2010, § 95;
- *Loizidou v. Turkey* (merits), no. 15318/89, 18.12.1996, § 43, Reports of Judgments and Decisions 1996-VI;
- *Loizidou v. Turkey* (preliminary objection), no. 15318/89, 23.03.1995, § 75, Series A, no. 310;
- *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21.01.2011, § 338, ECHR 2011;
- *Masson and Van Zon v. the Netherlands*, nos. 15346/89 and 15379/89, 28.09.1995, § 49, Series A, no. 327-A;
- *Micallef v. Malta* [GC], no. 17056/06, 15.10.2009, § 74, ECHR 2009;
- *Michaud v. France*, no. 12323/11, 06.12.2012, §§ 102-104, ECHR 2012;
- *Nada v. Switzerland* ([GC], no. 10593/08, 12.09.2012, §§ 177-178, ECHR 2012);
- *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, 06.07.2010, § 88, ECHR 2010;
- *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, 12.07.2001, § 43, ECHR 2001-VIII;
- *Roche v. the United Kingdom* [GC], no. 32555/96, 19.10.2005, ECHR 2005-X;
- *Sigma Radio Television Ltd v. Cyprus*, nos. 32181/04 and 35122/05, 21.07.2011, §§ 151-157;
- *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, 11.06.2011, ECHR 2013 (extracts);
- *Storck v. Germany*, no. 61603/00, 16.06.2005, § 98, ECHR 2005-V;
- *United Communist Party of Turkey and Others v. Turkey*, no. 19392/92, 30.01.1998, § 29, Reports of Judgments and Decisions 1998-I;
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, 18.02.1999, § 59, ECHR 1999-I.

Languages:

English, French.



Identification: ECH-2016-2-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 23.06.2016 / **e)** 20261/12 / **f)** *Baka v. Hungary* / **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.**

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

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

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

Keywords of the alphabetical index:

Judge, irremovability / Judge, mandate, termination, constitutional amendment / Judge, freedom of expression / Supreme Court, President, freedom of expression / Supreme Court, President, removal.

Headnotes:

An applicant's position as a senior member of the judiciary and statements made by him clearly falling the context of a debate on matters of great public interest called for a high degree of protection for his freedom of expression under Article 10 ECHR and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State. The premature termination of his judicial mandate could hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which was a key element for the maintenance of judicial independence (see paragraphs 171 and 172 of the judgment).

Summary:

I. The applicant, a former judge of the European Court of Human Rights, was elected President of the Supreme Court of Hungary for a six-year term ending in 2015. In his capacity as President of that court and of the National Council of Justice, he expressed his views on various legislative reforms affecting the judiciary. The transitional provisions of the new Constitution (Fundamental Law of Hungary of 2011) provided that the legal successor to the Supreme Court would be the Kúria and that the mandate of the President of the Supreme Court would end following the entry into force of the new Constitution. As a consequence, the applicant's mandate as President of the Supreme Court ended on 1 January 2012. According to the criteria for the election of the President of the new Kúria, candidates were required to have at least five years' experience as a judge in Hungary. Time served as a judge in an international court was not counted. This led to the applicant's ineligibility for the post of President of the new Kúria.

II.1 Article 6.1 ECHR

a. Applicability

i. Existence of a right – In accordance with the domestic law, the applicant's mandate as President of the Supreme Court had been due to last for a period of six years, unless it was terminated following mutual agreement, resignation or dismissal. There had thus existed a right for the applicant to serve his term of office until such time expired, or until his judicial mandate came to an end. This was also supported by constitutional principles regarding the independence of the judiciary and the irremovability of judges. Accordingly, the applicant could arguably claim to have been entitled to protection against removal from office during his mandate. The fact that his mandate was terminated *ex lege* by the new legislation could not remove, retrospectively, the arguability of his right under the applicable rules in force at the time of his election.

ii. Civil nature of the right – To determine whether the right claimed by the applicant was "civil", the Court applied the criteria developed in the judgment of *Vilho Eskelinen and Others v. Finland*. As to the first condition of the *Vilho Eskelinen* test – whether national law expressly excluded access to a court for the post or category of staff in question – the Court observed that in the few cases in which it had found that condition to be fulfilled, the exclusion at stake had been clear and express. However,

in the present case the applicant had not been expressly excluded from the right of access to a court; instead, his access had been impeded by the fact that the premature termination of his mandate was included in the transitional provisions of the new legislation which had entered into force in 2012. This had precluded him from contesting the measure before the Service Tribunal, as he would have been able to do in the event of a dismissal on the basis of the previously existing legal framework. The Court was thus of the view that, in the specific circumstances of the case, it had to determine whether access to a court had been excluded under domestic law before, rather than at the time when, the impugned measure concerning the applicant was adopted. The Court further noted that in order for national legislation excluding access to a court to have any effect under Article 6.1 ECHR in a particular case, it had to be compatible with the rule of law, which forbade laws directed against a specific person, as in the applicant's case. In the light of these considerations, it could not be concluded that national law expressly excluded access to a court for a claim based on the alleged unlawfulness of the termination of the applicant's mandate. The first condition of the *Vilho Eskelinen* test had not therefore been met and Article 6 ECHR was applicable under its civil head.

b. Compliance – As a result of legislation whose compatibility with the requirements of the rule of law was doubtful, the premature termination of the applicant's mandate was neither reviewed, nor open to review, by any bodies exercising judicial powers. Noting the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies, were attaching to procedural fairness in cases involving the removal or dismissal of judges, the Court considered that the respondent State had impaired the very essence of the applicant's right of access to a court.

The Court therefore found a violation of Article 6 ECHR.

2. Article 10 ECHR

a. Existence of an interference – In previous cases concerning disciplinary proceedings, removal or appointment of judges, the Court had concluded that Article 10 ECHR was applicable as the impugned measures had been prompted by the applicants' statements on a certain question and were not related to their eligibility for public service or their

professional ability to exercise judicial functions. In other cases the Court had found that the measure complained of was unrelated to the exercise of freedom of expression.

In the present case, no domestic court had ever examined the applicant's allegations or the reasons for the termination of his mandate. The facts of the case therefore had to be assessed and considered "in their entirety" and, in assessing the evidence, the Court adopted the standard of proof "beyond reasonable doubt". In this connection, the Court noted that in 2011 the applicant, in his professional capacity as President of the Supreme Court and the National Council of Justice, had publicly expressed critical views on various legislative reforms affecting the judiciary. Despite the assurance given by two members of the parliamentary majority and the Government in the same year to the effect that the legislation being introduced would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime, the proposals to terminate the applicant's mandate were made public and submitted to Parliament shortly after he gave a parliamentary speech in November 2011 and were adopted within a strikingly short time. Having regard to the sequence of events in their entirety, there was *prima facie* evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate. Thus, the burden of proof shifted to the Government.

As to the reasons put forward by the Government to justify the impugned measure, it was not apparent that the changes made to the functions of the supreme judicial authority or the tasks of its President were of such a fundamental nature that they could or should have prompted the premature termination of the applicant's mandate. Consequently, the Government had failed to show convincingly that the impugned measure was linked to the suppression of the applicant's post and functions in the context of the reform of the supreme judicial authority. Accordingly, it could be presumed that the premature termination of the applicant's mandate was prompted by the views and criticisms he had publicly expressed in his professional capacity, and thus constituted an interference with the exercise of his right to freedom of expression.

b. Whether the interference was justified – Although it was doubtful that the legislation in question complied with the requirements of the rule of law, the Court proceeded on the assumption that the interference was prescribed by law. State Parties could not legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for

reasons that had not been established by law and which did not relate to any grounds of professional incompetence or misconduct. In these circumstances, the impugned measure appeared to be incompatible with the aim of maintaining the independence of the judiciary.

In the present case, the impugned interference had been prompted by criticisms the applicant had publicly expressed in his professional capacity as President of the Supreme Court and of the National Council of Justice. It was not only his right but also his duty to express his opinion on legislative reforms which were likely to have an impact on the judiciary and its independence. The applicant had expressed his views and criticisms on questions of public interest and his statements had not gone beyond mere criticism from a strictly professional perspective. Accordingly, his position and statements called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the domestic authorities. Furthermore, he was removed from office more than three years before the end of the fixed term applicable under the legislation in force at the time of his election. This could hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which was a key element for the maintenance of judicial independence. The premature termination of the applicant's mandate undoubtedly had a chilling effect in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary. Finally, in the light of the Court's findings under Article 6.1 ECHR, the impugned restrictions had not been accompanied by effective and adequate safeguards against abuse. In sum, the reasons relied on by the respondent State could not be regarded as sufficient to show that the interference complained of was necessary in a democratic society.

The Court therefore found a violation of Article 10 ECHR.

Cross-references:

European Court of Human Rights:

- *Aktaş v. Turkey*, no. 24351/94, 24.04.2003, ECHR 2003-V (extracts);
- *Albayrak v. Turkey*, no. 38406/97, 31.01.2008;
- *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22.04.2013, ECHR 2013 (extracts);
- *Association Ekin v. France*, no. 39288/98, 17.07.2001, ECHR 2001-VIII;
- *Axel Springer AG v. Germany* [GC], no. 39954/08, 07.02.2012;
- *Bayer v. Germany*, no. 8453/04, 16.07.2009;
- *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, 05.02.2015, ECHR 2015;
- *Boulois v. Luxembourg* [GC], no. 37575/04, 03.04.2012, ECHR 2012;
- *Castells v. Spain*, no. 11798/85, 23.04.1992, Series A, no. 236;
- *Colombani and Others v. France*, no. 51279/99, 25.06.2002, ECHR 2002-V;
- *Creangă v. Romania* [GC], no. 29226/03, 23.02.2012;
- *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13.11.2007, ECHR 2007-IV;
- *Delfi AS v. Estonia* [GC], no. 64569/09, 16.06.2015, ECHR 2015;
- *Di Giovanni v. Italy*, no. 51160/06, 09.07.2013;
- *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, 09.10.2012;
- *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, 13.12.2012, ECHR 2012;
- *Fadeyeva v. Russia*, no. 55723/00, 09.06.2005, ECHR 2005-IV;
- *Fruni v. Slovakia*, no. 8014/07, 21.06.2011;
- *G. v. Finland*, no. 33173/05, 27.01.2009;
- *Golder v. the United Kingdom*, no. 4451/70, 21.02.1975, Series A, no. 18;
- *Guja v. Moldova* [GC], no. 14277/04, 12.02.2008, ECHR 2008;
- *Handyside v. the United Kingdom*, no. 5493/72, 07.12.1976, Series A, no. 24;
- *Harabin v. Slovakia*, no. 58688/11, 20.11.2012;
- *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, 30.11.2010;
- *Ivanova v. Bulgaria*, no. 52435/99, 12.04.2007;
- *Juričić v. Croatia*, no. 58222/09, 26.07.2011;
- *Karaduman and Tandoğan v. Turkey*, nos. 41296/04 and 41298/04, 03.06.2008;
- *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, 13.11.2008;
- *Kudeshkina v. Russia*, no. 29492/05, 26.02.2009;
- *Kyprianou v. Cyprus* [GC], no. 73797/01, 15.12.2005, ECHR 2005-XIII;
- *Khuzhin and Others v. Russia*, no. 13470/02, 23.10.2008;
- *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22.10.2007, ECHR 2007-IV;
- *Lombardi Vallauri v. Italy*, no. 39128/05, 20.10.2009;

- *Makhmudov v. Russia*, no. 35082/04, 26.07.2007;
- *Mamère v. France*, no. 12697/03, 07.11.2006, ECHR 2006-XIII;
- *Markovic and Others v. Italy* [GC], no. 1398/03, 14.12.2006, ECHR 2006-XIV;
- *Morice v. France* [GC], no. 29369/10, 23.04.2015;
- *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, 06.07.2005, ECHR 2005-VII;
- *Nazsiz v. Turkey* (dec.), no. 22412/05, 26.05.2009;
- *Nedelcho Popov v. Bulgaria*, no. 61360/00, 22.11.2007;
- *Ohneberg v. Austria*, no. 10781/08, 18.09.2012;
- *Oleksandr Volkov v. Ukraine*, no. 21722/11, 09.01.2013, ECHR 2013;
- *Olujic v. Croatia*, no. 22330/05, 05.02.2009;
- *Özpınar v. Turkey*, no. 20999/04, 19.10.2010;
- *Pellegrin v. France* [GC], no. 28541/95, 08.12.1999, ECHR 1999-VIII;
- *Perinçek v. Switzerland* [GC], no. 27510/08, 15.10.2015, ECHR 2015 (extracts);
- *Pitkevich v. Russia* (dec.), no. 47936/99, 08.02.2001;
- *Poyraz v. Turkey*, no. 15966/06, 07.12.2010;
- *Roche v. the United Kingdom* [GC], no. 32555/96, 19.10.2005, ECHR 2005-X;
- *Roland Dumas v. France*, no. 34875/07, 15.07.2010;
- *Savino and Others v. Italy*, nos. 17214/05, 20329/05 and 42113/04, 28.04.2009;
- *Serdal Apay v. Turkey* (dec.), no. 3964/05, 11.12.2007;
- *Stanev v. Bulgaria* [GC], no. 36760/06, 17.01.2012, ECHR 2012;
- *Steel and Morris v. the United Kingdom*, no. 68416/01, 15.02.2005, ECHR 2005-II;
- *Stran Greek Refineries and Stratis Andreadis v. Greece*, no. 13427/87, 09.12.1994, Series A, no. 301-B;
- *Süket v. Turkey* (dec.), no. 59773/00, 11.09.2007;
- *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, 08.07.1999, ECHR 1999-IV;
- *Tsanova Gecheva v. Bulgaria*, no. 43800/12, 15.09.2015;
- *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19.04.2007, ECHR 2007-II;
- *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, 25.10.2012;
- *Vogt v. Germany*, no. 17851/91, 26.09.1995, Series A, no. 323;
- *Wille v. Liechtenstein* [GC], no. 28396/95, 28.10.1999, ECHR 1999-VII;
- *Zander v. Sweden*, no. 14282/88, 25.11.1993, Series A, no. 279-B.

Languages:

English, French.



Identification: ECH-2016-2-009

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 05.07.2016 / e) 44898/10 / f) Jeronovičs v. Latvia / g) Reports of Judgments and Decisions / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

European Court of Human Rights, judgment, domestic case, reopening / European Court of Human Rights, State, unilateral declaration, effects / Ill-treatment / Investigation, effective.

Headnotes:

The State has a continuing obligation to investigate Article 3 ECHR complaints even following a decision striking out the complaint following a unilateral declaration.

In the absence of an effective investigation into the applicant's ill-treatment by police officers, the strike-out decision did not and could not extinguish the continuing obligation to conduct an investigation in compliance with the requirements of the Convention (see paragraph 118 of the judgment).

Summary:

I. In 1998 the applicant instituted criminal proceedings concerning his alleged ill-treatment by police officers. Those proceedings were ultimately discontinued. In 2001 the applicant lodged an application with the European Court complaining, *inter alia*, about the ill-treatment and the lack of an effective investigation. In respect of that complaint, the Government submitted

a unilateral declaration acknowledging a breach of Article 3 ECHR and awarding the applicant compensation. On 10 February 2009 the application was consequently struck out of the list in so far as it concerned the complaints referred to in the unilateral declaration. In 2010, the authorities refused a request by the applicant to have the criminal proceedings reopened. In his second application to the European Court, the applicant complained that, despite the acknowledgment by the Government of the breach of his rights under Article 3 ECHR, the State authorities had failed to properly investigate his ill-treatment by the police officers.

II. Article 3 ECHR:

a. Court's case-law and practice on unilateral declarations – The considerations to be taken into account when deciding whether to strike out a case, or part thereof, under Article 37.1.c ECHR on the basis of a unilateral declaration were:

- i. the nature of the complaints made, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases and the impact of these measures on the case at issue;
- ii. the nature of the concessions contained in the unilateral declaration, in particular the acknowledgement of a violation of the Convention and the payment of adequate compensation for such violation;
- iii. the existence of relevant or “clear and extensive” case-law in that respect, in other words, whether the issues raised are comparable to issues already determined by the Court in previous cases; and
- iv. the manner in which the Government intend to provide redress to the applicant and whether this makes it possible to eliminate the effects of an alleged violation. If the Court is satisfied with the answers to the above questions, it then verifies whether it is no longer justified to continue the examination of the application, or the part in question, and that respect for human rights does not require it to continue its examination. If these conditions are met it then decides to strike the case, or the relevant part, out of its list.

Even after it has accepted a unilateral declaration and decided to strike an application (or part thereof) out of its list of cases, the Court reserves the right to restore that application (or part of it) to its list. In exercising such power, the Court carries out a thorough examination of the scope and extent of the various undertakings referred to in the Government's declaration as accepted in the strike-out decision, and

anticipates the possibility of verifying the Government's compliance with their undertakings. A Government's unilateral declaration may thus be submitted twice to the Court's scrutiny. Firstly, before the decision is taken to strike a case out of its list of cases, the Court examines the nature of the concessions contained in the unilateral declaration, the adequacy of the compensation and whether respect for human rights requires it to continue its examination of the case according to the criteria mentioned above. Secondly, after the strike-out decision the Court may be called upon to supervise the implementation of the Government's undertakings and to examine whether there are any “exceptional circumstances” which justify the restoration of the application (or part thereof) to its list of cases. In supervising the implementation of the Government's undertakings the Court has the power to interpret the terms of both the unilateral declaration and its own strike-out decision.

b. Merits – In its strike-out decision in the applicant's case the Court did not expressly indicate to the Government whether they remained under an obligation to conduct an effective investigation or whether such obligation was extinguished by the acknowledgment of a breach and the payment of compensation. The Court therefore had to examine whether such an obligation could arise from the Government's undertaking contained in their unilateral declaration and from the Court's decision striking out the applicant's complaint, or whether the refusal in question disclosed a failure to comply with any procedural obligation that continued to exist after that strike-out decision.

The Court found no exceptional circumstances that could justify restoring to its list of cases the part of the applicant's first application which it had struck out on 10 February 2009. However, in its 2009 decision the Court considered particularly relevant the reference, in its 2009 decision, to the fact that the applicant retained the possibility to exercise “any other available remedies in order to obtain redress” as a pre-condition of the Court's decision to strike the relevant part of the application out of its list of cases. Such possibility had to be accompanied by a corresponding obligation on the part of the respondent Government to provide him with a remedy in the form of a procedure for investigating his ill-treatment at the hands of State agents. The payment of compensation could not suffice, having regard to the State's obligation under Article 3 ECHR to conduct an effective investigation in cases of wilful ill-treatment by agents of the State. The unilateral declaration procedure was an exceptional one and was not intended either to circumvent the applicant's opposition to a friendly settlement or to allow the Government to escape their responsibility for the breaches of the most fundamental rights contained in

the Convention. Accordingly, by paying compensation and by acknowledging a violation of the various Convention provisions, the respondent State had not discharged the continuing procedural obligation incumbent on it under Article 3 ECHR.

Under the domestic law the applicant could request the reopening of the investigation on the grounds of newly disclosed circumstances, and he had availed himself of this possibility. His request was however dismissed on the ground that the Government's unilateral declaration was not considered as a newly disclosed circumstance for the purposes of the domestic law at issue. Although the Convention did not in principle guarantee a right to have a terminated case reopened, the Court could nevertheless review whether the manner in which the Latvian authorities had dealt with the applicant's request produced effects that were incompatible with their continuing obligation to carry out an effective investigation. In this regard, it found that national legal obstacles could not exempt States to comply with such obligation. Otherwise the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible. This would make it possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and would render the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, ineffective in practice. It followed that the applicant had not had the benefit of an effective investigation as required by Article 3 ECHR.

The Court therefore found a violation of Article 3 ECHR.

Cross-references:

European Court of Human Rights:

- *Aleksentseva and Others v. Russia*, nos. 75025/01, 75026/01, 75028/01, 75029/01, 75031/01, 75033/01, 75034/01, 75036/01, 76386/01, 77049/01, 77051/01, 77052/01, 77053/01, 3999/02, 5314/02, 5384/02, 5388/02, 5419/02 and 8192/02, decisions of 04.09.2003 and 23.03.2006 and Judgment of 17.01.2008, §§ 14-17;
- *Askoy v. Turkey*, no. 21987/93, § 95, 18.12.1996, *Reports of Judgments and Decisions* 1996-VI;
- *Assenov and Others v. Bulgaria*, no. 24760/94, § 102, 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *Baybora and Others v. Cyprus* (dec.), no. 77116/01, 22.10.2002;
- *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, § 44, 05.02.2015, *ECHR* 2015;
- *Bonomo and Others v. Italy* (dec.), nos. 17634/11 and 164 other applications, 09.04.2015;
- *Bouyid v. Belgium* [GC], no. 23380/09, §§ 114-123, 28.09.2015, *Reports of Judgments and Decisions* 2015;
- *Brecknell v. the United Kingdom*, no. 32457/04, §§ 66-67, 27.11.2007;
- *Bulut and Yavuz v. Turkey* (dec.) no. 73065/01, 28.05.2002;
- *Büyükdağ v. Turkey*, no. 28340/95, § 64, 21.12.2000;
- *Canbek v. Turkey* (dec.), no. 5286/10, 13.01.2015;
- *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 220, 16.06.2015, *ECHR* 2015;
- *Denisov v. Russia* (dec.), no. 33408/03, 06.05.2004;
- *Egmez v. Cyprus*, no. 30873/96, § 70, 21.12.2000, *ECHR* 2000-XII;
- *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, §§ 182-185, 13.12.2012, *ECHR* 2012;
- *Gäfgen v. Germany* [GC], no. 22978/05, 01.06.2010, *ECHR* 2010;
- *Galstyan v. Armenia*, no. 26986/03, § 39, 15.11.2007;
- *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 301, 24.03.2011, *ECHR* 2011 (extracts);
- *H. v. Iceland* (dec.) no. 29785/07, 27.09.2011;
- *Hackett v. the United Kingdom* (dec.), no. 34698/04, 10.05.2005;
- *Haralambie v. Romania*, no. 21737/03, § 70, 27.10.2009;
- *Harrison and Others v. the United Kingdom*, nos. 44301/13, 44379/13 and 44384/13, § 51, 25.03.2014;
- *Hazar and Others v. Turkey* (dec.), no. 62566/00 et seq., 10.01.2002;
- *Ielcean v. Romania* (dec.), no. 76048/11, 07.10.2014;
- *Josipović v. Serbia* (dec.), no. 18369/07, 04.03.2008;
- *Kelly v. the United Kingdom*, no. 10626/83, Commission decision, 07.05.1985, *Decisions and Reports* (DR) 42, p. 205;
- *Labita v. Italy* [GC], no. 26772/95, § 131, 06.04.2000, *ECHR* 2000-IV;
- *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, 17.09.2014, *ECHR* 2014 (extracts);
- *Musayeva and Others v. Russia* (dec.), no. 74239/01, 01.06.2006;
- *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 172, 14.04.2015;

-
- *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 123, 06.07.2005, *ECHR* 2005-VII;
 - *Prystavska v. Ukraine* (dec.), no. 21287/02, 17.12.2002;
 - *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, 15.05.2007, *ECHR* 2007-II;
 - *Rantsev v. Cyprus and Russia*, no. 25965/04, § 197, 07.01.2010, *ECHR* 2010 (extracts);
 - *Rezgui v. France* (dec.), no. 49859/99, 05.07.2016, *ECHR* 2000-XI;
 - *Sapeyan v. Armenia*, no. 35738/03, § 21, 13.01.2009;
 - *Schulz v. Germany* (dec.), no. 4800/12, 31.03.2015;
 - *Sroka v. Poland* (dec.), no. 42801/07, 06.03.2012;
 - *Stanev v. Bulgaria* [GC], no. 36760/06, § 252, 17.01.2012, *ECHR* 2012;
 - *Stanimirović v. Serbia*, no. 26088/06, § 29, 18.10.2011;
 - *Tahsin Acar v. Turkey* (preliminary objection) [GC], no. 26307/95, §§ 75-77, 06.05.2003, *ECHR* 2003-VI;
 - *Tucka v. the United Kingdom (no. 1)* (dec.), no. 34586/10, § 14, 18.01.2010;
 - *Tuna v. Turkey*, no. 22339/03, §§ 58-63, 19.01.2010;
 - *Union of Jehovah's Witnesses and Others v. Georgia* (dec.), no. 72874/01, 21.04.2015;
 - *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, 18.09.2009, *ECHR* 2009;
 - *Volokhy v. Ukraine*, no. 23543/02, § 37, 02.11.2006;
 - *Williams v. the United Kingdom* (dec.), no. 32567/06, 17.02.2009;
 - *Withey v. the United Kingdom* (dec.), no. 59493/00, 13.05.2003, *ECHR* 2003-X;
 - *Yaşa v. Turkey*, no. 22495/93, § 74, 02.09.1998, *Reports of Judgments and Decisions* 1998-VI;
 - *Younger v. the United Kingdom* (dec.), no. 57420/00, 07.01.2003, *ECHR* 2003-I;
 - *Žarković and Others v. Croatia* (dec.), no. 75187/12, 09.06.2015;
 - *Žarskis v. Latvia* (dec.), no. 33695/03, § 38, 17.03.2009.

Languages:

English, French.



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* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

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¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.

⁵² Including the body responsible for revising or amending the Constitution.

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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

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⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

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⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

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⁷⁹ See also 3.6.

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⁸⁰ See also keywords 5.3.41 and 5.2.1.4.

⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

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⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹¹ For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

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⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

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¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Including all questions of non-discrimination.

¹⁰⁹ Taxes and other duties towards the state.

¹¹⁰ "One person, one vote".

¹¹¹ According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

¹¹² For example, discrimination between married and single persons.

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¹¹³ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹⁴ Detention by police.

¹¹⁵ Including questions related to the granting of passports or other travel documents.

¹¹⁶ May include questions of expulsion and extradition.

¹¹⁷ Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

¹¹⁸ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁹ This keyword covers the right of appeal to a court.

¹²⁰ Including the right to be present at hearing.

¹²¹ Including challenging of a judge.

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¹²² Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²³ This keyword also includes the right to freely communicate information.

¹²⁴ Militia, conscientious objection, etc.

¹²⁵ Aspects of the use of names are included either here or under "Right to private life".

¹²⁶ Including compensation issues.

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127

This keyword also covers "Freedom of work".

128

This should also cover the term freedom of enterprise.

129

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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